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THE

Weekly Reporter,

APPELLATE HIGH COURT,

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H. M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND.

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The Weekly Reporter,

APPELLATE HIGH COURT.

The 4th January 1866.

Present:

The Hon'ble L. S. Jackson and J. B. Phear, *Judges.*

Sale of lands for arrears of Revenue—Object of Section 54, Act XI. of 1859, as to encumbrances—Onus probandi.

Case No. 2512 of 1865.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 29th June 1865, reversing a decision of Moulvie Nasirooddeen Mahomed, Principal Sudder Ameen of that District, dated the 28th November 1864.

Monohur Mookerjee (Plaintiff), *Appellant,*

versus

Joykishen Mookerjee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Bamachurn Banerjee* for Appellant.

Baboos Mohendro Lal Shome and *Banee Madhub Banerjee* for Respondents.

The object of Section 54, Act XI. of 1859, is to protect, not every encumbrance which may be set up, but only *bonâ fide* encumbrances executed in contemplation of an impending sale, or in fraud of a possible purchaser. Where surrounding circumstances suggest such creation, it is for the party setting up the encumbrance to establish its *bonâ fide* character.

In this case a share in a joint estate, consisting of a specific portion of land, had been separated from the estate under Section 11, Act XI. of 1859, and, default in the payment of the Government Revenue having occurred, was separately sold under Section 13 of the same Act. The plaintiff, who purchased, sought to obtain immediate *(khas)* possession of a piece of land comprised within the portion sold, but was met by an allegation of mokurruree lease, granted by the defaulter to his son some months before the sale, which lease was said to be protected under Section 54 of the Act cited. Plaintiff impugned the lease as collusive and fraudulent, and sued for possession of the ground. The Principal Sudder Ameen, who tried the suit in the first instance, being of opinion that the lease was of this character, decreed to set it aside; but, having referred to the object to which the land had been devoted, further decreed that, on payment by the defendant of an enhanced rent, the land should be left in the condition in which it then was.

The Zillah Judge in appeal, finding the lease to have been really executed by the defendant Joykishen, and observing that it was for the plaintiff "to prove his pleas of collusion and fraud and antedating," decided that no such proof had been afforded, and reversed the decree.

Mr. Allan for the plaintiff (special appellant), having to deal with this positive finding in a matter of fact, has had some difficulty in making out a case on which a special appeal would lie.

We are of opinion that, by a slight shifting of the burthen of proof, the Lower Appellate Court has departed from the principles on which this case should have been determined; and that a rigid adherence to those principles is absolutely necessary for the purpose of preventing serious frauds under the operation of this portion of the Sale Law.

It cannot be doubted, but the object of Section 54, Act XI. of 1859, was to protect, not every encumbrance which might be set up, but only *bonâ fide* encumbrances executed in contemplation of an impending sale, or in fraud of a possible purchaser; and that, where surrounding circumstances suggested such creation, it would be for the party setting up the encumbrance to establish its *bonâ fide* character, which he could readily do if it were really of that complexion.

Applying these principles to the present case, the Courts below should have enquired into the following points :—

1stly.—Was the pottah Joykishen's deed?

2ndly.—Was it executed at the time stated, *bonâ fide*, with the intention of immediately passing a substantial interest to the lessee, his son?

3rdly.—Was this assignment intended to operate in fraud of a foreseen possible auction-purchaser?

Another point appears not free from doubt, and, therefore, calling for enquiry, namely,

4thly.—To what extent, looking at Joykishen's relations with his co-sharers, could this pottah constitute an encumbrance on the plaintiff's purchase within the meaning of the Act?

Now, looking at the relations of all the parties to this suit, and to the continual occurrence in this country of family arrangements made for the purpose of defeating the legal consequences of acts and omissions, we have no hesitation that there were points on which it was for the defendant to satisfy the Court; in other words, that the burthen of proving the *bonâ fide* encumbrance lay on him. The Judge, on the other hand, we think, as contended by Mr. Allan, finding a mere *factum* of a pottah, has thrown it entirely on the plaintiff to prove the fraud. It seems to us more than probable that, if he had looked at the case in the light in which we now set it before him, he might have come to a different conclusion. At any rate, it will be his duty now attentively to re-consider the case in that light.

We, therefore, reverse the decision of the Lower Appellate Court, and remit the case with directions to re-hear it as above indicated. The costs will be costs in the suit.

The 4th January 1866.

Present :

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Minors—Section 2, Regulation XXVI., 1793—Proprietors of estates paying Revenue to Government—Necessaries—Power of Minor to authorize third party to settle an account.

Case No. 300 of 1865.

Regular Appeal from a decision passed by the Judge of Dacca, dated the 12th August 1865.

Bykuntnath Roy Chowdry (Defendant), *Appellant,*

versus

Mr. N. P. Pogose (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellant.

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Respondent.

Suit laid at Rupees 3,801-9.

Section 2, Regulation XXVI., 1793, extends the term of minority of proprietors of estates paying revenue to Government, from the end of the 15th to the end of the 18th year, in respect of all acts done by such proprietors, both as to matters connected with real estate, and matters of personal contract.

Minors have a qualified power of contracting, and an implied or expressed contract for necessaries is binding absolutely on a minor.

As a minor cannot himself, by reason of insufficient capacity for business, state and settle an account so as to be bound thereby, so neither can he authorize another party to do for him that which he cannot do himself.

THE plaintiff in this suit, Mr. N. P. Pogose, sues the defendant, Bykuntnath Roy Chowdry, a zemindar of Zillah Mymensing, for a sum of money due on three bonds executed by him: one for 1,450 rupees, dated 6th Aghran 1260, another for 550 rupees, dated 30th Aghran of that year, and a third for 250 rupees, dated 29th Pous of the same year, and for 680 rupees under an account stated and signed by Bindabun Chunder Mojoomdar, the gomashtah of the defendant.

The plaintiff alleges that, in consequence of disputes between the defendant and his mother regarding the property left by his father, Gokoolnath Roy Chowdhry, having risen to a great height, he left his house, and went to Bagoonbary to secure the assistance of Khajah Abdool Gunee, the zemindar of Baliati, and several other persons, residents of Dacca; but, having failed in all these places, he, defendant, with Bindabun Chunder Mojoomdar, his well-wisher Prannath Gossain, and his spiritual guide

Issurchunder Gossain, came to him, plaintiff, and made him many entreaties; that, upon this, he, without taking any writing from him, but merely out of kindness to him whom he thought a man of noble descent laboring under difficulties, assisted him; that the amount claimed was spent for his maintenance and other useful purposes, and, as he, plaintiff, cannot recover the sum in any other way, he brings the present action.

The defendant in his statement avers that, during his minority, he, in consequence of misunderstandings with his mother, went to Dacca; that, after he had arrived there, plaintiff persuaded him to carry on lawsuits with his mother with a view of forwarding his own ends, and procured his signature to certain bonds; that, when he signed them, he was a minor and incapable of understanding the effect of what he was doing, and therefore cannot be liable under them; that Bindabun Chunder Mojoomdar was never his servant, but a creature of the plaintiff, and plaintiff could obtain from him any account he pleased; that on no account can he be justly made liable for the present demand.

The Judge of Dacca, who tried the case, remarks as follows: "The execution of "the bond has been proved by the evidence "of the witnesses. They were also admitted by the defendant himself before "the Magistrate, and their execution is "not now denied, the only plea being "minority at the time of their execution. "The plea is wholly untenable. The age "for a Hindoo male to emerge from minority as regards civil liability (with exception of the charge of a landed estate "paying revenue to Government) is 15 "years, and it is scarcely pretended that "the defendant was not more than 15 years "of age at the time he executed these bonds "and received the money from the plaintiff. "The evidence of plaintiff's witnesses proves "that defendant was over 15 then, and the "*jumno putro* said to have been drawn out "at the time of his adoption places it beyond "doubt, copy of it having been placed for "the defence.

"In respect of the money due on the "account for which there is no bond, I do "not consider that the plaintiff has shown "that Bindabun was authorized to sign any "account so as to make it binding on the "defendant, but I do think that the "evidence in support of plaintiff's case is "sufficient to prove that the money was "advanced by the plaintiff, and that the "defendant is liable for it. The defendant "was summoned by the Court to give evidence, but refused to attend, alleging that "he was afraid of being arrested under a "decree against him by another party. "There is no question raised by the defence "regarding any item in the account, which "is contested only on the same ground as "the bonds, *viz.*, minority, and that it was "signed by Bindabun, who is alleged to be a "servant of plaintiff instead of defendant. "This man gave his evidence in a straightforward manner, and produced his sunnud "of appointment in defendant's service; "whilst it seems to me that the evidence of "the witnesses for the defence, brought to "prove that Bindabun was a servant of "Pogose, the plaintiff, seemed open to grave "suspicion. Being of opinion, therefore, "that the defendant is not protected by "minority, I decree the suit for the principal in full with interest on the amount "covered by the bonds, and costs, with interest on the total amount of the decree "from this date."

From the decision passed by the Judge, an appeal has been preferred to this Court by the defendant below. He has urged the very same points which he has urged unsuccessfully in the Court of first instance. The defendant is admittedly a proprietor of an estate paying revenue to Government, and he admittedly had not reached the end of his eighteenth year, and was, in fact, a little over 15 years of age when he executed the bonds on which the present suit is mainly based. The question then arises, is he bound by his acts; or, in other words, do the terms of Section 2, Regulation XXVI. of 1793, extend the period of minority in the case of proprietors of estates generally to the end of the eighteenth year, and prolong the period of legal non-liability in all matters to that age; or, as held by the Judge, do they merely extend minority in matters connected with the minor's real estate, leaving him in all matters of personal contract in just the same position in which he was before the law above cited was enacted, *viz.*, a minor only to the end of the 15th year?*

* Section 28, Regulation X. of 1793.

We think that the question admits of one answer only. Minority is a legal personal disability. It may be placed arbitrarily at one age or another; but having been determin-

ed to extend, either generally or as to a particular class, up to a certain age, it is accompanied by complete legal disability, unless the law has expressly declared otherwise. Now, the terms of Section 2 of Regulation XXVI. of 1793 are to the following effect: "The Rule contained in "Section 28 of Regulation X. of 1793, which "limits the minority of Hindoo and Maho-"medan proprietors of estates paying re-"venue to Government to the expiration of "the fifteenth year, is hereby rescinded, and "the minority of such proprietors is declared "to extend to the end of the eighteenth year." These words clearly extend the term of minority to a class of persons, but do not limit it to a class of subjects; and we have no doubt, therefore, that they extend the legal disability attending minority to any act which a proprietor of estates under the full age of 18 years might happen to be engaged in. Moreover, the reason of the thing supports the law as we read it; for it is unnecessary to remark at length as to the unreasonableness of finding the same person a minor as to some transactions, and a major as to others, and liable on account of some, non-liable on account of others.

As, then, we are of opinion that the defendant was a minor at the time of the execution of the bonds upon which this action is mainly based, it would ordinarily have decided so much of the case as is covered by them; but the plaintiff has attempted in his written statement to make out that the bonds were given for necessaries. Now, there can be no doubt that infants have a qualified power of contracting, and that an implied or express contract for necessaries is binding absolutely on an infant. But we have no evidence before us showing that the bonds were given on account of necessaries supplied or executed on account of expenses incurred for the minor's benefit and advantage; and in its absence, and looking to all the facts of the case, we are clearly of opinion that the bonds were executed by the minor under circumstances of very questionable propriety as far as the plaintiff is concerned.

As to the sum covered by the alleged account stated and signed by Bindabun Chunder, we agree with the Judge in thinking it not proved that Bindabun Chunder had any authority from the defendant to sign such an account, and to make him liable for it. Moreover, as the minor could not himself, by reason of insufficient capacity for business, state and settle an account so as to be bound thereby, neither could he authorize a party to do that for him which he could not do himself. But, undoubtedly, had plaintiff with reason laid out money in the purchase of necessaries for the minor, such money might be recovered from the latter in an action for money paid. Now, though this suit is not brought in this form, we should not have refused to decree to plaintiff any sum paid with reason on behalf of the minor, had we been convinced that he had supplied to him what the law considers necessary. That, however, we think, is not evident. We rather look upon the transactions involved in the present suit as a series of attempts on the part of plaintiff to wring from the youth, incapacity, and necessities of the defendant, monies which, under no circumstances, would the law assist him to recover. Under this view, we reverse the judgment of the Lower Court, and dismiss the plaintiff's suit with costs.

The 6th January 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Minority (of proprietors of estates paying Revenue to Government)—Construction of Regulation XXVI., 1793—Onus probandi—Mahomedan Law—Marriage and Legitimacy—Gifts.

Regular Appeals from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 6th April 1865.

Case No. 158 of 1865.

Ranee Roshun Jahan (Plaintiff), *Appellant*,

versus

Rajah Syud Enaet Hossein (Defendant), *Respondent*.

Messrs. R. V. Doyne, G. C. Paul, and *C. Gregory* for Appellant.

Mr. R. E. Twidale, Baboo Kishen Kishore Ghose, and *Moonshee Ameer Ali Khan Bahadoor* for Respondent.

Suit laid at Rupees 8,32,068-15 as. 7g.

Case No. 178 of 1865.

Rajah Syud Enaet Hossein (Defendant), *Appellant*,

versus

Ranee Roshun Jahan (Plaintiff), *Respondent*.

b

Baboo Kishen Kishore Ghose and *Moonshee Ameer Ali Khan Bahadoor* for Appellant.

Mr. C. Gregory for Respondent.

Suit laid at Rupees 8,32,068-15-7.

Regulation XXVI., 1793 (extending the period of minority of proprietors of estates paying revenue to Government from the end of the 15th to the end of the 18th year), applies to proprietors out of, as well as to those in, possession; and is not over-ridden by the Mahomedan Law with reference to the validity of the marriage-contract which may be dependent upon physical considerations; and even the Mahomedan Law is vague and uncertain as to the time at which a woman arrives at majority owing to her having attained to puberty.

The *onus* of proving that a deed of compromise was beneficial to a minor is on the party making the allegation in a transaction where the minor is alleged to give up her title in a large estate for a very inadequate maintenance, and when the minor withdraws her right of appeal as to a portion of the property, and waives her right of cross-appeal as to the remainder.

The Mahomedan Law is very scrupulous in bastardizing the issue of any connection in which it can be shown by presumption that there has been cohabitation and acknowledgment of paternity.

Under the Mahomedan Law a gift cannot depend upon a contingency, or be postponed, but possession must be immediate.

In a gift for consideration, there must be an exchange of property for property, or property for money or for a legal appreciable value.

THE parties before the Court are descendants of Rajah Deedar Hossein, zemindar of Pergunnah Soorjapore in Zillah Purneah.

It is admitted on both sides that Rajah Deedar Hossein died, leaving 5 sons, 5 daughters, and several wives, of whom more hereafter. The defendant in the suit of Ranee Roshun Jahan, or Rajah Enaet Hossein, is the eldest son of the late Rajah Deedar Hossein. The plaintiff, Ranee Roshun Jahan, is the daughter of another son of the Rajah Deedar Hossein, or of Nusurooddeen. The suit of the plaintiff, Ranee Roshun Jahan, was instituted in the Court of the Principal Sudder Ameen of Purneah on the 7th May 1860, and was, at an early stage of the proceedings, transferred to the file of the Judge of Zillah Purneah. On the 18th of February 1862, the plaintiff's suit was rejected under the provisions of Section 29 of Act VIII. of 1859 by the Officiating Judge, Mr. E. G. Birch, who held that the plaint was prolix, that it contained much matter irrelevant to the point in contention, and that it was not properly verified.

On appeal to this Court, it was held on 9th September 1862, present the Judges cited in the margin,* that the form of the verification of the plaint was regular and correct, that the Judge might have directed the plaintiff to amend † her plaint if it contained irrelevant matter or was unnecessarily prolix, that he was wrong in rejecting it altogether after the issues had been fixed, and those in bar of the hearing of the suit argued and disposed of adversely to the defendant. The suit was, therefore, remanded for trial.

* The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, Mr. Justice Bayley, and Mr. Justice Kemp.

† Section 81, Act VIII. of 1859.

On the 19th November 1862, the Zillah Judge, Mr. F. B. Simson, dismissed the plaintiff's suit.

The Judge held that the plaintiff had failed to show "any fraud, forgery, collusion, or *mala fides*" whatsoever on the part of the defendant; that all that was shown was "that the plaintiff, then a minor under the guardianship of her mother, did not go to Purneah where her mother compromised the suit;" that, at the time of the compromise, plaintiff's age was as uncertain as the Mahomedan Law defining the date when a girl comes of age; that her mother was her natural and her legal guardian; that there was no reason to suppose that she would or did injure her daughter; that it was not proved that the plaintiff was ignorant of these proceedings at the time; and that it was proved that she did not raise any objections till she married Ahmed Reza, the well-known litigious opponent of the defendant, Rajah Enaet Hossein."

The Judge proceeds to observe "that the whole of the proceedings in the matter of the compromise were openly conducted. The plaintiff's witnesses, such as they are, relatives and servants, knew of them at the time; no objection was made at the time, nor till the plaintiff married Ahmed Reza, when forthwith this claim, seeking to disturb points long settled, and to revive the minor's litigation, is brought forward; and the evidence in support of the charge of fraud fails to carry conviction to my mind which would lead me to believe that either the mother of the plaintiff, Khooboonissa, or the defendant Rajah Enaet Hossein, against whom there is not a shadow of proof, committed the fraud with which they are charged."

The Judge concludes his very brief judgment, considering the important interests involved, by remarking "that so weak was the evidence in support of the plaint that there seemed to him to be no need to call on the defendant to disprove an unproved

charge; the suit was, therefore, dismissed without further investigation."

The plaintiff appealed to this Court. On the 24th February 1864, the suit was again remanded by the Judges noted in the margin.*

*The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and Mr. Justice Kemp.

Those Judges were of opinion, for reasons given by them in great detail, that the judgment of the Zillah Judge could not stand, and that the suit must be again remanded. They remarked, *inter alia*, that the Judge ought to have allowed the plaintiff to give evidence herself in addition to the evidence of the witnesses whom she had called, as she might have come forward and sworn that she never executed the documents which she calls fraudulent and false; and that she never knew of the real state of the case until she attained her majority; that, as the Appellate Court had not sufficient evidence before them to say that a case had been made out for the plaintiff, the defendant, if he had an opportunity given to him, which was denied to him by the Zillah Judge, might not be able to rebut the plaintiff's case, a remand was absolutely necessary.

The Court directed the attention of the Judge to the main points and the more important facts arising in the case as requiring his more particular attention; and to prevent as much as possible further litigation and a miscarriage of justice, two sets of issues were drawn up—the *first* set applying to that portion of the plaintiff's suit which seeks to set aside the deed of compromise and other documents arising out of the same as fraudulent and not binding upon the plaintiff; the *second* set of issues having reference to the estates of Edoo Hossein the uncle, and Beebee Lodun the grandmother of the plaintiff, and to the estates of Ranee Soomrun, which was recovered from the other branch of the family by the defendant Enaet Hossein, under the decree of the Privy Council. The Judge was directed to try the two sets of issues separately. Each party was permitted to adduce further evidence. The examination of the plaintiff and her mother Musst. Khoobunissa, of the defendant and Asgur Ali, was directed to be made. The Judge was warned not to admit copies of documents, unless it were proved that the originals had been lost or destroyed; and, if the originals were produced, the Judge was directed to require strict proof of their execution.

The first set of issues is as follows :—

1st.—Was the plaintiff of age, according to the Mahomedan Law, independently of Regulation XXVI. of 1793, at the time when the alleged compromise was made?

2nd.—Did the plaintiff execute the documents, which it is said she did, or any and which of them?

3rd.—If so, was she induced to execute the same by means of fraud or misrepresentation?

4th.—Was the compromise a fair one and beneficial to the plaintiff?

5th.—Did the plaintiff receive any portion of the money alleged to have been paid by the defendant, or any portion of the profits of the putnee talooks?

6th.—Did the plaintiff's mother, Khoobunissa, receive the money mentioned in the receipt, or any and what portion of it, or any *tumusook* for any and what portion of it; and, if so, was the *tumusook* payable to Khoobunissa alone, or to her and the plaintiff jointly?

7th.—Were all or any and which of the receipts, alleged by the defendant in his written statement to have been executed by the plaintiff, executed by her; and, if so, were they obtained by fraud or misrepresentation; and had the plaintiff, at the date of any and which of those receipts, attained her majority according to the Mahomedan Law irrespective of Regulation XXVI. of 1793?

8th.—Was the decree in the Zillah Court of Purneah of the 30th August 1856, establishing the receipt for 31,400 rupees, obtained by fraud and misrepresentation?

9th.—Was the decree of the Sudder Court of the 10th December 1856, founded on the alleged compromise, obtained by fraud or misrepresentation?

10th.—If not, was it binding on the plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into?

The Zillah Judge, Mr. J. R. Muspratt, allowed both parties to call further evidence. The examinations of the plaintiff, of her mother, and of the defendant, were made by commission, and that of Asgar Ali in Court.

The Judge premises by observing that a great number of documents has been filed on both sides, chiefly authenticated copies; that in some instances the originals had been produced; that a large proportion of these documents have no bearing whatever on the points in issue, and, as such, were not referred to by the Counsel on either side.

The Judge's finding on the *first* issue is in favor of the plaintiff.

He observes that the *first* point for consideration is on or about what time symptoms of puberty appeared in the plaintiff. He then remarks that the plaintiff on oath deposed that she was born in Assar 1249 M. S. (Moolkee style), corresponding with June 1841 A. D.; and that in Jyte 1267 M. S., or May, June 1859, symptoms of puberty appeared; that the *Hedaya* clearly lays down the rule that, when a female declares herself to be adult, her declaration on that point must be credited; that the evidence of the mother Khoobunissa, who was fully competent to state when her daughter arrived at puberty, tends to show that symptoms appeared three or four months prior to the 31st August 1856; that the witnesses cited by the plaintiff to prove the date of her birth to be as averred by her are her uncle and another party by name Boodoo.

The evidence of the mother, Khoobunissa, is rejected by the Judge as untrustworthy, with the remark that, if she had pleased so to do, she could have given the best evidence upon a point respecting which she must have had the best means of being acquainted; that the defendant had referred to a horoscope as fixing the year 1247 M. S. as the year in which the plaintiff was born, but that this document is not forthcoming; that, according to the *Hedaya*, the evidence of the plaintiff, on such a point as majority or puberty, should be relied on; that, if the receipt filed by the defendant, dated Falgoon 1266, Exhibit No. 14, is to be relied upon, it shows that the plaintiff had not attained puberty until 1266, in which year there was some talk of her marriage with Keramut Hossein; that Falgoon 1266 M. S. corresponds with March 1859 A. D.; that, on referring to the grounds of appeal put in by the defendant in the Sudder Court in November 1856, the plaintiff is stated to be a minor, therefore she could not have attained full age in August 1856 when the alleged compromise is said to have been made; that the petition (No. 15 of defendant's Exhibits) alleged to have been put in by Situl Chunder Roy, vakeel, in August 1856, declaring plaintiff to have attained majority, is declared by the plaintiff to be fraudulent, and no special authority can be produced by the defendant to show under what authority the vakeel acted; that in the *vakalutnamah* filed in the Sudder Court for the purpose of filing the deed of compromise in December 1856, the plaintiff is styled a minor, and her mother as her guardian; that, on considering the whole evidence, documentary and oral, the only conclusion which the Judge could arrive at was that the plaintiff was still a minor, *i.e.*, that she had not attained puberty when the alleged deed of compromise was executed, or in August 1856, neither had she reached the end of her sixteenth year, at the expiration of which minority terminates according to Mahomedan Law (*vide* small edition of Macnaghten, Chapter VII., page 220). Finally that, according to Regulation XXVI. of 1793, the minority of Mahomedan proprietors paying revenue to Government extends to the end of the eighteenth year.

The *second* and *third* issues were tried together. After reviewing the evidence, oral and documentary, adduced by both parties, the Judge comes to the conclusion that the plaintiff "never executed a single one of the documents purporting to have been executed by her."

The *fourth* issue, which involves the question as to the fairness and beneficial character of the alleged compromise, in as far as it affects the plaintiff's interest, is thus disposed of by the Zillah Judge. He observes that the written statement filed in this suit by the mother of the plaintiff is directly at variance with her evidence. In her written statement, the mother states that she had only compromised her own rights, and not those of her daughter. In her evidence she deposes that she compromised both her own and her daughter's rights, and, at the same time, adds that, out of the money received in consideration of the compromise, the plaintiff purchased some clothes, and this, observes the Judge, is the only evidence on record to show that the plaintiff ever received one *cowrie* of the large sum said to have been paid, that there was no attempt to show that the plaintiff shared in the profits of the putnee granted to her mother, that the defendant had not produced the two bonds said to have been executed in favor of the mother and daughter jointly, and that, therefore, there is nothing to show that plaintiff and her mother received them.

The *fifth* issue, as to the receipt of any portion of the profits of the putnee by the plaintiff, was decided in the negative.

On the *sixth* issue, the Judge finds, for reasons stated in his judgment, that it is very doubtful whether Khoobunissa ever received any money, but that it was very clear that the plaintiff received nothing.

On the *seventh* issue, the Judge remarks that the plaintiff has distinctly stated in her deposition that she never received any allowance from the defendant, and never executed any receipt. The Judge distrusts these receipts, and holds that it has not been proved that the plaintiff executed them; that, even admitting for argument's sake that she signed them, they are not binding upon her, inasmuch as she was then a minor according to Regulation XXVI. of 1793, the Mahomedan Law, and Act XL. of 1858.

With reference to the *eighth* issue, the Judge observes that, as the plaintiff never executed the compromise, the decree of 30th August 1856, in as far as she is concerned, must have been obtained by fraud. Further, the said decree was a decree based on the alleged compromise. The defendant sued Khoobunissa, the mother of the plaintiff, on the alleged receipt for 31,400 rupees. No judicial decision was given. The suit was decided with reference to a compromise which the Judge holds was executed by Khoobunissa alone, and not by the plaintiff.

In respect to the *ninth* issue, the Judge observes that Asgur Ali, the mooktear, whose evidence has been recorded under the instructions of the Court conveyed in their decision remanding the case, distinctly states that he received two *vakalutnamahs*, one signed by Khoobunissa for herself, and one by her in her capacity of guardian of the plaintiff. From this the Judge infers that the plaintiff must have been a minor when the petitions offering to compromise the suit were filed in the late Sudder Court; that this witness further states that, when he did not see the plaintiff's seal and signature attached to the power of attorney, then he filed the *vakalutnamah* signed by Khoobunissa as guardian of the plaintiff contrary to the special power of attorney, but according to a general power of attorney held by him; further, that he received a special power of attorney from Enaet Ali, mooktear, deceased, empowering him to file the petition of compromise on behalf of Khoobunissa, but none on behalf of the plaintiff; neither did he receive any authority signed and sealed by the plaintiff to do so. The presumption, therefore, the Judge observes, is that the plaintiff was totally unacquainted with all these arrangements; and consequently the only conclusion that the Court can come to is that the decree of the Sudder Dewanny Adawlut of the 10th December 1856, as far as plaintiff was concerned, was obtained by fraud.

On the *tenth* and *last* issue, the Judge finds that the whole of the evidence on the record tends to show that the mother acted for herself alone according to terms dictated to her by the defendant; and, even supposing for one instant that she also compromised her daughter's case, there is not a tittle of evidence to show that her daughter, a minor, ever derived any benefit from such a compromise; nor does the mother as guardian attempt to show or produce any evidence in support of the benefit said to have been derived by such arrangements.

The *second* set of issues, six in number, which apply to the shares claimed by the plaintiff, and which belonged to her uncle Edoo Hossein, and her grandmother Beebee Lodun, as well as to the share recovered by the defendant under the decree of the Privy Council, is as follows:—

1st. Did the father of the plaintiff survive her uncle Edoo Hossein; and is the plaintiff entitled to recover any and what portion of the share, if any, of her uncle Edoo Hossein of the estate of plaintiff's late grandfather Rajah Deedar Hossein?

2nd. Did Edoo Hossein receive the allowance given by his father's will, or assent to the will?

3rd. Did the plaintiff's grandmother Musst. Lodun, *alias* Syma, succeed to any and what portion of the estate of Rajah Deedar Hossein?

4th. Did Beebee Lodun take the allowance as alleged in the defendant's written statement?

5th. Is the plaintiff entitled to recover any and what portion of Beebee Lodun's share, if any, of Rajah Deedar Hossein's estate?

6th. Is the plaintiff entitled to recover any and what portion of the 1 anna 8 gundhas share of Pergunnah Soorjapore recovered back by the defendant under the decree of the Privy Council, dated 11th July 1859?

The Judge, on the *first* issue, remarks that both parties are agreed as to the date of the death of Nussurooddeen, the father of plaintiff, as in 1251 M. S. The Counsel for plaintiff contended that the uncle of plaintiff, or Edoo, died also in 1251 M. S., but prior to Nussurooddeen; whereas the Counsel for defendant contended that Edoo Hossein survived Nussurooddeen,

and died in 1253 M. S., and not in 1251 M. S. The Judge finds mainly on copies of certain documents put in by the defendant, and which were objected to by the Council for the plaintiff as inadmissible, that Edoo survived his brother Nussuroodeen; and that, therefore, the latter under the Mahomedan Law could not have inherited the estate of Edoo; nor consequently could she, plaintiff, do so. This *first* issue was given against the plaintiff.

On the *second* issue, as to the receipt by Edoo Hossein of any allowance, and as to any assent on his part to his father's will, the Judge was of opinion that there was no reliable evidence to show that Edoo Hossein ever received any allowance or assented to his father's will; that, on the contrary, his conduct, and more particularly his proceedings "*in formâ pauperis*" to contest the will show that he was not an assenting party thereto. This issue was found in plaintiff's favor.

The *third*, *fourth*, and *fifth* issues were tried together. For the plaintiff it was contended that Beebee Lodun was the wife of Rajah Deedar Hossein; for the defendant, that she was only a "*kadima*," *i. e.*, a female servant, not a wife, but a concubine, and, as such, not entitled to inherit any portion of the estate of Rajah Deedar Hossein. The Judge was of opinion that there was no proof of continual cohabitation after the birth of Nussuroodeen, by which even the presumption under Mahomedan Law can arise that Beebee Lodun was the wife of Rajah Deedar Hossein; that, according to the Sheea Law of Inheritance (Rule 25, page 195 of the small edition of Macnaghten's Mahomedan Law), the wife of a temporary marriage has no title to inherit; that, according to ordinary Mahomedan Law, marriage will be presumed in a case of proved continued cohabitation, but, as already observed, no proof had been submitted on that point; that the will of Rajah Deedar Hossein, while it recognises the *status* of Nussuroodeen as a legitimate son, makes no allusion of Beebee Lodun as a wife of the testator. The conclusion come to on the *third* issue by the Judge was adverse to the plaintiff. The oral evidence, the Judge remarks, tends to show that Beebee Lodun received her allowance under the will of Rajah Deedar Hossein. The *fourth* and *fifth* issues, the latter being involved in the former, went against the plaintiff.

On the *sixth* and *last* issue, the Judge remarks that both parties admit that the share of Ranee Soomrun is not included in the will, or deed of gift, alleged to have been executed by Rajah Deedar Hossein. In the suit before the Privy Council, plaintiff, through her guardian Khoobunissa, was a party; that, as the claim of the defendant to the share of Ranee Soomrun had been decided by the Privy Council in his favor, the present claim of the plaintiff is barred under the provisions of Section 2 of Act VIII. of 1859 as *res adjudicata*. The decision of the *sixth* issue was against the plaintiff.

From the above, it will be observed that the plaintiff was wholly successful on the ten issues which involved the question of the execution and *bona fides* of the alleged compromise, and failed altogether in her claim to inherit any portion of the shares of her uncle Edoo, her grandmother Beebee Lodun, and of the Ranee Soomrun, the mother of Rajah Deedar Hossein.

As might be expected, both parties appealed; the defendant, Rajah Enaet Hossein, against the finding of the Judge on the ten issues framed by this Court, the plaintiff, Ranee Roshun Jahan, on the findings which were adverse to her out of the six issues which form the second set of issues laid down by this Court.

The appeal of the defendant was heard first, and then that of the plaintiff. The argument occupied the entire time of the Court for several days, and was very elaborate and able.

On the part of the plaintiff, the learned Counsel, Messrs. Doyne and Paul, were heard, on the part of the defendant, Baboo Kishen Kishore Ghose, Moonshee Ameer Ali, and Mr. Lingham.

Before giving the reasons for the judgment which we have recorded in this very important suit, we think it proper, as the case will probably be taken up in appeal to their Lordships of the Privy Council, and to make our judgment a complete record of the past and present history of the protracted litigation between the parties, to give a succinct account of the position of the parties, and of the nature and extent of their respective claims.

The zemindary of Soorjapore, a very extensive one, is situated in the Zillahs of Purneah and Dinagepore. Fukeeroodeen Hossein, beyond whom it is unnecessary for the purposes of this suit to trace the family, died in December 1793, leaving two sons, Rajah Akbur Hossein and Rajah Deedar Hossein. Akbur Hossein and Deedar Hossein jointly succeeded as heirs to the

zemindary in equal undivided moieties. Akbur Hossein died in September 1813 without male issue, but leaving wives and daughters, and his mother Ranee Soomrun, the lady alluded to above. Deedar Hossein died on the 13th Aghran 1249 M. S., leaving five sons, (1) Enaet Hossein, the defendant before the Court, (2) Nussuroodeen, the father of the plaintiff before the Court, (3) Edoo Hossein, (4) Muneeroodeen, and (5) Bahadoor Hossein; five daughters whose names it is unnecessary to give; and five wives according to the statement of the plaintiff, but according to the statement of the defendant, only one wife and four *kadimas* or slave girls, amongst the latter of whom was Musst. Lodun, the grandmother of the plaintiff.

On the death of Raja Deedar Hossein, Enaet Hossein applied under the provisions of Act XIX. of 1841, claiming to be executor of the estate of Deedar Hossein, and succeeded under the provisions of that Act in obtaining possession of the whole of the real and personal estate of the said Rajah on the strength of a Will and deed of gift alleged to have been executed by the Rajah. This took place on the 19th November 1842.

Musst. Khoobunissa, the mother of the plaintiff, for herself and as guardian of the plaintiff, instituted two regular suits to set aside the will and deed of gift set up by the defendant Enaet Hossein, and to recover possession of their shares in the estate of Rajah Deedar Hossein in right of inheritance. Those suits were decided by the Zillah Judge, Mr. George Loch, on the 12th of September 1855. That learned Judge held that there was no doubt that both the will and the deed of gift were executed by Rajah Deedar Hossein, and that both documents had been fully and satisfactorily attested; but that the will was invalid, inasmuch as there was no reliable evidence that the other heirs consented thereto. The deed of gift, which covered one-third of the estate of Rajah Deedar Hossein, was held to be valid. A decree was given to the plaintiffs in the suit for the share of Nussuroodeen after deducting one-third on account of the deed of gift.

It was against this decision that Rajah Enaet Hossein appealed to the late Sudder Court. His appeal, of course, questioned the decision of the Judge *quoad* the will. This appeal was disposed of according to the terms of an alleged compromise said to have been executed by Khoobunissa, the mother, and by the plaintiff herself, she then being of full age according to the Mahomedan Law, the date of the alleged compromise being 30th August 1856.

In 1859, the plaintiff was married to Syud Ahmed Reza, and at once took steps to assert her rights. She applied for a review of the decree of the Sudder Court, striking off the appeal as per terms of the compromise, and prayed to be heard upon the question of the will, and of the deed of gift, as well as to open out all questions which would have arisen, had the appeal not been removed from the file, asserting broadly that the alleged deed of compromise was never executed by her or with her consent, that she was a minor at the time wholly without cognizance of the transaction which was in fraud of her just rights.

Her application was heard on the 6th March 1860 before Messrs. Trevor, Samuells, and Bayley, Judges of the late Sudder Court, and she was referred to a regular suit, the Judges being of opinion that, though the Court was doubtless competent to make a summary enquiry into the allegations brought forward by the petitioner for review, still, considering the complexity of the circumstances of the case, and the number of the parties involved in the charge of fraud and conspiracy, the truth or falsity of the petitioner's statements could only be satisfactorily enquired into in a regular suit.

Acting upon these instructions, the plaintiff brought her present suit, the prayer of which is to set aside the deed of compromise, and to obtain possession with mesne-profits of the shares of her father Nussuroodeen, her uncle Edoo, and her grandmother Musst. Lodun, in the estate of the late Rajah Deedar Hossein, as also of her share in the estate of the late Ranee Soomrun. She also seeks, if successful in showing that the compromise was never entered into by her, and is in fraud of her, to be permitted to revive her appeal from the decision of Mr. G. Loch adverted to above, which was adverse to her in the matter of the deed of gift *quoad* one-third of the estate of the late Rajah Deedar Hossein, and to be heard on that point and all other points which were open to her to argue, had the appeal not been taken off the file in the present stage of the case.

The history of the litigation and this suit, from its institution to the present time, has been given above. We now proceed to record judgment on the first set of issues numbering ten.

On the *first* issue there has been much argument. For the appellant, Rajah Enaet Hossein, it is contended that the Zillah Judge's exposition of the Mahomedan Law is wrong; that, by that law, a woman is of age when she arrives at puberty, which may be at any period after the completion of the ninth or the fifteenth year; but that, under no circumstances, even if the usual physical symptoms of puberty have not appeared, can a woman be considered to be a minor under the Mahomedan Law after she had completed her fifteenth year? The pleader for the appellant, Moonshee Ameer Ali, quoted the *Kefayah*, the *Jema al Rumooz*, the *Tuhtavee*, and the *Futwah Alumgheer* in support of his argument, and further submitted that the Judge's opinion is based upon the doctrine laid down by Abool Haneefa, which doctrine is opposed to that laid down by his disciples, who concur in holding that a Mahomedan female attains her majority even if symptoms of puberty have not shown themselves on the completion of her fifteenth year; that, as the plaintiff was born on the 6th Magh 1247 Moolkee, corresponding with the 18th January 1840 A.D., she attained her majority under his view of the Mahomedan Law in Bysack or Jyte 1263, corresponding with May or June 1855 A. D.; and that she was, therefore, of full age according to the Mahomedan Law, irrespective of the Regulation Law when the compromise was effected. On the facts he contends that the evidence of the witnesses examined by the plaintiff, by which she attempts to fix the date of her birth as in Assar 1249 M. S., corresponding with June or July 1841 A. D., is untrustworthy; that, with respect to the evidence of the plaintiff herself, he objects to its admissibility, inasmuch as it was taken *ex parte*.

Baboo Kishen Kishore, who followed on the same side, contended that the plaintiff cannot claim any benefit under the provisions of Regulation XXVI. of 1793, inasmuch as she is not a proprietor of an estate paying revenue to the Government, though she may be a party claiming a portion of a revenue-paying estate.

The learned Counsel, Mr. Doyne, for the plaintiff, urged that, according to the doctrine of Abool Haneefa, a Mahomedan female is of age on the completion of her seventeenth year; according to that of the disciples of that learned Doctor, on the completion of her fifteenth year. He then quoted Chapter VIII., Section 1; page 62, of Macnaghten, a work of the very highest authority, to the effect that all Mahomedans, whether male or female, are considered as minors until the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period; that the case No. 17, in the Precedents of Marriage to be found in Macnaghten, refers to the age at which a woman may contract marriage with or without the consent of her guardians, and has nothing to do with the age at which a woman is competent to dispose of her estate, or to bind herself by any act or contract respecting that estate; that the statement of the mother is not to be relied on, inasmuch as she has sold herself to the opposite party, and is, and all along has been, acting in fraud of her daughter; that, as the mother's evidence cannot be trusted, there is no reliable evidence to rebut the plaintiff's evidence as to the date of her birth, and the period at which she attained puberty.

The learned Counsel further calls the attention of the Court to the fact that, by the defendant's own admission, no overtures were made for the marriage of the plaintiff until in 1266 M. S., when it was proposed to marry her to Moonshee Keramut Hossein, in which year, if she was born, as defendant avers in 1247 M. S., she must have been more than 18 years old, and when, if the view of the law and facts taken by the opposite side is correct, the plaintiff had reached puberty, and had consequently been fit for marriage more than two years before any attempt was made to seek a husband for her; that the mother in her deposition shirks the question of the date of her daughter's birth; that the uncle of the plaintiff, Abdool Hossein, in whose house the plaintiff was born, and to whose evidence no objection can be taken, is most precise in fixing the date to be that set up by the plaintiff.

After giving much consideration to these arguments, we are clearly of opinion that the plaintiff was not of age even under the Mahomedan Law, irrespective of Regulation XXVI. of 1793, in August 1856, when the alleged compromise is said to have been executed by her.

Under the Regulation quoted, the plaintiff, even taking the date of her birth to be as fixed by the defendant, was not 18 years old until a year after the date of the alleged compromise. That Regulation required her to attain the age of 18 years before she could exercise any of the powers of a proprietor of an estate paying revenue to Government. By Section 2 of Regulation XXVI. of 1793, the

rule contained in Section 28, Regulation X. of 1793, which limited the minority of Hindoo and Mahomedan proprietors of estates paying revenue to Government to the expiration of the 15th year, was rescinded, and the minority of such proprietors was declared to extend to the end of the 18th year.

Now, it is admitted that Pergunnah Soorjapore is an estate paying revenue to Government. The plaintiff, but for the compromise set up by the defendant, and which she wholly repudiates as not executed with her consent, and as in fraud of her just rights, would be entitled in right of inheritance to succeed to a share of this revenue-paying estate. She has, she asserts, been kept out of her right by the fraud of the defendant. Regulation XXVI. of 1793 clearly extends to proprietors of revenue-paying estates out of possession, as well as to those in possession. Were this otherwise, a powerful and unscrupulous member of a family would have nothing to do but to keep the weaker members of the family out of possession, in order successfully to deprive them of their rights under the law. We cannot admit that the Mahomedan Law as to majority, with reference to the marriage-contract which depends entirely upon physical considerations, can over-ride and nullify the express enactments and provisions of the Regulations of Government. But, even under the Mahomedan Law, we are clearly of opinion that the plaintiff was not of age when she is said to have executed the compromise, dated 30th August 1856. In coming to an opinion on this point, the first question for consideration is, when was the plaintiff born? Was she born in Assar 1249 M. S. as she avers, or in Magh 1247 M. S. as the defendant avers.

In support of the plaintiff's averment, we have her own evidence, the evidence of her uncle in whose house she was born, a most important witness, and one who had the best means of being accurately acquainted with the date of her birth, as well as that of other witnesses. On the other hand, we find that the mother of the plaintiff, in her written statement *which is verified*, states that she, the plaintiff, was a minor at the time the alleged compromise was made; in her evidence taken after the remand of the suit, she states, at variance with her former *verified* written statement, that her daughter, the plaintiff, arrived at full age four months previous to the date of the compromise. When questioned as to the date of her daughter's birth, she is not precise: she says she was born in the month of Magh, of what year she cannot recollect; that Deedar Hossein died three years after her birth; and that symptoms of puberty appeared three or four months prior to the compromise. These statements are too vague and general, and, opposed as they are to her former verified statement filed in Court, are utterly untrustworthy. We regret to find that this lady has so completely gone over to the opposite side for the consideration of a putnee and monies admittedly received by her from Enaet Hossein, as to sacrifice the birth-right of her daughter, her only child. The defendant, in his evidence on oath, states that the plaintiff was born in the year 1247 M. S.; that he cannot recollect in what month or in what day she was born; that the horoscope of her birth was with Doolar Jaha. He gives us no further information as to the birth of the plaintiff.

The horoscope alluded to has not been produced, but Doolar Jaha, who has been examined in this suit, tells us that it has been burnt; that he made a copy of it, not from the original, but that he prepared another after referring to the Almanac; even this copy is not produced. The other witnesses, who have been examined by the defendant, are his menial servants and dependants. They depose as they were instructed to do, and their testimony is entitled to no credit whatever. On a review of the whole evidence on this point, we are clearly of opinion that the plaintiff was born in Assar 1249 M. S.

With reference to the time at which she attained puberty, we think that her own statement on oath, taken with the fact that no steps were taken to give her in marriage until 1266 M. S. (when, if the defendant's statement is true that the plaintiff was born in 1247 M. S., she must have been more than eighteen years old), must be relied upon.

The Mahomedan Law which, as already observed, cannot over-ride the Regulation Law, is very vague and uncertain as to the limit within which a Mahomedan female reaches her majority, owing to having attained puberty. Abool Haneefa, who is considered by Mahomedans as the great oracle of jurisprudence (*vide* Preface to the *Hedaya*), fixes the limit at the completion of the eighteenth year. His disciples differ from their great master, and fix it at the completion of the fifteenth year, that is to say, a Mahomedan woman who is sixteen years of age must be presumed to have attained puberty. But the question of whether a woman has attained puberty or not, important

as it may be when a question arises as to the validity of a marriage which has been contracted without the consent of the guardian of the woman, has, in our opinion, no reference to a question as to the disposal of the title of a woman in a revenue-paying estate at the time, when she had admittedly not completed her eighteenth, and when it is more than doubtful whether she had even completed the fifteenth year, that is to say, whether she was sixteen years of age.

Under either view of the case, whether we apply the Regulation or the Mahomedan Law, we hold that, at the time the compromise is alleged to have been executed, the plaintiff was not of age, and we fully concur with the Judge in deciding the first issue in favor of the plaintiff, respondent.

With reference to the remark that the evidence of the plaintiff was taken in the absence of the defendant's pleaders, we have to observe that the defendant alone is to blame for this. The date upon which the evidence of the plaintiff was to be recorded by commission was fixed, and notice given to the defendant. The Court was closed for the Mahomedan holidays in the interval, thus giving the defendant more time and opportunity to depute a pleader or mooktear to be present on his behalf on the date fixed for the examination. The plaintiff was identified by her husband and her female servants, and her evidence was recorded by a judicial officer, a Moonsiff. The defendant's absence was entirely owing to his own laches.

We now proceed to consider the suit on the merits. The nine remaining issues all hinge upon the question, whether the plaintiff executed the deed of compromise at all, and, if not, whether the acts of her mother, as her guardian, were in fraud of the plaintiff or beneficial to her interests. The issues framed by this Court in their order of remand exhausted all the possible points of controversy, but their adjudication, one way or the other, entirely depends upon the decision the Court may arrive at in respect of the *bona fides* of the alleged deed of compromise. The learned Counsel and pleaders have, therefore, argued the nine remaining issues in the lump, and not separately.

The Court has already expressed an opinion that, on the 30th August 1856, the date of the alleged compromise, the plaintiff was a minor. Khoobunissa, the mother, who in 1856 was the natural and legal guardian of the minor, has gone over to the opposite party. The *onus* of proving that the transaction was beneficial to the daughter's interest is upon the defendant, and the Court has a right to expect *uberrima fides* on the part of the defendant in a transaction of this description, where it is alleged that a minor gives up her title in a principality (for Pergunnah Soorjapore is a property of great magnitude and value) for a bare maintenance utterly out of proportion to her rank and birth, and to the assets of the estate, and when she withdraws her right not only to respond to an appeal in which she stood on vantage ground, having succeeded in setting aside the will of Deedar Hossein which covered two-thirds of the estate, but also waives her right of cross-appeal against that portion of Mr. Loch's decision which confirms the deed of gift covering the remaining one-third of the estate.

In her written statement in the present suit which is verified, Khoobunissa, the mother of the plaintiff, states "that she never executed any deed relinquishing the right of her daughter; that, for a consideration of 3,200 rupees in cash received on the 29th August 1856, and having obtained a putnee lease from the defendant, she, being in straitened circumstances, relinquished her own rights; that if Enaet Hossein, the defendant, has fraudulently caused the insertion of her daughter's name in the deed of compromise, he alone must answer for it." She further states that, at the time she entered into a compromise of her own rights, her daughter was not in Purneah, but at the family residence, Dhantolla. This fact was also found by the Judge, Mr. Simson, whose decree was in favor of the defendant, and is opposed to the whole of the oral evidence adduced by the defendant, which goes to show that the plaintiff was at Purneah negotiating for, and fully cognizant of, the transactions connected with the deed of compromise.

The mother also stated that her daughter had no interest whatever in the putnee lease.

In her deposition after the remand taken on the 19th July 1864, she says that she took Roshun Jahan, the plaintiff, with her to Purneah, that Enaet Hossein executed the putnee in her, the mother's name only, and not jointly; admits that the plaintiff cannot write, though the mother can; that plaintiff touched the pen, and is unable to say who signed her name for her. This lady also admits, when cross-examined by the pleader for the plaintiff, that she is in the habit of mak-

are false, and Edoo Hossein was not a consenting party to the Will, but was contesting it in a Court of law; or the copies filed by him in support of the existence of such contention are rank forgeries.

Being of opinion that these copies are inadmissible as evidence in the absence of any proof or presumption that the originals ever existed, and entertaining very grave suspicions, nearly amounting to proof, that they are wholly spurious and fabricated, we find this issue in favor of the plaintiff, preferring, with reference to the fraudulent conduct of the defendant, to rely upon the evidence adduced by the plaintiff, rather than upon that adduced by the defendant.

The Court, therefore, reversing the decision of the Judge on this issue, finds that Nusuroodeen, the father of the plaintiff, survived his brother Edoo Hossein, and that, therefore, the plaintiff is entitled to the share of her uncle Edoo Hossein in the estate of the late Rajah Deedar Hossein, which devolved to Nusuroodeen, and after his death to the plaintiff.

With reference to the *second* issue, we find with the Zillah Judge that the uncle of the plaintiff did not receive any maintenance from the defendant, Enaet Hossein. The receipt filed in support of his having received maintenance has, as the Judge observes, not been properly attested. It is dated in Srabun 1251 M. S. The defendant avers that Edoo Hossein died in 1253 M. S. He has not filed any receipt of a later date than Srabun 1251, nor shown us how Edoo managed to live without maintenance from Srabun 1251 to 1253 M. S. Moreover, the fact that Edoo Hossein did fight for his rights, and never consented to the terms of the will by which he was disinherited, are not only probable, but are to a certain extent admitted by the defendant himself, for he files copies of proceedings, which, if genuine, would only go to show that Edoo Hossein sued him, the defendant, for his rights. The appeal of the defendant against the decision of the Judge on this issue is dismissed.

The *third*, *fourth*, and *fifth* issues were tried by the Judge together, and were decided by him against the plaintiff.

These three issues were, with the permission of the Court, argued together.

The plaintiff contends that Beebee Lodun was the wife of Rajah Deedar Hossein, the defendant; that she was a slave-girl, a concubine, and not the wife of the said Rajah; that all she was entitled to was a monthly maintenance of Rupees 18-12 under the terms of the Rajah's will, which was regularly paid to her during the term of her life.

The parties before the Court are admittedly of the Sheea, commonly called the Imamya sect, as they follow the doctrines of the twelve Imams. Macnaghten, in his preface to his learned work entitled the Principles and Precedents of Mahomedan Law, at page 22, remarks that the heterodox Code observed by the Sheeas has hitherto had no weight in India, and even at Lucknow, the *then* seat of heterodox majesty itself, the tenets of the Soonees are adhered to. Macnaghten has, however, given a compendium of the Sheea Law of Inheritance, extracted from the "Shurayool Islam," quoted by the pleader of the defendant, Moonshee Ameer Ali, a work which the learned author tells us is of the highest authority amongst that sect.

There can, we think, be no question that, if the parties were of the Soonee sect, the acknowledgment by the late Rajah Deedar Hossein of Nusuroodeen as his legitimate son, coupled with the admitted fact of cohabitation with the mother Musst. Beebee Lodun, would give rise to a legal presumption of the marriage of the Rajah with Musst. Beebee Lodun. The Privy Council have ruled in the case of Khajah Hidayutoollah *versus* Rao Jan Khanum, Volume III., Privy Council Reports, the parties to which suit, we may observe, were admittedly Soonees; that continued cohabitation and acknowledgment of paternity raise the legal presumption of marriage; and that it is on the party impugning the marriage to prove that such a marriage was impossible. In the present case we have the defendant admitting in pleadings in a suit brought by the acknowledged wife of the late Rajah Deedar Hossein, or Ranee Khairoonnissa, that Beebee Lodun was the wife of Rajah Deedar Hossein; indeed the admitted wife Ranee Khairoonissa lost a suit which she brought against the defendant, solely on his plea of non-joinder of parties, in that the Ranee had omitted to include Beebee Lodun in the category of defendants, she being the wife of Rajah Deedar Hossein. We also find that the defendant has filed receipts which he alleges that Beebee Lodun executed in acknowledgment that she had received her maintenance under the will of Rajah Deedar Hossein, in which she is styled the wife of Deedar Hossein. It, therefore, in our opinion, does not lie in the

mouth of the defendant, after making these admissions, to turn round, and, now that it does not suit his purpose to admit that she was the wife, to say that she was never married to the Rajah Deedar Hossein. It is true that, when these statements were made, it was not necessary for a party to a suit to verify his written statements (a wholesome rule which has been introduced by the new Code of Civil Procedure), still we are of opinion that the practice which obtained in pleading, lax as it was in those days, cannot be held to warrant a party deliberately putting forward one statement in a Court of Justice to-day, and another utterly irreconcilable with it to-morrow, as it may suit his purpose, and in order to meet the exigencies of any particular suit.

That the Rajah cohabited with Musst. Beebee Lodun is admitted on all sides. Her *status*, when she entered the family, may have been a low one; she may have been, and probably was, a slave-girl, but her master, the late Rajah Deedar Hossein, cohabited with her; she lived in his household to the day of her death or for more than 20 years; she had a son by him who was acknowledged by the father; and her *status* as wife has been freely admitted by the defendant himself and other members of the family. The recognition of her *status* by the defendant has not been a tacit one; on the contrary, whenever it has suited his purpose to defeat other members of the family who may have been claiming their rights as heirs of the Rajah Deedar Hossein, he never neglected to put forward the claim of Musst. Beebee Lodun to be recognized as the married wife of his father; nay, he has benefited by this plea, and caused suits against him, which otherwise were formal, to be nonsuited, because this lady was not arrayed amongst the parties to the suit as the wife of his father.

It is contended by the pleaders for the defendant that the late Rajah Deedar Hossein in his will has declared that he had only one married wife, but that he had four *kadeemas* or slave-girls; that by this will he left a monthly allowance of 175 rupees to his wife, and 75 rupees only to be distributed amongst the four slave-girls, of which number Musst. Beebee Lodun is one. It has been urged upon us that this declaration of the head of the family in a matter of pedigree, and which was made *ante litem motum*, is entitled to very great weight, and doubtless it is entitled to consideration. But we cannot shut our eyes to the fact that the executor under this will, or the defendant Rajah Enaet Hossein, has acted openly in direct contradiction to this declaration, and has hitherto consistently treated Musst. Beebee Lodun as the wife of his father.

The Mahomedan Law is particularly tender on such points, and is scrupulous in bastardizing the issue of any connection in which it can be shown by presumption that there has been cohabitation and acknowledgment of paternity.

It is not unusual for a slave-girl to be honored by the notice of her master, and it is notorious that many such connections have by lapse of time and continued cohabitation ripened into more permanent and legitimate connections. Musst. Beebee Lodun was never repudiated by the Rajah Deedar Hossein during his life-time, nor has it been shown that the connection was a temporary one, fixed for a period, however short, as is usual, in *munkata* or temporary marriage, and then dissolved.

In the work quoted by the pleader for the defendant, the Shuraya Ool Islam in the Chapter treating of Marriages, it is laid down that there are three descriptions of marriages:—

1. *Daimee*, or indissoluble.
2. *Munkata*, or temporary.
3. *Amud*, or marriage with slave-girls.

Now, the defendant in this suit admits that the connection beween his father Rajah Deedar Hossein and Musst. Beebee Lodun was of the second description, *i.e.*, a *munkata* or temporary marriage. In page 281 of the aforesaid work, it is laid down that Ajhal, or a period certain or for a fixed time, is a necessary condition in a temporary or *munkata* marriage, and that, if no such period be fixed, the marriage must be taken to be a *daimee* or indissoluble and permanent one.

Now, it is very clear that no period was fixed during which the temporary marriage between the Rajah Deedar Hossein and Beebee Lodun was to inure. The connection and cohabitation lasted until the death of the Rajah, and continued for many years; the offspring of this connection was acknowledged by the father to be his son; and consequently the presumption under the Mahomedan Law that the marriage was not a temporary but a permanent one clearly arises.

We are, therefore, of opinion that Musst. Beebee Lodun was the wife of the late Rajah Deedar Hossein, and that the plaintiff,

as her grand-daughter, is entitled to inherit the share which devolved to Beebee Lodun as wife of the Rajah Deedar Hossein. We reverse the decision of the Judge on this issue.

With respect to the *sixth* issue which involves the question, whether the plaintiff is entitled to recover any and what portion of the 1 anna 8 gundah share of pergunnah Soorjapore recovered back by the defendant under the decree of the Privy Council, dated the 11th July 1859, we observe that, in the suit before the Privy Council, Enaet Hossein is treated as the only son of the late Rajah Deedar Hossein, whereas the Rajah left five sons, all of whom, whatever the *status* of their mothers may have been, were entitled under the law which obtained amongst Sheeas to inherit equally with Enaet Hossein.

Enaet Hossein recovered, under the decree of the Privy Council, as heir-at-law of his paternal grand-mother, Ranee Soomrun.

When this suit was pending before the Privy Council, Nusseroodeen, the father of the plaintiff, had been dead for about eight years, and she herself was a minor. In the Courts in this country the mother of the plaintiff was made a *pro formâ* defendant; we have not been shown that she was a party to the appeal before the Privy Council, and it is very evident from the decision of their Lordships that Enaet Hossein passed himself off as the only son of the late Rajah Deedar Hossein. (*See* page 244, Moore's Reports, Volume VII.) The share of the Ranee Soomrun was not covered by the will or deed of gift alleged to have been executed by the Rajah Deedar Hossein: for the above share had not been recovered from the other branch of the family, *viz.*, from the heirs of Akbar Hossein, the brother of Deedar Hossein, until after the death of the latter.

No issue was raised, nor was any question adjudicated, in the presence of the plaintiff or of her guardian *quoad* their title to inherit any portion of the share of Ranee Soomrun.

We further observe that no answer was filed by the mother of the plaintiff in the suit to which she was not a substantial party. What was recovered by Enaet Hossein was, we hold, recovered by him as *trustee for the other members of the family.*

The pleaders for the defendant have attempted to raise the plea of limitation, urging that, as Ranee Soomrun died in 1819, and the plaintiff's father Nusuroodeen in 1844, and as no claim was made by Nusuroodeen during his life-time, more than 12 years had elapsed from the date of the Ranee's death to the date of the death of Nusuroodeen, and that, therefore, the time for bringing the suit had run out during the life-time of the plaintiff's father. The Court observes that this plea was not distinctly raised below, and it cannot be taken at this stage of the case.

As, then, the parties to the appeal before the Privy Council and the subject-matter of the appeal were not the same as in the present suit, and as no adjudication was made on the title of the plaintiff in that suit, we hold that the doctrine of *res adjudicata* will not apply, and we reverse the decision of the Zillah Judge on this issue. The plaintiff will be entitled to recover a 5 gds. 1d. share out of the 1 anna 8 gds. which the defendant recovered back as the share of the Ranee Soomrun.

Having disposed of both sets of issues in favor of the plaintiff, the Court proceeds to consider the question whether the plaintiff is entitled to revive her own appeal from the original decision of Mr. Loch, dated 12th September 1855.

Having held that the withdrawal of the appeal under the alleged compromise from that decision by Enaet Hossein was a gross fraud, we of course cannot permit him to reap the benefit of that fraud by allowing him to revive his appeal and to question the decision of Mr. Loch rejecting the will as invalid for want of consent of the other heirs of the testator. But the position of the plaintiff is a very different one. At the time the appeal was filed by Enaet Hossein, she was entitled under the then law, Act XV. of 1853, *to a notice*, which would have given her an opportunity, within four weeks from the date of such notice, to file her cross-appeal. She was deprived of this unquestionable right by the fraudulent conduct of the defendant. Clearly, therefore, she is now entitled to revive her appeal, and to be heard on those points in the decision of Mr. Loch, which are adverse to her title. The record is complete, and all the evidence which will enable the Court to pass judgment is before us. We, therefore, proceed to hear the appeal of the plaintiff against the decision of Mr. Loch rejecting, for reasons fully stated above, the claim of the defendant to be heard in appeal against any portion of that decision.

The pleader for the respondent, Rajah Enaet Hossein, took the following preliminary objections to our hearing the appeal of

the plaintiff, questioning the decision of Mr. Loch in the matter of the *Hebbah*.

First.—That, as no appeal was preferred by the plaintiff against the aforesaid decision, she cannot be permitted to re-open a question decided ten years ago.

Second.—That, if the compromise between the parties which resulted in the withdrawal of the appeal from the aforesaid decision be set aside, the respondent's right of appeal revives.

Third.—That, in the present case, the right of appeal in the matter of the *Hebbah* had been over-ruled by the decision of this Court, dated the 9th September 1862.

With reference to the *first* objection, it is sufficient to remark that the plaintiff was deprived of her right of appeal by the fraud of the defendant, as fully shown in our decision.

In regard to the *second* objection, we have already stated that the Court will not permit the defendant to benefit by his own fraud; his right of appeal is irrevocably, but deservedly, lost to him.

With respect to the *third* objection, we observe that this Court, in their decision of the 9th of September 1862, did not rule that the plaintiff was estopped from questioning *in appeal* the propriety of the decision of Mr. Loch, in as far as her rights were prejudiced by the *Hebbah* being pronounced to be valid. What the Court held was this, that, if the plaint in the suit before the Judge contained matters which had already been disposed of by Mr. Loch's decision, such might be struck out, and the plaint be amended, and a decision passed upon such pleas as were not adjudicated upon in that decision. The right of appeal to this Court from the decision of Mr. Loch in the event of the plaintiff establishing that the deed of compromise was in fraud of her was never taken away.

We now proceed to consider the question of the validity of the deed, dated the 19th Kartick 1247 M. S., which purports to be a *Heba-bil-ewuz*, or gift for a consideration, executed by the late Rajah Deedar Hossein in favor of his son Rajah Enaet Hossein, the defendant in this case, whereby one-third of a moiety of the immense estate of Soorjapore is said to have passed to the latter for the nominal consideration of rupees (10,000) ten thousand.

With reference to the question of the validity of this instrument, the learned Judge, Mr. George Loch, in his decision, dated the 12th of September 1855, observes that "the Law Officers, both of the Zillah and Sudder Dewanny Adawlut, have declared that, in all cases of *Hebbah*, whether for or without a consideration, possession must be given to the donee. In the present instance, no possession was given, nor, under the circumstances, could be given, for the Soorjapore estates were at the time under attachment, and collections were made by a Surburakar. But on reference to the decisions of the Sudder Dewanny Adawlut, in the case of Syud Hossein Ali Khan *versus* Fyzoodeen Hydar, dated 28th November 1832, and Imdad Ali *versus* Kadir Buksh, of 24th April 1833, it is laid down that a gift for a consideration is not vitiated by confusion of property or defect of possession, and, as the *Hebanamah* was acknowledged by Deedar Hossein in the presence of Mr. Perry and other credible witnesses, it must be considered valid, and the retraction of the donor, as expressed in his petition to the Collector of the 9th of June 1841, be considered inoperative."

We have carefully attended to the arguments of the learned Counsel and pleaders. We will consider, *first*, whether the deed in question is a gift; *second*, whether it is a will; and, *third*, whether it is a sale.

First.—Is it a gift? We think not, and that, if a gift, it is wholly invalid, inasmuch as no *seizure* followed, and further it is a gift of an undivided portion of a divisible thing. A gift under the Mahomedan Law cannot depend upon a contingency or be postponed; seizin must be immediate. Now, in the present case, although the witnesses cited by Enaet Hossein, and Enaet Hossein himself (*see* his reply to question I put to him by the pleader of the plaintiff, page 9 of the printed papers), have the temerity to depose that possession was made over to the donee, the said Enaet Hossein, it is obviously impossible that such could have been the case, for the whole estate was, as already observed, under attachment at the time the alleged gift is said to have been made. This fact is found by the learned Judge, Mr. Loch, and is beyond doubt.

Second.—Is it a will? To this we say no, and, even if it could be termed a will, it would be invalid as without the consent of the other heirs.

Third.—Is it a sale—for a *heba-bil-ewuz*, *i. e.*, a gift for a consideration, is nothing more nor less than a sale? In considering this question, we must look to the spirit of

the contract, and not to the mere words of the same, and we must be fully satisfied that consideration really passed. In a sale there must be an exchange of property for property, or property for money, or for a legal appreciable value. In the present case we are asked to believe that, for the paltry consideration of ten thousand rupees, Rajah Deedar Hossein sold one-third of a moiety of the Soorjapore estate to his eldest son, the defendant, Enaet Hossein. Looking to the inadequacy of the consideration and to the position of the parties, the Court will not be satisfied with anything short of the most reliable evidence, and in this case such is wholly wanting, while every probability is against the truth of any consideration having really passed.

The only independent and credible witness who has been examined, with reference to the above transaction, is Mr. R. Perry, a gentleman who has resided for many years in the Purneah district, and who was manager of the Soorjapore estate during the whole of the long period it was under attachment by order of the Court. That gentleman distinctly deposes that no consideration *passed in his presence* between father and son, and that from this circumstance, his suspicions being aroused, he questioned the ostensible vendor, Rajah Deedar Hossein, who then admitted that he had received the consideration. This admission is, we observe, wholly inconsistent with the conduct of the alleged vendor immediately after the alleged sale: for we find him, on the vendee attempting to give operation to the deed by applying to the Collector for mutation of names on the district rent-roll, distinctly and emphatically repudiating the receipt of consideration, and it was upon this repudiation of the sale that the Collector refused to enrol the name of the alleged vendee, the defendant Enaet Hossein, on the district rent-roll—a proceeding from which the defendant did not appeal to the Revenue Commissioner, nor did he further press his claim during the life-time of his father, Rajah Deedar Hossein.

Again, we have the alleged vendee, Enaet Hossein, in his examination deposing, in reply to a question put to him by the pleader of the plaintiff, as to whether the properties conveyed by the deed were put into his possession, and how and before whom he paid the money in lieu of the same, that they were put into his possession—an obvious falsehood as shown above; and that the money in lieu was paid then and there, but in whose presence, he is unable to recollect.

See page 9 of the printed papers.

Then, as to the effect which is to be given to the declaration of the Rajah Deedar Hossein, that he had received consideration as deposed to by Mr. Perry.

If the admission of Deedar Hossein be opposed to the facts, we cannot be turned from the fact that no consideration did really pass. We must decide, not upon what the parties said, but upon what they did. False statements will not alter, or give another complexion to, facts. Fraud has been imputed in this case, and the Court is bound to go to the bottom of the case. The plaintiff, the Ranee Roshun Jahan, cannot be bound by the false averment of Rajah Deedar Hossein, which was in fraud of her and the other heirs. The fact is, that the whole transaction was a colorable one—a mere device engendered by the pride of the head of an old Mahomedan family—and an attempt to prefer the eldest son at the expense of the others. Holding, therefore, that Deedar Hossein made a statement which was false to give operation and effect to a deed otherwise invalid, we can have no hesitation in saying that this was not a valid sale, inasmuch as no consideration passed between the contracting parties. The decision of the learned Judge, Mr. Loch, with reference to this deed, is therefore reversed, and the appeal of the Ranee Roshun Jahan decreed. We dismiss the appeal of Rajah Syud Enaet Hossein, No. 178, with all costs bearing interest, and for which also the said Enaet Hossein is liable.

To sum up, we decree the appeal of Ranee Roshun Jahan, No. 158, with all costs bearing interest, and for which the respondent in that number, Rajah Syud Enaet Hossein, is liable.

Under this decree, which sets aside the alleged compromise, the plaintiff will recover possession of the following shares in the 8-anna share of the zemindary of Soorjapore, *viz.*:—

	As.	Gds.	C.	Kts.	D.
The share of her father Nusuroodeen ...	0	16	1	1	1
The share of her uncle Edoo ...	0	2	2	0	½
The share of her grandmother Musst. Lodun	0	10	0	0	0
Total ...	1	8	3	1	1½

Of the other 8-anna share in the same zemindary, the plaintiff will recover out of the share of the Ranee Soomrun, which is

equal to 1 anna 8 gundahs, the following shares, *viz.*:—

	As.	Gds.	C.	Kts.	D.
Of Nusuroodeen ...	0	2	3	1	½
Of Edoo ...	0	0	1	2	½
Of Lodun ...	0	1	3	0	0
Total ...	0	5	0	0	1
Grand Total ...	1	13	3	1	2½

with mesne-profits from date of the first suit by Khoobunissa as guardian, or from August 1852. The amount of the mesne-profits to be ascertained by local enquiry, and to bear interest at 12 per cent. per annum from date of ascertainment.

With reference to the personal property which the plaintiff agrees to accept according to the valuation stated in the schedules appended to the *Hebbah* of the late Rajah Deedar Hossein, and to the buildings, Istermorarees, and Mehals Khas Zubtee, the plaintiff will recover possession of a 2 annas, 17 gundahs, 3 cowrees share out of the whole 16 annas as follows:—

	As.	G.	C.	K.	D.
On account of Nussuroodeen	1	12	2	2	2
" " Edoo	0	5	0	0	1
" " Lodun	1	0	0	0	0
Total ...	2	17	3	0	0

with wassilat bearing interest as stated above.

As this decision involves a claim to various fractional shares, it may be that there is some clerical error in the above calculations, as also in the dates mentioned here and there in this lengthy decision. The parties are at liberty to move the Court through their pleaders by petition to amend any such error, provided such petition is presented within 15 days from the date of this decision.

The 9th January 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Evidence (Copy of Deed of Partition)—Hindoo Law (of Inheritance) — Step-brother and Uterine Brother.

Case No. 330 of 1865.

Regular Appeal from a decision passed by the Officiating Principal Sudder Ameen of Rungpore, dated the 18th July 1865.

Ishen Chunder Chowdry (Defendant), *Appellant,*

versus

Bhyrub Chunder Chowdry (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter and *Kalee Prosunno Dutt* for Appellant.

Baboos Onoocool Chunder Mokerjee and *Kishen Dyal Roy* for Respondent.

A copy of an alleged deed of partition, set up to defeat the ordinary rule of Hindoo Law with respect to succession (*viz.*, that a step-brother cannot inherit in preference to an uterine brother), and taken from the record of a Miscellaneous proceeding without any suggestion as to what has become of the original, is not admissible in evidence.

THIS is a suit to recover possession of a share amounting to a moiety in the estate, real and personal, of the late Hur Chunder Chowdry, laid at Rupees 4,699-15-7-1-7.

It is admitted that the plaintiff is the step-brother, and the defendant the uterine brother, of the said Hur Chunder Chowdry.

The claim is based upon a deed of partition alleged to have been executed by the common father of the parties, dated the 15th Magh 1243.

The answer is to the effect that the defendant, according to the Hindoo Law, is the heir of his uterine brother, and not the plaintiff; and, further, that the deed of partition set up by the plaintiff is false, and was never executed by the father of the parties to this suit.

The Officiating Principal Sudder Ameen of Rungpore was of opinion that the deed of partition was fully and satisfactorily proved and authenticated; that this document had been admitted, in a petition to the Collector presented by the defendant on the 15th Falgoon 1257, as just and valid; and further that a perusal of the Collector's proceeding, dated 22nd September 1837, and a decision of the Privy Council, dated the 25th July 1861, which are final and binding under the Law of Limitation, established the same. Under such circumstances, observes the Principal Sudder Ameen, it was not requisite to file the original deed of partition, and it matters not on what stamp it was engrossed.

The Principal Sudder Ameen gave the plaintiff a decree for the real property claimed, but dismissed his claim to the personal property.

In this case, it is very clear that the plaintiff, according to the ordinary rules of Hindoo Law with respect to succession, would not be the heir of his step-brother in preference to the defendant who is the uterine brother. To defeat this rule, the plaintiff relies upon a deed of partition, but fails to produce the original, or to account in any satisfactory manner for its non-production. A copy is filed, taken from the record of a Miscellaneous proceeding. There is no sug-

gestion even as to what has become of the original. The Principal Sudder Ameen was, therefore, undoubtedly wrong in admitting this document as evidence.

The petition, dated the 15th Falgoon 1257, has been read to us. It contains no admission of the *bona fides* of the alleged deed of partition. It appears that, when the defendant came of age, he petitioned the Collector for the removal of his guardian, and for registry of his name on the Collector's rent-roll. We cannot understand how the Principal Sudder Ameen could have construed the terms of this petition into an admission of the *bona fides* of the alleged deed of partition. The subscribing witnesses to the said deed are not examined by the plaintiff. Some *Mujleesee* witnesses have been examined, of whom two who are Hindoos depose that they know nothing about the deed; the others, who are Mahomedans, depose in such a manner to facts of which they are not likely to have had any cognizance, that we wholly discredit their testimony. The defendant examined one of the subscribing witnesses to the alleged deed, Debnarain, who tells us that the document was written 25 days after the death of the party said to have executed it. The proceeding of the Collector, alluded to by the Principal Sudder Ameen, simply removes the guardian from his post, and directs the plaintiff's name to be enrolled on the distinct *Towjee*.

The decision of the Privy Council, Vol. VIII., page 447, referred to by the Principal Sudder Ameen in his judgment, did not turn upon the validity or otherwise of the alleged deed of partition. That suit was based on a *kistbundee*, and their Lordships observed "that it was impossible to permit the respondents in that appeal, the plaintiff and defendant in the present suit, after the death of their guardian, now to dispute their liability for payment of the debt which they had deliberately undertaken to pay."

The issue in that appeal was whether the respondent executed the *kistbundee* or not. The question of the validity or *bona fides* of the deed of partition was not raised.

As, therefore, the plaintiff has wholly failed to prove the deed upon which he relies, and which alone would prevent the operation of the ordinary and legal rule of succession, we reverse the decision of the Principal Sudder Ameen, which we consider to be any thing but creditable to him, and decree this appeal with all costs in both Courts to be borne by the respondent with interest.

The 9th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for land as Mal—Decree of Resumption Court declaring it invalid Lakheraj.

Case No. 307 of 1865.

Regular Appeal from a decision passed by Mr. T. E. Ravenshaw, Officiating Judge of Beerbhoom, dated the 16th June 1865.

Bishonath Dutt and others (Plaintiffs), *Appellants,*

versus

Fool Chand Birjobashee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose, Juggadanund Mookerjee, and *Dwarkanath Mitter* for Respondents.

A suit will not lie for the declaration, as part of a formerly-settled mâl estate of land declared by a Resumption Court liable to assessment as a resumed invalid tenure, and brought after such resumption on the rent-roll as an estate totally separate from the plaintiff's.

In this case, plaintiff sued on the 27th May 1864 to cancel certain survey-proceedings and a map, and thereby to have certain lands declared as part of his mâl estate, and also to be confirmed in possession of those lands.

The Judge has held that the suit is not in time; that such a suit cannot be entertained as against the decision of a Resumption Court; and that plaintiff does not prove that possession for the confirmation of which he sues.

It is sufficient for us in this case to record our opinion that the suit will not lie.

It is to all intents and purposes a suit to cause that land to be declared plaintiff's *mâl of a formerly-settled mâl estate,* which land has been declared by a Resumption Court to be liable *to assessment as a resumed rent-free tenure* held on an invalid title, and brought after such resumption on the rent-roll as an estate totally separate from plaintiff's.

The case of Hur Gobind Ghose, page 131, 17th July 1847, of Carrau's Summary Reports, and that of Lal Beharee, 2nd September 1850, page 459, Sudder Dewanny Adawlut Decisions, support this view, and nothing is shewn to us to contradict it.

We accordingly dismiss this appeal with costs.

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The 10th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Mahomedan Law (of Inheritance)—Sister's Son—Widow.

Case No. 2295 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 20th May 1865, reversing a decision passed by the Moonsiff of Naraingunge, dated the 29th February 1864.

Moonshee Mahomed Noor Buksh and others (Defendants), *Appellants,*

versus

Moulvie Mahomed Hameedool Huq (Plaintiff), *Respondent.*

Baboo Woomesh Chunder Banerjee for Appellants.

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Respondent.

According to Mahomedan Law, where a man dies leaving no children, a sister's son can claim his inheritance after the widow has obtained her one-fourth share.

THE appellant raises a point, which was not raised in the Lower Court, to the effect that the plaintiff was not in a position to sue at all for the inheritance of Moheeooddeen, while the wife of this person was alive and was entitled to the property. We have heard the pleaders on both sides, and have referred to Macnaghten's Mahomedan Law on this subject, Section 3 of Inheritance, and Case 15 of Precedents of Inheritance. We find that the law, read carefully, and interpreted by the Precedent of Case 15, is decidedly adverse to the appellant's claim. The widow, under no circumstances, can be entitled to more than one-fourth of her husband's property, the rest going to sister's sons and to various other distant members after the widow's share has been satisfied. The law of the precedent, Case 15, says: "A widow takes one-eighth where "there are children, and a fourth where "there are none. The remainder goes to "the legal sharers; in default of them, to "the residuary heirs; in default of them, to "the distant kindred."

On this point, then, we have no hesitation in pronouncing the appellant's contention not warranted by the law. The plaintiff, as a sister's son, is clearly among the legal heirs, and only claims his inheritance after the widow has obtained her one-fourth. There were no children of Moheeooddeen in this instance.

On a *second* point urged, the Lower Court has expressly found that, by oral and documentary evidence, the plaintiff has been in possession through his brother Kootubooddeen. This is a finding of fact with which we cannot interfere.

We dismiss the appeal with costs.

The 10th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mahomedan Law of Dower—Proof of—Largeness of amount of.

Case No. 35 of 1865.

Regular Appeal from a decision passed by Moulvie Syud Mahomed Waheedoodeen Khan, Principal Sudder Ameen of Bhaugulpore, dated the 28th September 1864.

Mulleeka and others (Defendants), *Appellants,*

versus

Beebee Jumeela and others (Plaintiffs), *Respondents.*

Mr. C. Gregory, Moonshee Ameer Ali, and *Baboo Kalee Kishen Sein* for Appellants.

Mr. W. A. Montriou and *Baboo Aushootosh Dhur* for Respondents.

The production of a deed of dower is not indispensable to the truth and validity of a claim for dower; nor is such a claim to be set aside by reason of the largeness of the amount of dower.

IT is admitted by both the parties before us that all that has to be decided in this appeal is the question what was the amount of dower proved to have been fixed at the time of the marriage, and that the remand order of Justices Norman and Loch was made only for the purpose of evidence being given on this point, and the case being decided accordingly.

The remand order was this: After holding that the dower was recoverable from the estate of Syed Mahomed, the Judges added these words: "But, as we have no "evidence before us to determine satisfactorily the amount, we think that the Lower "Court will be able to come to a satisfactory "conclusion on this point. We reverse the

"decision of the Lower Court with costs, "and remand the case to the Principal "Sudder Ameen to dispose of the question "as regards the amount of dower."

The Principal Sudder Ameen on this remand put in issue (1) what was the actual amount of plaintiff's dower; and (2) whether she is entitled to it or not, and then decided that the amount claimed (16,25,000 rupees) should be decreed to plaintiffs Jumeela, Sumbut Koonwar, and Mr. King, with interest from date of suit, from the defendants in possession of the property left by Syed Mahomed, in proportion to their respective appropriations, as well as from the other property left by Syed Mahomed.

We have here to notice that the appellants, representing the 12 annas share, have entered into a compromise with the respondents as to their respective interests in the case.

The grounds of the Principal Sudder Ameen's decision on the remand are: *1st*, That the verbal statements of Syed Mahomed and of the vakeel of Beebee Mulleeka showed that they relied solely on the plea of limitation, and had not questioned the correctness of the amount of dower claimed; and that their written statements went mainly on the plea of the insufficiency of proof to warrant a decree on the dower claimed when no deed of dower was produced; *2ndly*, That the custom prevailing in the plaintiff's family, and in other respectable families of that class at Bhaugulpore, was to make dowers of 1,80,000, half in rupees, and half in gold mohurs; or, *literally*, half *red* and half *white*.

The Principal Sudder Ameen states that the main evidence on which he relied to support the finding is in these terms: "It also appears from the deed of *bye-"mokasa*, or sale in lieu of dower, exe-"cuted by Moulvie Imdad Ali, Principal "Sudder Ameen of Tirhoot, vested with "powers of a Small Cause Court Judge, "dated the 9th October 1857, brought by "plaintiff's witness, Moulvie Ally Hossein, "second son of the above-named Principal "Sudder Ameen, that the amount of the "dower in it is just the same as claimed by "plaintiff, *i.e.*, 1,80,000, a moiety gold mo-"hurs, and the other moiety rupees. As "regards the evidence of witnesses, it is "to be observed that the depositions of "Moonshee Mukeeooddeen Ahmed, a plead-"er of the Civil Court, Gyasooddeen "Khan, a respectable mooktear, Mirza Ma-"homed Hossein, a pleader of the Sudder "Ameen's Court, Sheikh Abtaf Ali, a "relative of the plaintiff, Moulvie Mahomed "Gosil, daughter's son of Mahomed Mojeed, "former Principal Sudder Ameen of Bhau-"gulpore, Nazir Mahboot Khan, nazir of "the Judge's Court, Moulvie Ali Hossein, "second son of Moulvie Syed Imdad Ali, "Principal Sudder Ameen of Tirhoot, Nujat "Ali Khan, mooktear, Arzeez-ur-Ruhman, a "relative of the plaintiff, Hajee Syed Ma-"homed Hossein, a pleader of the Sudder "Ameen's Court, Sheikh Muyher Hossein, "naib mohafiz of the Judge's Court, Mahomed "Soleem, a relative of the plaintiff, Samdat "Khan, Sheikh Kader Buksh, a zemindar, "Mudar Buksh, and Syed Ali, prove fully "to the satisfaction of the Court that "it is the custom in the *Mowlana Shabhaz* "family in this city of Bhaugulpore to fix "the dower at 1,80,000, all red coins, *i. e.*, "gold mohurs, a fact verified by Moulvie "Mahomed Rofik Khan, Judge of the Court "of Small Causes at Monghyr, a member "of that family. Another custom prevail-"ing in other families in Bhaugulpore is "to fix it at 1,80,000, a moiety rupees, and "the other moiety gold mohurs, or at one "lakh rupees and eighty thousand gold "mohurs."

"The other witnesses for the defendants "depose that Moonshee Mobarik Oollah "wanted to marry his daughter for a dower "of 1,80,000, half gold mohurs, and the "other half rupees, insisting it to be "the custom in his family; but Syed "Mahomed did not agree, saying it was the "custom in his family to fix the dower at "40,000 rupees and forty gold mohurs; "and that at last the marriage was solemnized "according to the custom of Syed Mahomed's "family. The tenor of this deposition "also proves that it is the custom in plaint-"iff's family to grant 1,80,000 rupees. "Moreover, this custom is borne out by the "*Muzernamah*, written opinion of respect-"able men, filed on behalf of the plaintiff, "which bears the seal and signature of Syed "Shah Enaet Hossein, Sojjada Nusheen, and "other respectable men of this city."

"The *second* point to be determined is "the amount of dower settled on plaintiff's "marriage. As to this point, I have to "remark that Moulvie Mahomed, Sharek "Azeezut Ruhmun, Mahomed Subun Sawdut "Khan, Sheikh Kader Buksh, Muder Buksh, "and Syed Share Ali, witnesses for the "plaintiff, depose, they saw with their own "eyes plaintiff's marriage settled at 1,80,000, "a moiety rupees, and the other moiety "gold mohurs, and as this deposition is "perfectly consistent with the general

"customs it is no doubt true and fit to be "credited by the Court. This fact is "also borne out by the plaintiff's husband, "Syed Mahomed's own petition of 26th "September 1837. Again, in the verbal "statements of the defendants, taken down "by the former Principal Sudder Ameen, "Mr. Robert, alluded to above, they (de-"fendants) do not deny the amount of "the dower pleaded by plaintiff. Although "in the written statements, which were re-"turned, objection has in a manner been "raised by the words 'heavy, without *ka-"beenamah*, &c.,' it is no direct denial. As "regards the *kabeenamah*, it is to be re-"marked that the defendants now allege the "dower to be 40,000 rupees and forty gold "mohurs, which amount they themselves say "has been settled without a *kabeenamah*, and "it is well known that a *kabeenamah* is not at "all customary among the respectable Syeds "and Sheiks of the *Ohaly* sect, and, even "granting it to be a denial, still it is of no "avail in the face of oral statements taken "down by the former Principal Sudder "Ameen in his own hand-writing. It is "quite obvious that the plea now set up "by the defendants, after four years' pen-"dency of the suit, as to the dower being "40,000 rupees and forty gold mohurs, "is a plea only which is usually taken in "such cases, and the corroboration of this "plea by the defendant's witnesses is by no "means fit to be taken notice of, as these "witnesses are men of little worth, and, com-"pared with the witnesses for the plaintiff, "have no worth at all; for witnesses Suffa-"nent Hossein and others are residents "of different remote stations, Monghyr, "Gogry, Sooruj Gurrah, &c., and of different "castes; most of them are illiterate, and are "rather of the plebeian order, their deposi-"tions are contradictory and conflicting."

The Principal Sudder Ameen concludes his judgment by ruling: "The point to be "determined in the *third* place is, whether "a claim for such a large amount of dower "can be entertained by the Court? Now, "according to Macnaghten's Mahomedan "Law, page 288, and decision of the Sudder "Court, dated 20th July 1801, in the case of "Golam Hossein Ali, for dower to the "amount of 3,00,000 gold mohurs, the "largeness of the amount does not vitiate "the claim; certain of plaintiff's witnesses "say that the object of granting dower to "such a large amount is to secure to the "wife, after the death of her husband, all "that he might acquire. What harm, then, "if it was granted with this object? In "this view it is apparent that all the pro-"perty left by Syed Mahomed cannot but "come under the operation of this decision."

The defendant appeals from this decision, and urges:—

1st.—That such a decree cannot be given without the production of a deed of dower.

2nd.—That the written statements recorded at the previous hearing in 1860 are not sufficient evidence in this case.

3rd.—That the depositions of the plaintiff's witnesses are not credible.

4th.—That the *bye-mokasa* of Moulvie Imdad Ali, relied on by the Principal Sudder Ameen, is not a genuine document.

5th.—That the copy of the petition of Syed Mahomed, dated 26th September 1837, has already been rejected by the Judges of this Court who ordered the remand.

6th.—That the evidence does not show a uniform custom of fixing, as dower amongst the respectable families of Bhaugulpore, the large amount claimed in this case.

7th.—That the *muzernamah* was not deposed to by those who signed it.

8th.—That defendant's witnesses prove the dower fixed to have been 40,000 rupees.

9th.—That the suit being a speculative one for the property of Syed Mahomed on the part of the present plaintiffs, and not really one on the Mahomedan Law of dower, should be dismissed.

We omit to notice the other grounds of appeal, such as refer to the Principal Sudder Ameen's personal knowledge of these matters, and the probability or otherwise of Mahomed Syed's double journey to Sahibgunge, as our judgment need not have reference to these items.

Judgment.—After consideration of the arguments of pleaders, and the evidence they have used to support them, we are clearly of opinion that there is no sufficient ground to interfere with the judgment below.

On the *first* of these pleas, we would observe that, although ordinarily, where the actual deed of dower, upon which a suit for dower is brought, is not produced and proved, the Courts require other sufficiently convincing evidence to establish the contract before they will give a plaintiff verdict in his favor, still it would be absurd to hold, as an absolute rule of law, that, where such a deed is not produced, no claim of dower shall ever be decreed. Each case must depend upon the circumstances of it. Experience shews us that a deed of dower

is not in all cases indispensable to the truth and validity of a claim for dower, and this leads us to the *second* and *third* pleas in appeal.

With respect to the *second* plea, we see no reason why the statements recorded in Court by parties in a position to know the facts should not have a certain weight. The Principal Sudder Ameen has not relied upon them absolutely, but only as one and by no means the strongest of the grounds upon which his decision has been based.

The *third*, *sixth*, and *eighth* pleas may well be taken together. We are of opinion as to these that there is on plaintiff's part an amount of evidence, as set forth in the Principal Sudder Ameen's detailed judgment, and as read to us, which establishes sufficiently that the dower claimed was that agreed to and customary. It is, of course, difficult in such cases as this after 30 or 40 years for plaintiffs to produce such full and direct evidence as they otherwise might have done. But taking all the evidence on their side as a whole, and looking to the respectability of many of the witnesses, and to the consistency of the testimony as a whole, and, further, considering that defendant does not in any way establish his plea that the dower was 40,000 rupees and 40 gold mohurs, we see no reason why we should say that the Principal Sudder Ameen is wrong, and reverse his judgment. It may be true that the sum claimed and deposed to, as agreed upon and customary, is a very large sum: but the Mahomedan Law books, and the decided cases, and also the experience of the country, show that it is a fact that sums so apparently beyond the means of the parties are fixed as dower amongst Mahomedans from the lowest to the highest.

The *fourth* plea is not established, nor is it one very material either way.

We admit that the *fifth* plea has some weight, and it is the only one that has. This Court certainly did, before remand, pronounce an opinion unfavorable to the *bond fide* character of the petition of Syed Mahomed of the 26th September 1837. But, excluding it altogether from our consideration, we think there is sufficient evidence without it to warrant our not interfering with the decision of the Principal Sudder Ameen.

On the *seventh* plea, we notice that the *muzeranamah* or statement "not on oath before the Court" of respectable parties is not essential to plaintiff's proving his case, and, therefore, may be put out of it; but it is certainly not opposed to his claim.

The *ninth* plea may be correct as to the speculative character of the suit; and yet those who are legally plaintiff's, and can establish the original claim of dower, have a legal right to a verdict.

Upon these grounds we see no sufficient reason to interfere with the decision of the Principal Sudder Ameen, and we accordingly dismiss the appeal with costs.

The 10th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence—Civil Court not bound by Magistrate's opinion of a document.

Case No. 1970 of 1865.

Special Appeal from a decision passed by Mr. G. G. Balfour, Judge of Chittagong, dated the 20th April 1865, affirming a decision passed by the Moonsiff of Satkaneah, dated the 16th December 1863.

Nittyanund Surmah and others (Defendants), *Appellants,*

versus

Kashenath Nyalunker (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Mr. R. E. Twidale for Respondent.

A Civil Court is not bound to adopt the view of a Magistrate as to the genuineness or otherwise of a document.

THE ground of special appeal in this case is, that the Magistrate (to whom the Moonsiff referred the *first* document now pronounced to be spurious) found it not to be so, and that, therefore, the Civil Court was bound so to regard it. In respect to the *second* document, the special appellant urges that no sufficient grounds have been given for its rejection.

We are not aware of any law or rule of legal practice which compels a Civil Court to adopt the view of a Deputy Magistrate as to the genuineness or otherwise of a document. The Judge has found, as a fact, on all the circumstances shown by the evidence, and on the appearance of the *second* document, that neither of the documents is trustworthy. With this finding of fact we cannot interfere in special appeal, and we, accordingly, dismiss this special appeal with costs.

The 11th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Damages (Civil Suit for)—Conviction by Magistrate.

Case No. 2328 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 25th May 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 30th November 1864.

Bishonath Neogy (Plaintiff), *Appellant,*

versus

Huro Gobind Neogy and others (Defendants), *Respondents.*

Baboos Umbica Churn Banerjee and *Doorga Doss Dutt* for Appellant.

Baboos Onoocool Chunder Mookerjee, Nil Madhub Sein, Banee Madhub Banerjee, and *Luckhee Churn Bose* for Respondents.

The conviction in a criminal case is not conclusive in a civil suit for damages in respect of the same act.

THE ground of special appeal in this case, which is a suit to recover damages for an assault, is that a conviction of the defendants by the Magistrate for rioting under Sections 147 and 148 of the Penal Code is conclusive evidence, and proves the assault complained of. The Magistrate does convict the defendants of rioting under these Sections, and, in his judgment, finds that the plaintiff was personally assaulted by them. The Lower Appellate Court has, however, considered it not proved that any assault took place, and therefore dismissed the suit.

We cannot in special appeal interfere with the finding of the Lower Court, as the conviction in the criminal case is not conclusive in this, which is a civil suit for damages (*see* the cases collected in Roscoe's Nisi Prius, 10th Edition, 171).

The whole case is highly unsatisfactory. The Lower Court directed that each party should pay his own costs, and we make a similar order, while we dismiss this appeal.

The 11th January 1866.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation (Act XIII. of 1848)—No deduction for legal disability—Commencement of, in the case of an adopted son.

Cases Nos. 678 and 679 of 1865.

Special Appeals from a decision passed by the Judge of Mymensing, dated the 28th November 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 11th July 1864.

Huro Chunder Chowdry (Plaintiff), *Appellant,*

versus

Kishen Koomar Chowdhry and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboos Kalee Kishen Sein and *Hem Chunder Banerjee* for Respondents.

No deduction or allowance is made by law for legal disability from the period of limitation prescribed by Act XIII. of 1848.

Limitation against an adopted son will count from the time of his attaining majority.

THE plaintiff sued the defendants in two different suits for certain plots of land of which he had been dispossessed by the defendants. A portion of the plaintiff's claim the Judge remitted to the Lower Court for investigation on the merits; but as to plots Nos. 3 and 4 to 42 in suit No. 27, and plots Nos. 2 and 3 in No. 28, he declared plaintiff out of Court under the Statute of Limitations.

The Judge finds that, as to all these plots, plaintiff is on his own showing out of Court. As to plot No. 3 in No. 27, plaintiff, remarks the Judge, states that his mother Taramonee was dispossessed by a summary award in the year 1264 whilst Act XIII. of 1848 was in force; and as the order as to three years in that Act is absolute, no time being allowed for any cause whatever to be deducted in counting limitation, and as the suit was not instituted within three years from that time, plaintiff is barred by lapse of time as regards it. Again, as regards Nos. 4 to 42, remarks the Judge, plaintiff states that defendant took possession in 1254 under an

Act IV. of 1840 award. When Taramonee, the mother of plaintiff, was dispossessed in that year, the plaintiff's right had not begun, as he was not then adopted; consequently, Taramonee ought to have sued whilst she was under no legal disability. Plaintiff states that, at the time of dispossession, she was only the guardian of her former adopted son, Jugut Chunder, who died in Chyet 1257; from that date, therefore, she was under no legal disability to sue for her own rights until Chyet 1258, when, plaintiff's vakeel states, the plaintiff was adopted; consequently, limitation began to run from 1st Bysack 1258, or earlier; and, as this suit was instituted more than two years after the passing of Act XIV. of 1859, no subsequent time can be allowed on account of the subsequent liability of the plaintiff under Section 11, and he is, therefore, barred by limitation, as this suit was not instituted till Chyet 1270, being 13 years after 1st Bysack 1258. The Judge considers that plaintiff was similarly barred as regards plot No. 2 in appeal 28, in which Taramonee was dispossessed in 1262. As regards plot No. 3 of appeal 28, of which a former proprietor was dispossessed according to plaintiff's statement in 1232, confirmed by a decree under Act IV. in 1834, which kept Taramonee out of possession of it, plaintiff alleges, remarks the Judge, that Gobind Chunder Chowdry, the plaintiff's father, held the zemindary when of full age, from 1246 to 1248, and when under no legal disability; consequently limitation runs from 1246, and plaintiff's claim is barred as regards this plot.

Plaintiff now appeals specially, urging that his claim is not barred by the Statute of Limitation, and that the Lower Court has miscalculated in determining him to be out of time under the Statute.

As to the plot No. 3 in No. 27, we think that there can be no doubt that plaintiff is out of time in suing for it. When suing to reverse a summary award, it is necessary, under Act XIII. of 1848, to sue within three years of the final award. No deduction or allowance is made by law for legal disability. The agents, of whatever nature they may be, of parties legally disabled from appearing themselves, are under obligation to appear for them within three years to contest the awards, and, if they fail to take the necessary steps to that end, the parties for whom they are acting lose their right by efflux of time.

As to the plots Nos. 4 to 42 in appeal No. 27, it appears that, when the dispossession by defendant took place in 1254, plaintiff's mother was in possession as the guardian and manager of her minor adopted son, Jugut Chunder, who was adopted on 12th Falgoon 1250, and who died in 1257. It appears, moreover, that plaintiff was adopted in Jait 1258, and brings his present suit in Chyet 1270, he having reached his majority in Magh 1268 or 1861.

Now, it seems clear that plaintiff is not the heir of either his adopted brother who died in infancy, or of his mother; consequently, when the cause of action arose, and previous to his adoption, no one through whom he claims was in possession of the property of which the lands are said to form a portion. It follows that limitation did not begin to run against him until his adoption; but he was a minor from that time (1258) until 1268, and has brought his suit within three years from the time when the disability ceased; he is consequently as to these lands clearly within time, and his claim to them must be enquired.

The same reasoning applies to plot No. 2 of appeal 28. Taramonee was dispossessed of it in 1262 when acting as the guardian of her first adopted son, and, until plaintiff's adoption, no one through whom he claims possessed his property in virtue of which he brings the present action.

In determining that limitation does not apply under the peculiar circumstances of this case to the above portion of the present claim, we are not unmindful of the ruling of the Privy Council in the case of Kalamimissa *vs.* the Rajah Swagunge to the effect that a decree obtained against a widow in possession of her husband's estate would bind her husband's heirs, unless that decree could be successfully impeached on some special ground.

As to plot No. 3 of appeal 28, the Judge is clearly of opinion that the decree of the Sessions Judge of 1252 was merely a recognition of a previous dispossession commencing in 1232, after which possession of his property has been acquired by plaintiff's father when he came of age in 1246. Limitation, therefore, having once, during his father's possession of the property, begun to run against plaintiff, his brother's and his own subsequent disability did not prevent the continuance of its running, and it has long since placed him out of Court as to this plot.

The Judge will enquire into the title of the plaintiff to plots Nos. 4 to 42 of appeal 27 and plot No. 2 of appeal No. 28.

The 11th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Suit for contribution—Hindoo Law—Expenses of Family Idols—Government Revenue.

Case No. 2638 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 12th June 1865, reversing a decision passed by the Moonsiff of Manickgunge, dated the 28th May 1864.

Sham Lal Set (Defendant), *Appellant,*

versus

Huro Soonduree Goopta and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboos Sreenath Doss, Romesh Chunder Mitter, and *Greeja Sunkur Mojoomdar* for Respondents.

Where a Hindoo ancestor makes no endowment for the support of the family idols, and creates no trust whereby his descendants were bound to provide for them, no legal obligation rests on them to support the idols, and no suit for contribution can lie against any of them for the expenses of the idols.

In a suit for contribution of Government revenue, where the defendants plead that the plaintiff was in exclusive possession of the entire property as manager, and had paid the revenue out of it before accounting to them for the surplus profits, the Court should not proceed simply on the fact of payment by the plaintiff, but should also consider whose money was paid.

THIS was a suit by the special respondent for contribution against his co-sharers in the ancestral estate, on account of the expenses incurred in keeping up the worship of the family idols, and also for their *quotas* of revenue due to Government, which special respondent had paid himself.

It appears from the record that the original proprietor of the estate, Ram Churn, left three grandsons by daughters, Gooroo Pershad, Mohun, and Gowree Sunkur. The last named got a 7-annas share of the property, the other two 9 annas between them.

The special appellants in this case are the heirs of Mohun (Gooroo Pershad who was a defendant in the original suit not appealing). They deny their liability to pay for the support of the idol and, with regard to the demand for their *quotas* of revenue, allege that the special respondent was a manager in possession of the entire property, and paid the revenue out of it before accounting to them for the surplus profits.

The Court of first instance held that, in the absence of any evidence fixing the amount and nature of the contribution, the defendants were not liable for the expenses of the idols, and that the plaintiff was in exclusive possession of the estate, and paid the Government revenue from it. The Sudder Ameen refused to consider the documentary evidence put in by the plaintiff, on the ground that it was not filed in time.

On appeal, the Principal Sudder Ameen received and considered this as well as the other evidence, and decided that it was sufficient to make the defendants liable for their share of the idol expenses.

On the question of rent, he held that, as the plaintiffs were proved to have paid it for the defendants' share of the estate, the latter were liable for contribution.

Against this decision, the defendants now appeal specially, urging that the evidence on which the Principal Sudder Ameen has relied, does not establish against them any legal liability to pay for any part of the idol's expenses, and that the Principal Sudder Ameen has altogether mistaken the issue on the claim for revenue, which should have been whether the special respondents held exclusive possession of the estate as managers, and paid the Government revenue from its proceeds in that capacity; the fact of their having paid in the full amount of Government Revenue proving nothing in their favor, unless it were also shown that the money did not come from the estate generally, but from their own particular share of it.

With regard to the *first* objection, we think the special appellant's contention sound. The grandfather, Ram Churn, made no endowment for the support of the family idols; nor did he create any trust whereby his grandsons or their descendants were bound to provide for them. And, although there would doubtless be, in accordance with Hindoo custom and usage, a moral obligation on the grandsons of Ram Churn and their descendants in possession of the property of their maternal grandfather, to assist in supporting the worship of the family idols, we do not think that any legal obligation existed, or that the special appellants can be forced to contribute if unwilling to do so.

The Principal Sudder Ameen has decided against the special appellants, on the ground that their liability is proved by the fact of their entering into a covenant to support the idol worship. If this were so, these parties would have of course no defence to the present action. But the documentary evidence on which the Lower Appellate Court

has relied does not, in our opinion, prove any such covenant. The *ekrar*, when properly interpreted, is no more than an arrangement between the parties, the grandsons of Ram Churn, regarding the amount to be allowed as maintenance to a widowed daughter of their grandfather. There is in it an incidental mention of the idols, a word or two at the end, stating that the worship would be kept up. But the *ekrar* was no binding engagement between the aunt and nephews regarding the *debsheba;* it only bound the latter to pay a certain sum for the former's maintenance. Had the aunt been the *shebait* or manager of the idols, the words at the end of the *ekrar* might perhaps have been taken as an obligation; but, as it is, they can have no legal effect in compelling the heirs of Mohun to contribute.

Then, as to the two *hesabs*, one of these may be at once put out of consideration, as it does not profess to have been signed by the special appellant's father at all, but only by Gooroo Pershad, and there is nothing on the record to show us that Gooroo Pershad was authorized by his brothers to sign for them. The question was not even put to Gooroo Pershad when his evidence was being taken in Court.

The *second hesab* is no doubt signed by all three brothers; but, on reading it, we find that it is simply evidence of a voluntary arrangement between the parties to pay certain monies for certain years (1232 to 1235 B. S.), and disclosing no obligation to pay the same in any succeeding years.

On the question of contribution of revenue, we think that the Principal Sudder Ameen has not tried the correct issue. The allegation of the special appellants was that the heirs of Gouree Sunkur were in exclusive possession of the lands on which contribution was claimed, and had paid the Government revenue from the rents of those lands. If this were so, the special respondents could, of course, have no claim, as they paid to Government the special appellant's money as well as their own. The Principal Sudder Ameen has gone simply on the fact of payment by the special respondents, without considering whose money it was that was paid.

The case must, therefore, be remanded to find whether the special respondents were in exclusive possession of the estate for which a contribution of revenue is claimed. If that be found, it follows that the revenue paid must have been from the joint property of all the litigants. If this issue be found against the special appellants, if it be found, that is, that the special respondents were not in exclusive possession as managers of the estate, but that each member of the family collected his own share, then the Principal Sudder Ameen's finding on the evidence that the special respondents had paid the entire Government revenue, would be sufficient to justify the decree passed against the other side, and with that order we, in special appeal, could not interfere.

That part of the Principal Sudder Ameen's judgment, therefore, which imposes a legal obligation on the special appellants to contribute to the support of the family idol is reversed, so far as regards the parties who have appealed, with costs on special respondents. As regards the portion of the claim which is the subject of remand, costs will follow the result.

The 11th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonauth Pundit, *Judges.*

Sale (in execution of decree)—Claims of prior purchasers—Res judicata—Minors—Costs.

Case No. 2733 of 1865.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 4th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 10th May 1864.

Deonarain Sing and others (Defendants),

Appellants,

versus

Tokhun Sing and others (Plaintiffs),

Respondents.

Baboos Onoocool Chunder Mookerjee and *Kalee Kishen Sein* for Appellants.

Baboos Dwarkanath Mitter, Sreenath Doss, and *Kishen Succa Mookerjee* for Respondents.

A purchased in execution the rights and interests of *B*, whose heirs in possession were sued by the creditor who obtained a decree against the estate of *B*. Before the sale, three persons, *C*, *D*, and *E* claimed to have previously purchased separately the whole property of *B* from his heirs. The claim of *E* was disallowed, those of *C* and *D* were allowed, and the rights and interests of *B* in the whole were ordered to be sold with notice of the claims of *C* and *D*. *A* sued *C* and *D* to prove that their purchases were fraudulent, and failed. He also sued to confirm his purchase to that to which

the claim of *E* was disallowed, and obtained a decree. Two heirs of *B*, *F* and *G*, afterwards sued *C* and *D* on the ground that their purchase from their relations while they were minors was not binding upon them, and recovered a portion of the estate with mesne-profits from the date of their dispossession. *A* then sued *F* and *G* for return of the property so recovered by them with mesne-profits from the date of his own purchase. HELD (1) that the dismissal of the former suit of *A* was no bar to his present claim; (2) that *A* was entitled to a decree for his claim, as *F* and *G* could only recover and hold as trustees for him, because he had already purchased the rights of *B*, the ancestor of *F* and *G*; (3) that the plea of one of these heirs, *F*, that he was a minor when the decree was obtained against the estate of *B*, and that, therefore, it was not binding upon him, was of no avail, when he could not show any fraud or reasonable neglect of the decree-holder in not making him a party to the case which the decree-holder had brought against all the persons he had been able to make out as the heirs of his debtor and in possession of his estate, and when *F* could not show that the debt was not due from his ancestor when the decree was obtained, or that the decree was not *bonâ fide*; (4) that when the sale was for the interest of *B* in the whole property, and when *F* allowed *A* to sue *C* and *D* in a case to which *F* was a party, and *A* in that case sued on the ground that what was claimed by *C* and *D* was a part of what *A* had purchased, *F* could not now be allowed to plead that the sale in execution was exclusive of what was purchased and held by the said purchasers, and only of the portion unsuccessfully claimed by *E*; (5) that *F* could not also be allowed to say that the sale to *A* of the property unsuccessfully claimed by *E* was also exclusive of the rights of *F*, when in the former case of *A* for the portion claimed by *E*, *F* had already failed to obtain any decree upon that right; (6) that *F* and *G* were entitled to recover from *A* all costs incurred by them in recovering the property now in dispute from *C* and *D*.

IN this case the special appellants contend that nothing more than the 9 pies for which the claim of Gunga Pershad was disallowed on the appeal of the decree-holder was sold. As the special appellants admit that the order was for the sale of the entire rights and interests of the original and deceased debtor, Sheomungul Sing (against whose estate the decree was passed), with a notice that for a portion of these rights the claims of Mujlis Roy and Fukhur-oon-nissa were summarily allowed by the Court executing the decree, and as by law only the rights and interests in, and not any particular specific portion of, any property of the debtor could be sold, it is too late for the special appellants to argue now before us not only what was sold, but also what should have been ordered to be sold. Besides when, after the purchase made by the present plaintiff in a suit to which the special appellants were parties, the plaintiff was allowed to bring an action against the last two claimants, Fukhur-oon-nissa and Mujlis Roy, on the ground of their alleged purchases from parties holding as heirs of Sheomungul the debtor not being *bonâ fide*, and the case was decided on the ground that these purchases were *bonâ fide*, it is too late now for the special appellants to argue in this case that the plaintiff had not purchased anything more than the 9 pies for which the claim of a third claimant was disallowed on appeal in the summary case in execution.

Deonarain, one of the special appellants, further argues that he is a son of a deceased son of Sheomungul, and not being a party to the decree, the sale in the execution of this decree cannot convey to the purchaser the rights which by succession were vested in that heir, who also, it is said, was a minor when this decree was passed. It appears that, after the failure of the plaintiff in the case against Mujlis Roy and Fukhur-oon-nissa, the special appellants sued these two purchasers on the ground that they, the special appellants, were no parties to the conveyance, and the brothers of one and the uncles and perhaps another brother of the other, had no right to convey their shares during their minority. In this suit the special appellants succeeded and obtained a decree against these purchasers for their own shares. After they had obtained possession and taken mesne-profits for the period during which they were kept out of possession, the present plaintiff brought this suit against them for the return of the property, with mesne-profits from the date of *his* purchase, on the ground that, as he is the purchaser of all the rights and interests of the ancestor of the appellants, they, as heirs of that debtor, have no right to retain against him any portion of the property of their ancestor. It does not appear that, at the time of this decree in execution of which the plaintiff was his purchaser, the special appellant, who objects on the score of minority, was made a defendant. It is moreover shown that he was made a party to the execution-case before the sale in dispute took place. Further, this special appellant not having taken this plea of minority below, no facts connected with it or with matters explaining away this objection are stated, nor evidence given regarding these points.

Even assuming that the special appellant was born when the action was brought or the decree was obtained, and that he was a minor at that time, and even assuming that he was not major when he was made a party to the further proceedings, we cannot consider that this special appellant has any right to deny his liability under and to question the legality of a decree passed for the debts of his ancestor against the estate of that ancestor in a case brought by the creditor against all the parties. The

creditor had, after all reasonable search and enquiry, succeeded in finding out the heirs of his debtor, and the parties holding his estate. It is not shown that the creditor had the means of knowing of the existence of a minor heir when he had from motives of precaution brought the action against the sons, one of the two grandsons, the wife and the manager of the estate of his debtor, and when the special appellant had no plea to urge either of fraud against the creditor, or his grandmother, his uncles or his brother, or to show that the estate of his ancestor was not indebted for the money for which the decree was obtained.

When this plaintiff had sued before to set aside the purchase in favor of Mujlis Roy and Fukhur-oon-nissa, he had sued also to have his purchase of the share unsuccessfully claimed before by Gunga Pershad confirmed. In that case this special appellant had objected that, to the extent of his share, the sale to the present plaintiff was not valid upon this very ground of the appellant's minority, but his objections as regards that portion of the property was disallowed. Both the special appellants further argue that, after the dismissal of the plaintiff's case against Mujlis Roy and Fukhur-oon-nissa, plaintiff cannot now sue the special appellants for any portion of the property recovered by them from the two purchasers. The former case was brought by the plaintiff on the ground of the sales being entirely fraudulent, and the action brought by the special appellants was on the ground that the sale to these purchasers could not convey any right in the shares of these special appellants. The plaintiff could have himself sued the two purchasers upon this right after the dismissal of his former case against these purchasers. The reason of his not thus suing appears to be this, *viz.*, that, in the decree passed in the first case brought by him, the Judge trying the case had thought that he could not sue upon this right, but that the special appellants could, and there is a proviso in the decree to the effect that the plaintiff can take steps to recover the shares of the special appellants when they may recover them from the two purchasers. The former case decided against the plaintiff is therefore no bar to his present suit to recover from the special appellants property which they are holding only as *trustees* for him.

The special appellants, however, contend that they are entitled to be re-imbursed for all the costs that they have incurred in recovering the property which they are now ordered to return. We think there is reason in this plea. We reject the special appeal, but, with reference to their right to recover the costs of the former case, think it proper to add that the plaintiff in this case will not recover any costs of any one of the three Courts from the special appellants, who also will not be entitled to recover from the plaintiff any portion of the costs of this special appeal.

The 11th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Adoption.

Case No. 321 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 29th May 1865.

Kishen Mohun Koond and others (Defendants), *Appellants,*

versus

Muddun Mohun Tewaree and others (Plaintiffs), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellants.

Baboos Kishen Kishore Ghose and *Dwarkanath Mitter* for Respondents.

After Act XIV. of 1859 came into operation, an adopted son out of possession should sue within three years of his majority to set aside illegal act of his adopting mother performed 12 years before the suit.

No cause of action to sue to set aside these acts arise to the adopted son either from the date of his obtaining possession of the estate, or from the date of the final decisions in any case brought for him or against his mother, or by or against him, to prove or disprove the validity of his adoption.

No deduction from the period of limitation can be allowed to the adopted son for the period of pendency of these suits.

In this case, the plaintiff sues for setting aside certain acts of his adopting mother with reference to some portions of the estate of his adopting father. Even the latest of these acts is admittedly twelve years before the suit, and more than three years after the plaintiff's arriving at majority. In answer to the limitation pleaded against the claim, the plaintiff asserts that, during his minority, his mother had occasion to contest the genuineness of the deed under which he and,

before him, another (deceased) adopted son was adopted by his mother; that the case was finally decided in England in favor of the genuineness of the deed after the plaintiff's arriving at majority, but that the legality of his adoption as a second adoption was left undecided; that, finding that his mother was not making over the estate of his adopting father, he sued his mother and those who, in failure of the plaintiff's right, have been the heirs to his adopting father after the death of his adopting mother; that another action was brought by these defendants against him and his mother to contest the legality of his adoption; that meanwhile his mother died, and these cases were finally, in appeal in the late Sudder, compromised between him and those defendants in 1862, when they admitted his title as the legally-adopted son of his father; that, as he could not sue before his rights were so established, he is in time when he has sued in this case within two years of their final adjudication regarding his rights of succession.

The Lower Court overruled the plea of limitation, and on the merits gave the plaintiff a decree.

Against this, the opposing defendant, who is in possession of the whole of the property in dispute, appealed to this Court.

He again pleads limitation. We find that the Lower Court has considered that the cause of action arose when the plaintiff was a minor, and so holds that he should, under Section 11 of Act XIV. of 1859, sue within twelve years of his majority. It thinks, however, that the plaintiff is in time, as he is entitled to a deduction in addition to the whole period of his minority of the entire period intervening between his arrival at majority and the final adjudication of the case between him and his cousins. It further holds that the plaintiff was legally incapable of suing before this termination of the dispute regarding his title, and so is in time when he has sued within three years of the removal of his legal disqualification.

We hold that, under Section 14 of Act XIV. of 1859, no deduction can be made in favor of the plaintiff of the period that either the first case against his mother, or his own case against his mother, or his cousin's case against him, was pending in Courts. The deduction there contemplated is of the pendency of suits of an entirely different kind as therein specified. Even admitting for argument's sake that the Section 12 of the law merely contains some illustration of what would be instances of the legal disqualification mentioned in Section 11, and that the former Section is not exhaustive of the definition of that disqualification, we cannot allow that the hesitation which plaintiff may have felt in bringing this suit before he found it convenient to sue would justify us in holding that the plaintiff was legally disqualified to sue before 1862. When he sued his mother, if he had actually any occasion to sue her, he might have sued at the same time also to set aside these acts of his adopting mother. His cause of action arose to him when his mother by her respective acts injured his father's estate; and we see no sufficient reason in his pleas why he did not sue his mother and the appellant immediately after his coming to age, notwithstanding the fact that his own rights of succession were contended in that suit against his mother. His mother did not in that case deny his right, or state anything adverse to him; and if she did not make over to him, on his arriving at majority, the estate to which by his adoption he was entitled, he should have immediately sued his mother. Plaintiff might under the old law have safely delayed for twelve years from his arrival at majority; but when Act XIV. of 1859 was *passed* (in 1859), he could not fail to perceive that he could safely wait only for three years from his majority. From 1862 this new law came into *operation;* and he could not but see beforehand that, if he allowed the year 1861 to expire, he would be affected by the new law. If he had, immediately after the termination of the dispute regarding his title in the beginning of 1862, brought his present action, he might have been in time under Section 11 of Act XIV. of 1859.

His case cannot come under Section 9 of the Act.

We do not see how the plaintiff can get over the plea of limitation in this case.

We accordingly decree the appeal with costs, and dismiss the plaintiff's suit with costs.

The 12th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence—Survey Map (Comparison of, with Ameen's Report).

Case No. 1711 of 1865.

Special Appeal from a decision passed by Mr. H. Richardson, Judge of Jessore,

dated the 31st March 1865, affirming a decision passed by Mr. J. Weston, Principal Sudder Ameen of that District, dated the 30th April 1865.

Puddo Monee Dossee and others (Plaintiffs), *Appellants,*

versus

Bisseshur Dutt Chowdhry (Defendant), *Respondent.*

Baboo Rajendurnath Bose for Appellants.

Baboo Gopal Lal Mitter for Respondent.

A survey-map sought to be set aside may be used for the purpose of testing the correctness of an Ameen's report.

THE point pressed upon us in special appeal in this case is that the Lower Appellate Court has erred in law in using the survey-map, which it was the object of this suit to set aside, for the purpose of testing the correctness of the Ameen's report.

It is true that this suit was brought to set aside that survey-map as incorrect. Its correctness, therefore, was a material issue in the case. The Lower Appellate Court has tested that correctness, not only by comparing the Ameen's report with the said map, but in other ways also; amongst them it has made a comparison between the configuration and boundaries of the disputed land as shown in the Ameen's report, and in the survey-map, respectively.

Now, we do not say that the Lower Appellate Court might have accepted the survey-map *per se* as evidence to establish the case of either party or as a basis of his decision when the suit was brought to set it aside; but we think that the Lower Appellate Court could not have decided such a case as this properly, without seeing how far the local investigation of the Ameen, ordered especially with a view to discover by its means whether the survey-map should be set aside as incorrect or not, represented in the same manner or differently, the local details and actual boundaries of the lands in dispute. If this comparison were not to be made in cases of this nature, the weight given to that most important item of evidence in such suits—the Ameen's local investigation—must be given without the real test of agreement or difference, which can alone render such a local investigation capable of answering its object, *viz.*, to see whether the survey-map, sought to be set aside as incorrect, is so or not.

We do not, therefore, consider the objection raised other than an untenable and unsubstantial one.

We may add that nothing is shown us to prove that the Judge has misconstrued the decree of the Civil Court, dated 3rd of April 1814, and that the objections raised to the Ameen's report are vague and unspecific.

On these grounds, we see no reason to interfere with the Lower Appellate Court's decision, and we, therefore, dismiss this special appeal with costs.

The 12th January 1866.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Benamee. Presumption of joint family—Allegation of separate property—Onus probandi—Evidence—Duty of Judge (as to Witnesses).

Case No. 315 of 1865.

Regular Appeal from a decision passed by Baboo Greesh Chunder Ghose, Principal Sudder Ameen of Cuttack, dated the 29th July 1865.

Nowbut Ram Bhukut (one of the Defendants), *Appellant,*

versus

Shuklee Dayee and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Onoocool Chunder Mookerjee, Dwarkanath Mitter, Unnoda Pershad Banerjee, Tarucknath Sein, and *Kishen Dyal Roy* for Respondents.

Suit laid at Rupees 31,235-9-6-16.

Suit by a Hindoo widow against her father-in-law's family on account of certain bonds and decrees realized by her father-in-law, and which she alleges to have been the property of her husband who predeceased his father. The defence is that the money was really that of the family, the name of the son being merely used according to the common practice of Hindoo families. The bonds were in the name of the son, and the suits upon them were instituted in his name. On his death, his father, as heir of the son, having procured his name to be substituted in the suits, carried them to a conclusion and realized the money now sued for. HELD that, though the use of the son's name and the father's conduct in substituting his name as heir of the son (instead of disclosing the *benamee*) sufficed to defeat the ordinary Hindoo presumption of joint family, and to throw on the defendant in the first instance the *onus* of proving that the money was joint property, yet the conduct of the father alone did not suffice to invalidate the whole evidence for the defence.

A Judge should see that the evidence of witnesses actually before him is properly taken and thoroughly sifted.

THIS is a suit by the widow of Ojoodhya, a Hindoo, against her father-in-law's family,

for 31,235 rupees on account of certain bonds and decrees realized by her father-in-law, and which she alleges to have been the property of her husband Ojoodhya who predeceased his father. If the property, in fact, belonged either to the father or to a joint Hindoo family of which plaintiff's husband was a member, then (the law is that of the Mitaksharah prevailing in Cuttack) the plaintiff would have no claim. The sole question, therefore, is, was the money, in fact, the property of Ojoodhya alone, or of his father and father's family?

The bonds were in the name of Ojoodhya, the son, and the suits upon them were instituted in his name. Moreover, on his death, his father, Luchmun, came forward, alleging himself to be heir to his son and possessor ("*dakilkar*") and *malick* of his property, and prayed to have his own name substituted in the suits. He produced witnesses who, in very general terms, supported this statement. His name was accordingly substituted, he carried the suits to a conclusion, and realized the monies now claimed by the plaintiff. It appears that, for upwards of two years after her husband's death, the plaintiff continued to reside with his family, but after the subsequent death of Luchmun, the father-in-law, she quarrelled with them, went off to her own father, and brought the present suit. The defendants, collateral heirs of, and, as they say, in joint family with, Luchmun, defend it on the ground that the money was really that of the family, the name of Ojoodhya being merely used according to the very common practice of native families.

The Principal Sudder Ameen finds that the property was the separate property of Ojoodhya, and decrees in favor of plaintiff. On a matter of fact, and especially purely native fact, such as is involved in this case, we should generally be very unwilling to disturb the well-considered verdict of a good Native Judge. But we regret to say that it appears to us, on the face of the record, that the Principal Sudder Ameen has not made any proper effort to sift the evidence. We think that, if he had devoted half the pains and intelligence which he seems to have directed to writing an acute judgment, to a proper examination of the witnesses, he would probably have arrived at a different conclusion. He also seems as it were to look at the case through English spectacles; and ignoring the notorious habits and manners of his own country, he talks of its being "*a breach of the rules which regulate all corporate interests*," that money of the family should be lent in the name of one of the younger members, and asks "what earthly motive had these members for departing from those rules," as if he had never heard of the common, we may almost say, universal, practice of thus acting *benamee* in Bengal; and he treats the allegation of defendants as *primâ facie* wholly improbable and incredible.

As regards the oral evidence, it seems to us that, as is, we fear, too common among Native Judges, he treats it as quite a minor matter to be left to the vakeels, and not deserving his serious attention. The most palpable and necessary questions are wholly omitted; the witnesses are merely allowed to tell what they came to tell in their own way. Yet, when the case has been thus formally completed, and the Judge comes to review the evidence, he applies to it the strictest rules of evidence, and says that there is no legal evidence of this or that, when it is evident that one or two questions put to the witnesses before him would have supplied that evidence. For instance, he says (truly enough as the record of proceedings before him stands) that the defendant's mercantile account books are not, strictly speaking, proved, and therefore cannot be admitted in evidence. In fact, witness after witness spoke in vague terms of the books as kept by Ojoodhya, although the proper questions as to the hand-writing or custody of the books were not put, and we were able during the hearing in appeal (finding some of the parties present in Court) to supply what was wanting, by evidence taken before ourselves which seemed to us very clear and satisfactory. It may be argued, no doubt, that it is not in every case the duty of a Judge to hunt up evidence for the parties (though even for that, when necessary, the new procedure makes provision). But, at any rate, we think that it is undoubtedly the duty of the Judge to see that the evidence of the witnesses actually before him is properly taken and thoroughly sifted; and that it is the height of injustice, when the necessary witnesses are forthcoming in Court, to allow them to pass without proper questions, and then, merely because ignorant Cuttack vakeels do not know the exact form in which books should be strictly proved, to turn round at the end of the case, and say that there is no legal evidence, as has been done in this case.

We have, then, thought that, at this stage of the case, we must carefully examine the evidence, and even, as we have said, have

supplemented before ourselves that proof of the books which seemed to us to be wanting only from the omission to put the right questions.

We think it may be conceded that the use of the name of Ojoodhya, and the conduct of the father in substituting his name as *heir* of his son (instead of telling the whole story of *benamee*), does suffice to defeat the ordinary Hindoo presumption of joint family, and to throw on the defendants, in the first instance, the *onus* of proving that the money was, in fact, joint property. But we are far from thinking with the Principal Sudder Ameen that the conduct of the father alone suffices to invalidate the whole evidence for the defence. The use of a son's name is, as we have said, the commonest of all things; and when the son died, the mere general assertion by the father, that he was heir to all his son's property, was an easier way of substituting his name under a recognised rule, than to enter into particulars of the *benamee*. The witnesses in that proceeding supported the father in the most vague and general terms, and it is to be observed that they made no secret of the existence of a widow of Ojoodhya, a fact which would then have been fatal to the father's claim, if Ojoodhya really were entirely separate. They nowhere said specifically that Ojoodhya Lal had business "*apart from that of the firm of his father*," as quoted and underlined by the Principal Sudder Ameen; any such thing might only be inferred from their saying that his father was heir to all his property and business. On this part of the case, it must also be noticed that the plaintiff's father, Ram Narain, who now comes forward to testify in his daughter's favor, and who may reasonably be presumed to be the real mover of this suit, was himself a joint lender and a joint plaintiff in the transactions and cases, the subject of suit. He must, therefore, have been perfectly cognizant of the substitution of Luchmun as his co-plaintiff in the suit; yet he then never said a word, and allowed to be perpetrated what he now represents as a gross fraud on his daughter. In opposition to the *primâ facie* inferences drawn from Luchmun's conduct, the defendants urge, with very great truth, the extreme improbability that Ojoodhya, who lived with his father and died a very young man, should at the age of 20 have acquired from no known source so large a separate fortune as is now the subject of suit. Altogether, then, while throwing it on the defendants to start a case, we see no strong antecedent probabilities against them. In this view, then, let us look at the evidence fairly.

The defendants produce a number of witnesses apparently in a respectable position, and are likely to render them acquainted with the affairs of the family, who swear that there was one shop, and one business, and one only; that Ojoodhya, when his years enabled him to do so, took an active part in the management of his father's affairs; that he lent and received monies of the firm, and with his own hand kept the account books; that he had no independent source of income; that he was but 20 years of age when the disputed transactions took place; and that he died at 21. They file in Court the books of the firm regularly kept after the custom of bankers, and in which all the disputed items are found as transactions of the firm, some in the hand-writing of Ojoodhya himself. These books have been proved by legal, and we think by good, evidence before us, and we have no hesitation in saying that there is not the least ground for the conjecture thrown out by the Principal Sudder Ameen (apparently at hazard without looking at the books), when, after first saying that they cannot be admitted in evidence, he adds that, if they were, the pages had probably been interpolated. There is not the least trace of such a thing. It seems to us that either the whole of the books have been forged from beginning to end, or the entries are genuine.

Turning to the evidence on the other side to rebut this strong evidence for the defendants, we find literally nothing that in any way meets it, except the evidence of two witnesses, *viz.*, plaintiff's father, Ram Narain (on whose conduct we have already commented), and one Sudanund Pundit. Do these witnesses make clear their case; do they show that which is the great test, the *source from which the separate money was derived?* Far from it; there is not an attempt at explanation. Ram Narain does not assert that he gave Ojoodhya a sum larger than 1,000 rupees at the time of his marriage; there is not a word of the source, place, manner, and nature of the separate business, but mere general assertions that the money in suit was Ojoodhya's separate property; nothing, in fact, that can be called evidence worth taking down, and no account books, &c., were produced. It is true that to these witnesses also the proper questions were not put; but, seeing Ram Narain's position, we think that, if he

had any story to tell, he would, more or less, have told it in some shape.

In this view, then, the evidence is almost one-sided, and the strong case made out by defendants is in no way met. We feel no doubt that in truth Ojoodhya was carrying on business with his father as his father's son, and without any separate capital or trade of his own. We think that, since the widow quarrelled with her husband's family and went to her father, they have taken advantage of the mere nominal circumstances mentioned at the beginning of the case to bring this speculative action, and that it should be dismissed with all costs. We decree accordingly in reversal of the decision of the Court below.

The 12th January 1866.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Benamee — Fraudulent acquiescence of beneficial owner.

Case No. 257 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 17th May 1865.

Nundun Lal (Plaintiff), *Appellant,*

versus

Mr. William Tayler and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee, Dwarkanath Mitter, and *Unnoda Pershad Banerjee* for Appellant.

Mr. R. T. Allan and *Baboo Juggadanund Mookerjee* for Respondents.

Parties who stand by and permit another to hold himself out to the world as the real proprietor of their estate, and thus induce persons innocent of the fraud to lend their money upon such faith, are not entitled to any consideration from a Court of Equity and good conscience.

THIS is a suit to recover certain monies, being the sale-proceeds of an estate sold for arrears of Government revenue, laid at rupees 6,325-2-10.

The plaintiff states that the property in dispute was purchased by his ancestor, Baboo Brijo Beharee Lal, in the ostensible name of Ameer Lal, who was under the protection of the said Baboo. That two of the defendants, or Mr. George Faulkner and Grijadhur Pershad, held decrees against the said Ameer Lal, in satisfaction of which they sought to bring about a sale of the property in dispute. The petitioner objected, urging that the beneficial owner was Baboo Brijo Beharee Lal, and not the judgment-debtor, Ameer Lal. In the meantime, the property was sold for arrears of the Government revenue, and the sale-proceeds were held in deposit in the Collectorate. The Principal Sudder Ameen, in the Summary Department, holding that the talook did not belong to the judgment-debtor Ameer Lal, rejected the application of the two before-named defendants, the judgment-creditors of Ameer Lal, to draw out any portion of the sale-proceeds in satisfaction of their demands. The proceeding of the Principal Sudder Ameen is dated the 17th January 1862, and, in the absence of an appeal, has become final. That, notwithstanding this, and in spite of the objections of the plaintiff, another defendant in this suit, Mr. William Tayler, was permitted to draw out a portion of the sale-proceeds of the aforesaid property in satisfaction of a decree he held against the said Ameer Lal. That the two other defendants above named also took out a portion of the proceeds in satisfaction of other decrees held by them against the said Ameer Lal.

This suit is brought to recover the monies thus appropriated; or

	Rs.	As.	Pie.
From Mr. W. Tayler, Principal ...	2,537	13	10
Interest ...	243	8	0
	2,781	5	10
From Grijadhur Pershad, Principal...	2,952	5	6
Interest ...	251	2	0
	3,203	7	6
From Mr. G. Faulkner, Principal ...	319	1	6
Interest ...	21	4	0
	340	5	6
Total, Principal ...	5,809	4	10
" Interest ...	515	14	0
Grand Total, Rupees ...	6,325	2	10

The defendants answered that the talook in dispute was the property of Ameer Lal, and was purchased with his own funds. Mr. William Tayler further urged that Ameer Lal borrowed money from him on a bond, pledging the talook in dispute, and that he obtained a decree against his debtor, Ameer Lal, which was satisfied out of the sale-proceeds of the property pledged.

The Principal Sudder Ameen found that the plaintiff "has not filed any conclusive evidence, showing that the real purchaser of

the talook was Baboo Brijo Beharee Lal, and that the purchase was made in the ostensible name of Ameer Lal;" that, as "the name of Ameer Lal was current in the Sudder and Mofussil papers, consequently the testimony of the defendant's witnesses has preference over the plaintiff's witnesses;" that the mere fact "of the title-deeds of the property being in the hands of the plaintiff was not conclusive proof of his proprietorship, inasmuch as plaintiff and Ameer Lal lived and messed together, and therefore some papers may have come into the hands of the plaintiff." The plaintiff's suit was dismissed with costs.

The main point for consideration in this appeal is, who was the real proprietor of the talook in dispute, the plaintiff's ancestor, Baboo Brijo Beharee Lal, or Ameer Lal, the judgment-debtor of the defendants.

We have read the whole of the material evidence in this case, and can have no hesitation in coming to the conclusion that Baboo Brijo Beharee Lal was the beneficial owner of the disputed property, and that the name only of Ameer Lal was used. The Principal Sudder Ameen appears to lay much stress upon the fact that the name of Ameer Lal was current in the Mofussil and Collectorate, apparently forgetting that this would, of course, be the case, and is but a part of the machinery of the *benamee* system. The title-deeds, *i. e.*, the sale-certificate, *dakhilas* for the Government revenue, are with the plaintiff; such documents are always in the custody of the beneficial owner, and not of the *benameedar*. The Principal Sudder Ameen's suggestion that plaintiff may, some how or other, have got hold of these documents, is not supported by any evidence, and appears to us to be purely theoretical and unfounded in fact. The plaintiff has examined, amongst other witnesses, the *putwaree* of the village, and he deposes that the plaintiff is the beneficial owner, and not Ameer Lal. To displace such evidence, the defendants examine two illiterate men: one a *peadah*, the other a bearer, who, in precisely the same words, depose as it is clear that they were instructed to do.

Having found that the talook in dispute was the property of the ancestor of the plaintiff, and not of Ameer Lal, it follows that the sale-proceeds of the said talook are not liable for the debts of Ameer Lal. We proceed, therefore, to consider whether there are any good and just grounds why a decree for the refund of the proceeds of sale appropriated by the three defendants should not pass against them.

We take Mr. Tayler's case first. We think that this defendant acted in perfect good faith, and that he is equitably entitled to the protection of the Court. It appears that the plaintiff permitted Ameer Lal to deal with the property as his own, pledging it to Mr. Tayler for sums borrowed from that gentleman. Further, after disputes had broken out between the plaintiff and his *benameedar*, Ameer Lal, in 1860, the former permitted the latter to lease* out the property to an Indigo Planter, treating it as his own. The defendant, Mr. Tayler, sued to recover the monies due on his bond, and the plaintiff permitted a decree to pass unquestioned, whereby the talook was rendered liable for Mr. Tayler's debt. If parties will stand by and permit another to hold himself out to the world as the real proprietor of an estate, when he in reality is not so, and thus induce parties innocent of the fraud to lend their money upon such faith, they are not entitled to any consideration from a Court of Equity and good conscience. For these reasons, we hold that the plaintiff cannot recover from Mr. William Tayler whatever remedy he may have against Ameer Lal of which it is unnecessary to treat further at present.

The case of the other two defendants, or of Grijadhur Pershad and Mr. G. Faulkner, is quite different. They were parties to the first summary enquiry in which, on the intervention of Baboo Brijo Beharee Lal, the talook was declared to be the property, not of Ameer Lal, but of the plaintiff's ancestor, and their attempt to make the property liable for their claim against their judgment-debtor, Ameer Lal, failed. They did not appeal, but remained quiet until another creditor of Ameer Lal, or Mr. William Tayler, being successful in drawing out a portion of the sale-proceeds, they came forward with other decrees against Ameer Lal, and were successful in getting the money out of the Court. That those defendants must refund the monies so drawn out, is but just and proper.

Mr. Allan has desired the Court to make a note of his objection to the effect that the plaintiff was bound to prove that he was the adopted son of Baboo Brijo Beharee Lal; but this, the Court thinks, is obviously unnecessary in the present suit. We also ob-

*Note.—This transaction appears to have been admitted by the plaintiff's pleaders in the Court below

serve that Mr. Allan's client, in his written statement filed in the Court below, appears to have been of the same opinion; for, in para. 1st of his statement, he observes "that the above question cannot be decided in the present suit."

The decision of the Principal Sudder Ameen is reversed. The plaintiff's suit against Mr. William Tayler, as well as his appeal in as far as that gentleman is concerned, are dismissed with costs of both Courts bearing interest. The suit and appeal of the plaintiff against the defendants Grijadhur and Mr. George Faulkner are decreed with costs in proportion bearing interest.

The 15th January 1866.

Present:

The Hon'ble L. S. Jackson and J. B. Phear, *Judges.*

Sale of Putnee Talook (Reversal of)—Jurisdiction—Onus probandi.

Cases Nos. 99 and 215 of 1865.

Regular Appeals from a decision passed by the Judge of Beerbhoom, dated the 17th April 1865.

Kalee Koomar Mookerjee and others (Plaintiffs), *Appellants,*

versus

The Maharajah of Burdwan and others (Defendants), *Respondents.*

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter, Banee Madhub Banerjee,* and *Umbica Churn Banerjee* for Appellants.

Moonshee Ameer Ali Khan Bahadoor, Baboo Kishen Kishore Ghose, Juggadanund Mookerjee, Sreenath Doss, Chunder Madhub Ghose, Ashootosh Dhur, and *Neel Madhub Bose* for Respondents.

Suit to set aside a sale made by the Collector of Burdwan of a putnee talook appertaining to a permanently-settled estate within the civil jurisdiction of the Judge of Beerbhoom, the lands, however, being situate within the Burdwan Collectorate. HELD (1) that, where a Collector, in exercise of his lawful functions, has assumed the jurisdiction to sell a putnee, it lies on the plaintiff who impugns that official act to show that it is done without jurisdiction; (2) that the jurisdiction of a particular Judge over a certain place does not necessarily imply the jurisdiction of a Collector, or more exactly the situation of that place within the Collectorate bearing the same name with the Zillah of the Judge; and (3) that it is no valid ground for impeaching a sale, otherwise good, to say that other sales, which apparently might have been set aside, had been conducted elsewhere.

THESE are suits in the Judge's Court of Beerbhoom, to set aside a sale of the plaintiff's putnee talook (the several plaintiffs being co-sharers), such sale having been made by the Collector of Burdwan, at the instance of the first defendant, and the second and third defendants having been the purchasers.

The grounds on which the sale was impeached, and the same were again urged before us, were:—

1st.—That the Collector of Burdwan was not the proper Collector to make the sale, the putnee being alleged to be locally situated in "Zillah Beerbhoom."

2nd.—That the requisite notice in the Mofussil, as prescribed by Clause 2, Section 8, Regulation VIII. of 1819, had not been duly served.

3rd.—That, as the plaintiffs had a sufficient deposit at their credit in the Collector's hands, the sale ought to have been stayed. On this latter point, it appeared that a sum of money, sufficient to liquidate the arrear, was lying in the Collector's Treasury at Beerbhoom, where the plaintiff expected the sale would have been held, subject to the orders of the Principal Sudder Ameen of that district, and an order had been obtained from his Court for the sum in question to be paid to the zemindar; but the sum had not reached the Collector of Burdwan previous to the sale.

The suit was dismissed in the Zillah Court, and the plaintiff appealed.

We are clearly of opinion, on hearing the argument and the evidence, that the two latter objections have not been sustained, as the notice was shown to have been duly served, and there was undoubtedly no such tender made as under the Regulation would entitle the defaulter to have the sale stayed.

The question remaining was that of jurisdiction to hold the sale; and, as the evidence on this point was not very satisfactory, we thought it right for the ends of justice to order that the Collector of Burdwan should attend and give evidence on this point. We have since heard his evidence, and referred to the maps and other papers which he produced, and the result is that we have no doubt but that the Collector of Burdwan had jurisdiction to hold the sale of this putnee, and that consequently the sale is, in that respect also, perfectly valid.

The difficulty in this case arose from the fact that the putnee "Lot Poochra," appertaining to the permanently-settled estate "Rajabati," is admitted to be within the jurisdiction of the Moonsiff of Ookra, which again is part of the jurisdiction of the Judge of Beerbhoom; and it is said that, on this account, sales under Regulation VIII. of 1819, connected with this putnee, have been hitherto held by the Beerbhoom Collector, but the lands, besides being borne on the Burdwan rent-roll, are said to be locally situated in the Pergunnah Shergurh, which is entirely within the Collectorate of Burdwan.

Now, Act VI. of 1853, Section 1, provides that, "if the lands which may be the subject of any such sale—be all situate in one Collectorate, the Collector of such Collectorate is the Collector to conduct the sale." And in Section 3 we find that "the word 'Collectorate' in this Act means the zillah or other district to which a Collector is appointed." It became, therefore, necessary to know exactly what were the geographical limits of the Collectorate of Burdwan, and whether the lands in dispute lay within these limits.

Mr. Hogg, the Collector of Burdwan, deposed that Lot Poochra was situate within Mehal Rajabati, which stands on the rent-roll of Burdwan; that rent-suits connected with it were instituted in the Revenue Office of the sub-division of Raneegunge, which is in the Burdwan district; and that appeals in such cases were instituted before him; that the lands of Lot Poochra were, as he believed, within the Burdwan Collectorate; and that they were shown to be so in the map of the district, which he produced, published by the Surveyor-General, and prepared from the detailed village surveys made under the authority of Government. He said that ordinarily he would look to the survey-map to show what the limits of his Collectorate were, and that he knew of no specific orders defining the limits of the Burdwan Collectorate.

Without saying that the evidence is perfectly conclusive on the question of geographical situation, we may say that it is such evidence as the plaintiff would have to rebut by the very strongest proof; and, indeed, we may observe that, where the Collector, in exercise of his lawful functions, has assumed the jurisdiction to sell a putnee as in the present case, it lies on the plaintiff, who impugns that official act, to show that it is done without jurisdiction.

In this case, the only evidence of that kind offered by the plaintiff is to the effect that the civil jurisdiction over that place is vested in a Judge other than a Judge of Burdwan. But we are satisfied, from what has come before us in this case, that the jurisdiction of a particular Judge over a certain place does not necessarily imply the jurisdiction of a Collector, or more exactly the situation of that place within a Collectorate bearing the same name with the Zillah of the Judge.

We were much pressed with the argument that the plaintiff had been misled by the previous custom of instituting such proceedings in Beerbhoom. We do not know under what circumstances, or to what extent, this may have happened, but we think it no valid ground for impeaching a sale, otherwise good, to say that other sales, which apparently might have been set aside, had been conducted elsewhere.

We are, therefore, of opinion that the decision of the Court below was right, and we dismiss the appeal with costs.

The 15th January 1866.

Present:

The Hon'ble L. S. Jackson and J. B. Phear, *Judges.*

Butwara—Private partition.

Case No. 218 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 29th April 1865.

Permessur Dutt Sahee and another (Plaintiffs), *Appellants,*

versus

Audh Sahajee and others (Defendants), *Respondents.*

Baboos Unnoda Persaud Banerjee and *Kalee Prosunno Dutt* for Appellants.

Baboos Dwarkanath Mitter, Ishur Chunder Chuckerbutty, Kishen Succa Mookerjee, and *Anund Gopal Paulit* for Respondents.

An estate was divided into four puttees more than 50 years ago. The ancestors of some of the defendants in the present suit sued the ancestors of the present plaintiffs upon this division, and obtained a decree in 1815 for possession of the puttee, which under it fell to their share, and all the co-sharers have exercised rights of ownership over their respective puttees quite independently of one another, some co-sharers having actually purchased portions from others as if they were dealing with entire strangers. This arrangement continued in force till in 1847, the one-fourth proprietors (including the present plaintiffs), by suit in the Civil Court, obtained

a regular separation of their share, and, in assigning to them their proper area of land and proportion of the assets, a quantity of land was withdrawn from the share up to that time enjoyed by the plaintiffs and their co-sharers. HELD that the plaintiffs could not now demand a butwara of the whole estate; nor could they (the several proprietors being thus wholly separate in their rights and interests) claim compensation from the defendants for losing what another litigant has obtained from them by action of the Courts.

THIS was a suit for a partition in appearance and name, but really for a rectification of the share held by plaintiffs in a certain estate which, except as to a fourth share (belonging to parties not concerned in the present suit), had not been subject to a butwara as provided by the Regulations, but had been apportioned by a private arrangement among the co-sharers, and separately enjoyed in accordance with that arrangement. Some of the co-sharers had sold and transferred among themselves certain portions of the estate; but with these modifications, the private arrangement, which was expressly referred to and maintained in a judicial decision between the parties as long ago as the year 1815, had remained in force, till in 1847 the one-fourth proprietors, by suit in the Civil Court, obtained a regular separation of their share, and, in assigning to them their proper area of land and proportion of the assets, a quantity of land (about 989 beegahs) was withdrawn from the share up to that time enjoyed by the plaintiffs and their co-sharers in one-fourth of the whole estate.

The plaintiffs, having an interest to the extent of a third part in this one-fourth share, applied to the Collector for a further separation of their own share, claiming to have the entire lands of the estate (excepting two mouzahs previously sold by themselves to the already-separated co-sharer) once more brought into *hotch-pot*, their full share of land and profits made up, and possession given to them. This application being, after objection on the part of the co-sharers, refused by the Collector on the 30th June 1864, this suit was filed on the 12th September in the same year.

No less than ten different written statements (some of them, however, containing identical allegations) were put in by as many sets of defendants, who, for the most part, pleaded that long-existing arrangements could not be disturbed, and, moreover, that plaintiffs already enjoyed as much as, or more than, they were entitled to. Limitation was also pleaded in various forms.

The Principal Sudder Ameen, on the ground that the parties had long been in separate enjoyment of their distinct puttees, and also that the butwara-papers prepared in consequence of the decree of 1847 showed the representatives of the two remaining fourth sharers to be in possession of even less land than they ought to have, dismissed the suit except to a partition of the one-fourth share of which the plaintiffs and the third set of defendants were co-proprietors.

The plaintiffs appealed to this Court, and it was urged on their behalf:—

1st.—That, whatever arrangement may have been come to between the co-sharers, such arrangement was only provisional, and could not impair their right to demand a regular partition; and that such partition could only be made under the provisions of Regulation XIX. of 1814, bringing in the whole undivided estate.

2ndly.—That the previous arrangement, whatever otherwise its validity, had been broken into by the butwara decreed in 1847 in favor of the one-fourth co-sharers.

3rdly.—That, as by that butwara concluded in 1853 a large extent of land had been taken from the plaintiff, he was entitled by a decree in this suit to be re-placed *in status quo ante* 1853, in other words, to contribution from the remaining co-sharers.

We have taken time to consider this case, as no similar case was brought to our notice; but we are now decidedly of opinion that the plaintiffs cannot, after this lapse of time, and in the present state of the property, disclaim their old agreements, and disturb long subsisting possession.

It is true that a different view was taken in the case of 1847. We are not at liberty to enquire into the grounds on which that case was decided, but we think it probable that substantial justice was done between the parties.

The Principal Sudder Ameen appears to have looked at the butwara-papers, and to have ascertained that, in the judgment of the Collector at that time, the present plaintiffs were holding land much in excess of their proper share.

Be this as it may, we must presume that in these proceedings they exhausted all the means of obtaining justice, and had full justice done to them; and we cannot, because of the determination to which the Courts came, probably on good grounds, in that particular instance, depart from the broad principles on which we think such cases ought to be decided.

In the present case, the division of the estate into four putties took place more than 50 years ago. Some of the defendants' an-

cestors sued the ancestors of the present plaintiffs upon it, and obtained a decree in 1815, for possession of the puttee which under it fell to their share, and all the co-sharers have exercised rights of ownership over their respective puttees quite independently of one another, some co-sharers having actually purchased portions from others as if they were dealing with entire strangers.

We cannot say that, in this state of things, plaintiffs are entitled to demand a butwara of the whole estate, which is the only shape in which the Collector could be, or was, called upon to act.

This being so, and the several co-proprietors being thus wholly separate in their rights and interests, to contend that the defendants are to compensate the plaintiffs for losing what another litigant has obtained from them by action of the Courts is, in our judgment, altogether inadmissible.

In this view of the case, we are constrained to affirm the decision of the Court below, and to dismiss the appeal with costs.

The 15th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale in execution of decree.

Case No. 325 of 1865.

Regular Appeal from a decision passed by the Judge of Patna, dated the 31st July 1865.

Syud Mahomed Afzul and others (Plaintiffs), *Appellants,*

versus

Kanhya Lal and others (Defendants), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Moonshee Ameer Ali Khan Bahadoor and *Baboos Dwarkanath Mitter* and *Roopnath Banerjee* for Respondents.

Suit laid at Rupees 48,947-13-11.

A purchased in execution the rights and interests of *B*, and sold the same to *C*. *D*, a mortgagee from *B*, was in possession of the property at the time of the sale to *A*. Meanwhile, the sale in execution was set aside, and, when *C* afterwards sued *A*, to make over to him possession of what was sold to him by *A*, his claim was dismissed on the ground that the sale to *A* had been set aside. The right of *A* to hold possession as a lien for his purchase-money, for which no provision was made in the decree to set aside the sale, was sold for his debts, and purchased by *E*. The heir of *B* is now in possession, and alleges that he has redeemed the property from *D*. *E* now sues the heir for possession. HELD that, at the time of the purchase by *E*, the sale to *A* being set aside, no such interests and rights were left to *A* as could be sold to *E* so as to give him a right to hold possession in any capacity, and that, owing to the previous sale by *A* to *C*, if any rights survived to *A*, or are to be supposed to have been confirmed by the heir of *B* to *A*, these rights belonged to *C*, the dismissal of whose claims could not transfer any rights either to *A* or through him to *E*.

IT is evident that, when the appellant purchased the rights and interests of Byjnath in the property in dispute, which had been purchased by the latter in a previous sale for execution, these rights had already been transferred by a deed of sale to one Pran Kishen Mitter by the said Byjnath. It is true that, when Pran Kishen sued Byjnath for possession, the sale in which the purchase was made by Byjnath had been set aside by the late Sudder Dewanny Adawlut on the 24th May 1837. There was no provision in the decree setting aside the sale, as to the party from whom the recovery of the purchase-money paid by Byjnath was to be made; whether from the proprietress or the decree-holder who had taken it for the payment of the debt due to him. It is admitted that now the proprietress is in possession of the estate, which she has recovered by suing her mortgagee for redemption of a mortgage made before her rights were sold in execution of a decree on the occasion of the purchase by Byjnath. Now, it is evident that the right to hold possession acquired by Byjnath, through the sale, passed from him to the proprietress when a decree was passed to set aside the sale, and accordingly the claim of Pran Kishen to recover possession by right of title was dismissed. Even if the decree for reversal of sale provided that Byjnath's purchase-money was to be returned to him, still Pran Kishen alone would, after his purchase from Byjnath, have the legal right to sue for it. The deed said to have been executed by Byjnath in favor of Pran Kishen, providing that, in case of the reversal of the sale, the said vendor would make good to Pran Kishen the purchase-money paid by the latter, cannot give the right now claimed by the plaintiff; nor could the petition of the proprietress to the Civil Court, to the effect that, not being able to pay to Byjnath his purchase-money, she agrees to allow him to hold possession of the property purchased by him, give any right to the plaintiff. He cannot recover possession without showing that by some legal proceed-

ing or act of Pran Kishen, or that, by the operation of law, the rights conveyed from Byjnath to Pran Kishen came back to Byjnath before the plaintiff's purchase. If this is not shown to have taken place, Byjnath had no right which the plaintiff could legally purchase by the sale made to him. Two other subsequent purchasers of the same rights of Byjnath, which the plaintiff had purchased before, have already been set aside, and one of them up to the High Court (*see* case of Rugoonath, dated 14th August 1863) lost all rights to recover possession of the property, even as a lien for the purchase-money paid by Byjnath on the same ground, *viz.*, that by the sale to Pran Kishen no right was left in Byjnath to pass to a purchaser of his rights and interests in the property purchased by *him*.

Further, the sale to the plaintiff is not of the rights and interests of a property, but merely of certain *supposed* rights to receive money from ryots and farmers and the zemindar. The right to receive any money from the proprietress is, for the reasons above given, vested in Pran Kishen, and cannot be vested in the plaintiff. Even if we suppose that Byjnath was in possession when the purchase was made by the plaintiff, under some private arrangement between Byjnath and the proprietress, the fact would not give any right to the plaintiff to claim possession of the property. The decree of the Court, reversing the sale to Byjnath, does not create a lien on the holder of the plaintiff, nor is any such lien created by any law. The decree of reversal of the Sudder Dewanny Adawlut of 1837 is silent as to the party who is liable to pay the consideration paid by Byjnath. We are clearly of opinion, then, that the decree for reversal of the sale could not take away the rights conveyed by Byjnath to Pran Kishen as between him and Byjnath or those holding through the former.

It is further not shown who was in possession at the time of the purchase by the plaintiff. It would seem that the mortgagee from the proprietress, to whom mortgage was given before the purchase by Byjnath, and from whom she afterwards by a decree of Court redeemed the property, was in possession up to the time of the redemption by her.

In this view, we do not, on the whole, see any ground to disturb the decision of the Lower Court, and this renders it unnecessary for us to consider the other grounds on which the Lower Court dismissed the claim of the plaintiff.

We accordingly dismiss the appeal with costs.

The 15th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence (copy of deposition)—Sale in execution of decree.

Case No. 352 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore in Dacca, dated the 17th July 1865.

Fukeerooddeen Mahomed Ahsun Chowdhry and others (Plaintiffs), *Appellants*,

versus

Kurreem Buksh Chowdhry and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Mohendro Lal Shome* for Appellants.

Mr. R. E. Twidale and *Baboo Gireeja Sunkur Mojoomdar* for Respondents.

Suit laid at Rupees 19,395-10-1.

A copy of a deposition of a person who is alive, if filed in the Lower Court, and not objected to there, may be used as evidence in the Appellate Court.

In a suit brought to render certain property liable in execution of a decree as being the judgment-debtor's property—HELD that, though the property had been purchased in the name of the judgment-debtor's son, yet, as it had been substantially conveyed for the benefit and support of the debtor and his family, it was liable for the judgment-debtor's debt.

THE plaintiff, appellant, a decree-holder, brought this action to obtain a declaration that the property in dispute, released summarily to Faiz Buksh, one of the sons of Kureem Buksh Chowdhry, the debtor, as the said son's property is still the property of the debtor, and so liable to sale in execution. Khajah Abdool Gunee, to whom the property was conditionally sold by the debtor, was examined in the summary case of execution, and an attested copy of his deposition was offered to the Lower Court by

the plaintiff as evidence long before its final disposal, and was without any objection, on the part of the defendant Faiz Buksh, received by the Court. Consequently, we allowed the copy of the deposition to be read at this stage of the case.

It appears from that deposition and the whole evidence in the case that Kureem Buksh was not in a solvent state; that he (not, as he and his own son allege, his wife and another) had mortgaged the property to the Khajah; that, on failure of payment, as agreed to, the mortgage was in due course of law foreclosed; that the Khajah, notwithstanding that the property had become absolutely his, finding that Kureem and his numerous children had no other means of subsistence, like a generous man, offered to return the property to Kureem and his sons for their maintenance, provided the Khajah was repaid the money due to him; that, though the sum due to him was below the market-value of the property, if sold by competition, the Khajah was quite satisfied with a payment of the greater portion of his dues in cash, and even agreed to receive a bond for the remainder 7,000 rupees from Faiz Buksh, the *second* son of the debtor in whose name the conveyance was taken on this occasion. It further appears that the money, paid in cash to the Khajah, was supplied by one Gunga Narain Chowdhry as an advance, and the conveyance was made by the Khajah, and the sums were 22,000 rupees as consideration for a portion of the property taken by this Gunga Narain Chowdhry in putnee, and another sum of 4,000 rupees, for which he took a bond from the said Faiz Buksh.

Gunga Narain, being examined in this case, states laconically that he took the putnee from the son, lent the money to him, and that the father has no rights left in the matter. Gunga Narain could not but be aware of the circumstances that must be naturally expected to have occurred when the deed of conveyance was executed by the Khajah in the presence of Kureem Buksh; yet this witness does not like to supply full details from which we could clearly understand that the son alone treated with the witness; that the latter is the energetic young man the Lower Court assures him to be; that the witness was aware that the son alone was treating with the Khajah; and that he, the witness, had, in order to oblige the son, as the Lower Court supposes, lent the money to him alone. There is nothing in all that which the son is supposed to have done which the father could not do and use at the same time the name of the son. As this witness holds a putnee granted ostensibly by the son, his interests, if not a generous desire to assist his landlord under whom he is holding a putnee, might have induced him not to be more full in his answer regarding the connection of the father with the property in dispute, than he would otherwise have been. We attach greater importance to the pointed statements of the Khajah, and do not think that it proves the case of the son, because the Khajah in some place says: "He does not know who now holds the estate." If he had sold to the son alone, as the father had no occasion to disturb the possession of the son, the Khajah would have used quite different expressions than are here used by him.

The real meaning of the transaction, which the Khajah deposed to, is this: Knowing that the father, and, through him, his children, after the father's death, would have no other means of subsistence, the Khajah agreed to return, as far as he was concerned, the property to the father from whom he had received it, thinking that he, and, through him, necessarily his children, might enjoy the property as a maintenance, and that, after the father's death, it may come to the children as their inheritance. We do not understand that the Khajah ever considered that Gunga Narain was advancing the money to Faiz Buksh alone, or that he himself would have conveyed the property for an inadequate price to Faiz Buksh alone for his sole benefit and enjoyment. It is not attempted to be shown that there was any ground or inducement to this generous partiality in favor of that son. The Lower Court has, then, we think, taken an erroneous view of the circumstances of the case, and required the plaintiff, appellant, to prove more than he is bound to show. If the property in dispute on the evidence of the Khajah is proved not to be the exclusive property of Faiz Buksh, it can only be the property of the father. In short, we find that the Khajah returned it to Kureem from whom he had taken it, whatever be the ostensible proprietorship now set up.

We are satisfied, therefore, on a full and careful consideration of the whole case, that the claim of the plaintiff is right, and that the decision of the Lower Court dismissing the plaint was wrong.

We accordingly reverse the judgment of the Lower Court, and decree the appeal and the plaint of the appellant with all costs of both the Courts.

The 23rd January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Instalment-bond—Intermediate payment—Limitation—Cause of action—Unsigned endorsement on bond.

Case No. 2152 of 1865.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 21st April 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st January 1865.

Shumboochunder Shaha (Defendant), *Appellant,*

versus

Baroda Soonderee Debea and others (Plaintiffs), *Respondents.*

Baboos Debender Narain Bose and *Gopal Lal Mitter* for Appellant.

Baboo Anund Chunder Ghosal for Respondents.

A creditor upon an instalment-bond may credit a payment made by his debtor in 1270 to the instalment due in 1267, in the absence of anything to show that the payment was for any particular instalment, or intended to be credited for any particular part of the general debt.

The payment in 1270 was such an acknowledgment of the debt as to give the obligee his cause of action.

An endorsement without signature cannot be deemed a written engagement which could be registered within the meaning of Clause 10, Section 1, Act XIV. of 1859.

In this case, plaintiff sued on an instalment-bond. It was agreed in that deed that defendant was to pay a certain loan by instalments, and that, if three instalments remained unpaid, the transaction was no longer to be one of payment by instalments, but plaintiff might demand payment of the whole sum lent at once and in one lump sum. It appears that three *kists*, due in 1267 B. S., were not paid when due, and that in 1270 B. S. the debtor in his own hand, but without his signature, endorsed the payment of a certain sum on the bond without any specification as to the particular portion of the debt to which the payment was to be credited.

Plaintiff's case was, *firstly*, that he had every right to credit the payment made in 1270 B. S. to the instalment due in 1267.

We are of opinion that plaintiff had this right, because there is nothing to show that defendant paid the said sum as payment of any particular instalment, or with a request that it should be made a credit for any particular part of the general debt. There was a debt still due in 1267 B. S. The plaintiff, therefore, was entitled to credit the payment, in 1270 B. S., to the outstanding debt of 1267 B. S.

The payment being then credited to the account of 1267 B. S., *secondly*, the question arises whether, although the suit will, as a mere matter of time, be within the period of limitation, as for the sums due after 1267 B. S., the *payment in 1270 B. S. is such an acknowledgment of the debt as to give a cause of action to the plaintiff.*

It is contended, on the one hand, that there is not here "a written engagement to pay the "money lent or interest, or a contract in "writing *signed* by the party to be bound "thereby or his duly-authorized agent;" that, therefore, the payment in 1270 in this case is no cause of action, and plaintiff is barred under Clause 9, Section 1, Act XIV. of 1859.

There is a case in the decisions of the Sudder Dewanny Adawlut, North-Western Provinces, page 401, of the Reports of 1851, in which that Court held that, in a case like the present, the creditor might sue as for the breach of contract on its occurring, or at any time within the period of limitation. But that case does not contemplate the provisions of the Act XIV. of 1859, under which we have to regard the circumstances of this case.

There is another case, of the 27th September 1864, reported in Sutherland's Weekly Reporter, Vol. I., page 189, in which the ruling is in these terms: "If the defendant "has from time to time paid, and the plaint-"iff received, sums of money on account of "unpaid instalments of former years, the "effect of such payment and acceptance is, "as the Judge has determined, to waive any "existing right to take advantage of a "previous default, and to restore the provi-"sion for payment by instalments. The "circumstances under which those several "payments were made and accepted are not "before us in evidence. If they were made "on account of interest, or in part payment "of the principal sum secured by the bond "(treating that sum as then due), they would "have no effect in preventing the operation

"of the Law of Limitation. If, on the other "hand, they were taken (as appears to be "the fact) on account of instalments then "overdue, they go to show a waivor or "agreement to restore the original provi-"sion for payment by instalment.

"The Act requires that the suit shall be "brought within the period of three years "from the time when the debt became due, "or when the breach of contract took place. "These words clearly bar all suits for un-"paid instalments of older date than three "years before the suit, and all suits in re-"spect of the consequences of the non-pay-"ment of such instalments. Instalments "due at the time of suit, which had accrued "due within the three previous years, are re-"coverable. We shall remand the case to "the Court of first instance for a new trial. "If the Court finds that the payments were "on account of instalments, it should ap-"propriate such payments in discharge of "the instalments as they severally became "due, unless the Court is satisfied that the "payments of any of them were especially "appropriated to any particular instalment, "in which case such payment should remain "so appropriated. Instalments which ac-"crued due within three years immediately "before the suit may be decreed."

We would follow the principle indicated in the decision just cited.

A case is also cited to us from Sutherland's Work on Small Cause Court References, Calcutta, 1865, pp. 92, 93, Ramnarain Chowdry's case, where it is stated, "and the "fact of a payment on account does not "keep alive the claim, so as to enable "the creditor to bring an action after three "years from the time when the debt became "due, not from date of loan, unless there be "a written agreement signed by the party "engaging to be bound thereby."

But neither the facts of that case, nor the law to be applied, appear to be the same as in this case. The facts there were of a suit on an *adjusted account* alleged by plaintiff, and denied by defendant. The Judge below and this Court decided that case under Section 4, Act XIV. of 1859. We, however, have to see how far Clause 9 or Clause 10, Section 1 of that law, apply, and not to consider Clause 4.

Now, Clause 10 states: "To suits brought "to recover money lent on interest, or for "the breach of *any contract in cases in* "*which there is a written engagement* or "contract, and in which such engagement "or contract *could have been registered* by "virtue of any law or regulation in force at "the time and place of the execution thereof, "the period of *three* years from the time "when the debt became due, or when the "breach of contract in respect of which "the action brought first took place." Can then the payment in 1270, endorsed by the debtor in his own hand on the instalment bond in this case, be a written engagement or contract coming within Clause 10, *i. e.*, which *could be registered?* We do not think that such an endorsement *without signature* could be deemed a written engagement which could be registered.

But we think that, as it is not denied that the payment in 1270 was made by and is in the handwriting of the debtor, we must regard the transaction of that payment as proved.

It is clear, too, from the terms of the instalment-bond, and the facts on the record, that the payment in 1270 was one of a portion of a larger debt. In such cases, it is laid down in Angell on Limitations, para. 248, page 304. "An acknowledgment or new "promise may be inferred from the fact of "part payment of a contract within six "years, or from the payment of a smaller "on account of a greater sum of money due "from the party making the payment to the "party to whom it is made."

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"In respect to promissory notes and bonds, "the common medium of proof of a part "payment or of interest is an endorsement of "it thereon. But it is always considered es-"sential that such endorsements be made *bona* "*fide*, and with the privity of the obligor: "for otherwise the creditor might be en-"abled to bind the debtor by an acknowledg-"ment or new promise, which the latter "never intended to make. In debt on a "bond dated 1785, before Lord Ellenborough, "it appeared that there were several endorse-"ments on the bond, acknowledging the "receipt of interest down to 1793, which "were proved to be in the handwriting of "the defendant. These were allowed to be "good evidence of the bond remaining un-"satisfied at the date of the last endorse-"ments."

Under all these circumstances, we are of opinion that we shall be right in following the principle of the decision of the 27th September 1864, Weekly Reporter, Vol. I., p. 189, and holding that the payment in 1270 in this instance gave the obligee his cause of action. We accordingly reject this special appeal with costs.

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The 23rd January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Clause 4, Section 1, Act XIV. of 1859.

Case No. 2347 of 1865.

Special Appeal from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 31st May 1865, affirming a decision passed by the Moonsiff of that District, dated the 26th November 1864.

Kebul Ram and others (Plaintiffs), *Appellants,*

versus

The Government and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboo Kishen Kishore Ghose for Government, Respondent.

A suit will lie to set aside an order of the Commissioner of Chota Nagpore, directing the plaintiff to pay Government revenue at a certain rate.

A suit to set aside such an order not having been instituted until more than three years from the date of the order, the revenue having meanwhile been paid by the plaintiff as directed by the order:

Held by *Seton-Karr, J.*, that this was a payment *under protest* within the meaning of Clause 4 of Section 1 of Act XIV. of 1859: but

HELD by *Macpherson, J., contra.*

Seton-Karr, J.—THE facts of this case are stated by the Deputy Commissioner at length, and need not be dwelt on. The question for consideration is, whether the plaintiff, who sues to recover a certain sum of money, paid, for years, in excess, as he alleges, to the Collectorate, can have six years to bring his action, or whether he is limited to one year.

The Deputy Commissioner, affirming the decision of the Moonsiff, has ruled that the plaintiff is not entitled to six years under Clause 16, Section 1 of Act XIV. of 1859, as for "suits for which no other limitation is expressly provided," but that he should have sued within one year from the time when his appeal against the excess payment was rejected, the case falling under Clause 4 of Section 1.

That appeal, which was to the Revenue Commissioner, was rejected on the 15th of April 1862. The suit was not brought until the 5th of July 1864. The plaintiff is admittedly out of time if Clause 4 be applied. The decision of the Deputy Commissioner, that the order passed in the Political Department is practically one passed in the Revenue Department, seems final as on a matter of fact depending on local knowledge and evidence.

With regard to the law-point raised, a suit under Clause 4 of Section 1 would, amongst other things, lie, to "recover any money paid *under protest*, in satisfaction of any claim made by the Revenue Authorities on account of arrears of revenue, or demands recoverable as arrears of revenue."

Now, that the sum paid in excess by the plaintiff, which he now seeks to recover, is a demand on an estate recoverable as arrears of revenue, cannot be denied; and I am also of opinion that the objection to the Collector against the payment, and the subsequent infructuous appeal to the Commissioner, must be taken as equivalents to a "protest." It is true that there is nothing to show that, at the time of tendering the payment in each year, a formal protest was again made by the plaintiff. But I would put what appears to me a fair and natural construction on the acts of the plaintiff according to native custom and habit. An appeal to the higher authority, set over the authority which disallows any request, is a native's way of *protesting.* It is his mode of attempting to vindicate his rights, and what he does when the attempt has failed, may be said, looking to native modes of thought and action, to be done under "protest." A law, it seems to me, should be interpreted according to the feelings and habits of those for whom it is meant, and this remark particularly applies to inhabitants of Non-Regulation Provinces, who are admittedly accustomed to a more patriarchal kind of rule than the residents of more civilised tracts. The plaintiff had stated his objections in vain to both Collector and Commissioner, and I should not expect any further or more formal *protest* on his part.

But, allowing that the sum was, to all intents and purposes, paid under protest and within the meaning of Clause 4 of Section 1, and that, in order to recover money so paid, the plaintiff should have sued within a year, I am still of opinion that, though the plaintiff cannot recover money so paid, except for one year previous to the suit, he may sue to set aside the obnoxious order in the Revenue Department of which he complains; and that, for this purpose, he may claim 6 years under Clause 16, as his suit would not be otherwise provided for.

Any person aggrieved by any act or order of the officials of Government in any Department, would, I conceive, be entitled to

his remedy, and has a right to sue to set the order aside.

I would, therefore, decide the question raised before us, by saying that, though the suit would be ineffectual to recover any sum paid after the vain appeal to the Commissioner, unless any such sum had been paid within one year previous to the date of institution, it may still lie to set aside the original order complained of, as brought within 6 years from April 1862, and that it may fairly go to trial on the merits of that order.

I am unable, after much consideration, to make any distinction between the first payment by the plaintiff immediately or soon after the order complained of, and any subsequent payment. I would consider the appeal as a formal protest, and all payments as made under it.

But I would remand the case for trial on the merits of the obnoxious order, and for the Courts to say whether it should or should not stand good. If it be set aside, any payment made under it within a year before the institution of the suit should be refunded.

Macpherson, J.—A judgment-creditor having seized an estate in execution of a decree, the appellants appeared and claimed it (under Section 246 of Act VIII. of 1859) as theirs. They established their right, and the property was ordered to be released. As, however, it appeared that a smaller amount of revenue was being paid to Government for the land in question than was legally payable, the Court made an order (which apparently was collateral to the actual issue on which it had to decide) that from the date of the attachment of the land the appellants should pay the Government revenue at the full rate. All these proceedings took place in the "Political Department" in Chota Nagpore. The appellants, being dissatisfied with the order for the payment of revenue at the higher rate (which order was passed on the 20th September 1860), appealed to the Commissioner of Chota Nagpore who, on the 25th April 1861, confirmed the order. Since then the appellants have paid the Government revenue at the higher rate. On the 5th July 1864, they instituted the present suit to set aside the order of the Commissioner, and to recover the money paid by them in excess of what was due, calculating at the rate at which they paid prior to the order complained of.

The Lower Appellate Court has dismissed the suit as barred by Act XIV. of 1859, Section 1, Clause 4, holding that "the plaintiffs "have only one year allowed them, wherein "to set aside the order of the Revenue "Court regarding the payment of demands "on account of revenue."

In my opinion, the suit, so far as it seeks to set aside the order of the Political Department and of the Commissioner, declaring the appellants liable to pay revenue at the higher rate, will lie, and is not barred by Act XIV. of 1859. Such a suit manifestly does not fall within the terms of Clause 4 of Section 1; and, as it is not specifically provided for in any other Clause, I think it falls under Clause 16, which limits the time within which a suit may be brought to six years. In this instance the suit was brought within six years.

As regards so much of the suit as has for its object, the recovery of the revenue paid in excess of what the appellants admit to have been due, I think the suit is bad. But I think it is so, not because Clause 4 of Section 1 of Act XIV. is applicable, but on the general principle that a suit will not lie to recover back money paid, as this has been, *to* a person who has committed no fraud or extortion, and *by* persons fully aware of all the facts and of the grounds on which the money was claimed, and who, if they intended further to contest their liability, should have done so at once, and who have been guilty of great laches and delay. In my opinion, although this money has been paid "in satisfaction of a claim made by the Revenue Authorities" on account of revenue, it has not been "paid under protest" within the meaning of Clause 4, Section 1 of Act XIV. of 1859. The appeal to the Commissioner is the last indication on the record of any protest, and I do not understand on what principle it can be held that money paid annually for three years after an order has been made by the Revenue Authorities can be said to be money paid under protest, when there is no evidence of actual protest, and when the suit brought more than three years afterwards to set aside the order complained of might (for all that appears to the contrary) have been instituted the day after that order was made.

There is no doubt that the decision of the Lower Court as to the "Political Department" being for the purposes of these proceedings "a Revenue Authority," is conclusive.

For these reasons, I would remand the case for trial of the validity or otherwise of the order declaring the appellants liable to pay revenue at the higher rate.

The 23rd January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Sale in execution of share—Butwara.

Case No. 2479 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 20th July 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 19th December 1864.

Nil Monee Doss Chund (one of the Defendants), *Appellant,*

versus

Sreekant Doss Chund and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Banee Madhub Banerjee* for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

Before a purchaser at a sale in execution of a share of a specific mehal in an estate is entitled to possession and to a butwara of his purchase, its nature and extent must be clearly determined and defined in the Civil Courts.

PLAINTIFF in this case, alleging himself to be the purchaser at a sale in execution of 12 gundahs in a certain property, and, unable to get possession of his purchase, sues for possession and for a butwara of his share.

The defendant, co-sharer in the estate, pleads that the estate has been divided, by private arrangement between the sharers many years ago, into three specific mehals with distinct area, representing severally 3 as. 15 gds., 6 as. 10 gds., and 5 as. 15 gds. of the estate; that plaintiff has only purchased 12 gundahs' share of the mehal, representing 3 annas 15 gundahs' share of the estate; that consequently, until a butwara has been made of the three mehals into which by arrangement the estate has been divided, plaintiff cannot maintain his present action, which should be dismissed.

The first Court, adopting the view set forth by the defendant, dismissed the plaintiff's claim. The second Court, without determining the question as to whether plaintiff had purchased a 12 gundahs' share of a specific mehal with distinct area representing a 3 as. 15 gds. share of the property or 12 gundahs of the whole estate, gave plaintiff a decree.

Defendant now appeals specially, urging the same grounds that he had taken up below, and contending that, on any view, the Judge's decision was defective, inasmuch as it had not distinctly found what the plaintiff had purchased, whether a 12 gundahs' share of a specific mehal, or 12 gundahs of the whole estate.

There can be no doubt that the Judge is correct in stating that the plaintiff is entitled to a butwara. But before the Revenue Courts can make this; it is necessary for the Civil Courts in this case to determine exactly what plaintiff purchased—did he purchase a 12 gundahs' share of a specific mehal, or did he purchase 12 gundahs of the whole estate? Moreover, if it be true, as contended by the plaintiff, that defendants, co-sharers in the estate held by agreement, made many years ago specific mehals with defined area, the butwara and assessment of the revenue will be made with reference to the assets of those specific mehals and the proportion which those assets bear to the assets of the whole estate, and not with reference to the share which that mehal is said to constitute in the whole estate, and plaintiff will only be entitled to 12 gundahs of such distinct mehal bearing its allotted sudder jumma. If, however, there be no such division, plaintiff will, on his contention, be entitled to 12 gundahs of the whole estate. It is, therefore, most necessary that the nature of plaintiff's purchase be, in the first instance, clearly determined. We, therefore, remit the case to the Judge, with directions that he will give both parties an opportunity of filing any evidence, documentary or oral, that they may possess to prove their different contentions regarding the nature of the plaintiff's purchase. The Judge, then, having duly considered it, will determine what that purchase was, and give plaintiff a decree for possession and butwara of the same.

The 24th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Cross-appeal under Section 348, Act VIII. of 1859.

Case No. 2828 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 10th July 1865, modifying a decision passed by the Sudder

Ameen of that District, dated the 10th June 1865.

Hossein Buksh Patooah (one of the Defendants), *Appellant,*

versus

Shaikh Baroo Beparee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Luleet Chunder Sein for Respondent.

A plaintiff (respondent) cannot be allowed, by way of cross-appeal, to take objections under Section 348, Act VIII. of 1859, to the finding of a Lower Court as to a defendant who has not appealed, and who is not before the Appellate Court.

THE appeal in this case is on the evidence generally, not on any point of law. We cannot entertain the objections which are taken to the decree of the Lower Court, which has gone at great length into the facts. The appeal is dismissed with costs.

The respondent seeks, by way of cross-appeal, to take certain objections before us to the finding of the Lower Court as to a defendant who has not appealed. We are of opinion that we cannot listen to such objections, the defendant whom they alone affect not having appealed.

The 24th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Limitation—Suit to recover value of personal property misappropriated.

Case No. 2806 of 1865.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 22nd June 1865, affirming a decision passed by the Officiating Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of that District, dated the 18th January 1865.

Ramnath Roy Chowdhry (Plaintiff), *Appellant,*

versus

Huro Chunder Roy Chowdhry (Defendant), *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Otool Chunder Mookerjee for Respondent.

A suit to recover the value of personal property misappropriated is governed by limitation under Clause 16, and not under Clause 2, Section 1, Act XIV. of 1859.

THIS was a suit to recover the value of certain *dhan* alleged to have been appropriated by the defendant, special respondent, the plaintiff's story being that, on a partition of ancestral property taking place between him and the defendants who are his cousins, a certain mouzah fell into the latter's share, in which mouzah plaintiff had stored a large quantity of *dhan*, his own private property.

The defendant denied having taken the *dhan*, and pleaded that the suit was barred by limitation.

Both Lower Courts have held that the suit is one for damages, coming under Clause 2, Section 1, Act XIV. of 1859, and that the one-year rule of limitation was to be applied. Plaintiff, not having brought his suit within that time, was barred.

We think it perfectly clear that the Judge was wrong in applying the Clause above quoted. That Clause refers, amongst other things, to damages for injury to personal property, but has nothing to do with a case where a person appropriates personal property belonging to another. The law applicable to such cases is Clause 16 of the same Section, and the special respondent's pleader is himself compelled to admit that this is so, and that he cannot support the Lower Court's decision.

The appeal is, therefore, decreed, and the case remanded to the Court of first instance for trial on the merits. Costs to follow the result.

The 24th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Written Statements—Evidence of Parties.

Case No. 2866 of 1865.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 25th May 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th November 1862.

Juggessur Mookerjee and others (Plaintiffs), *Appellants,*

versus

Gopee Kishen Sein and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Baneenath Bose for Respondents.

A written statement cannot be called for by an Appellate Court, or read as evidence against any party to the suit, save the person by whom it is made, and those who are bound by admissions made by him.

We regret that we should be obliged to remand this case again, and that we should be obliged to do so owing to the very irregular manner in which the Lower Court had carried out the former order of remand passed by this Court on the 2nd of August 1864.

The main issue in the case being the *bona fides* of a certain *Kobalah*, and the Lower Court having decided against it, solely because it appeared that the consideration-money had not been paid in the precise manner alleged, the case was remanded with a direction that the Court should decide the question at issue, not on the one ground on which it had relied, but upon the whole evidence before it.

On the case being remanded, the Lower Court (although acting as an Appellate Court) ordered the defendants to put in a written statement, and, a statement having been put in, treated it as evidence in the cause.

We know of no law which authorizes a Court of Appeal to call upon any of the parties for a written statement. It is only by a Court of original jurisdiction, and before final judgment, that written statements can be called for (Section 122 of Act VIII. of 1859). In this case, final judgment had been passed by the Court of first instance, and the time for putting in written statements was past. Further, under no circumstances can a written statement be read as evidence against any party to a suit save the person by whom it is made, and those who are bound by admissions made by him. If the Court deems it necessary that the evidence of a defendant should form part of the record, it is the duty of the Court to summon that defendant, and have his evidence taken in the regular manner: and the Court acts illegally if, instead of having the defendant examined as a witness, it simply calls on him to put in a written statement, and then treats the statement as if it were evidence given by the defendant against the plaintiff.

Under Section 355 of Act VIII. of 1859, the Lower Appellate Court might have allowed, and may still allow, the defendant and any other necessary witnesses to be examined. But the calling for written statements and using them as evidence is a very serious and substantial error in the procedure and in the investigation of this case; and the appellants are entitled, in special appeal to us, to demand that the case should be sent back in order that the original order of remand may be legally carried out.

In conclusion, we observe that the Lower Court seems to have misconceived the effect of the statement made by the defendant as to his having received "a promissory note for 1,000 rupees." What the defendant states is that he got 450 rupees in Bank Notes, and 550 rupees in cash.

On the whole, the case is remanded for re-trial, so that the original order of remand may be fully carried out. The Judge will take the case up out of its turn, and dispose of it at once.

The 29th January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Deduction—Interest (in excess of principal).

Cases Nos. 558 and 560 of 1863.

Applications for Review of Judgment passed by Justices F. B. Kemp and A. A. Roberts, C. B., on the 4th August 1863, in Regular Appeals Nos. 518 and 548 of 1862.

Huromonee Gooptia (Plaintiff), *Petitioner,*

versus

Gobind Coomar Chowdhry (Defendant), *Opposite Party.*

Mr. Montriou and *Baboos Chunder Madhub Ghose* and *Romesh Chunder Mitter* for Petitioner.

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Opposite Party.

The time occupied in the Summary Department to recover excess of jumma according to a decree should be deducted from the period of limitation for the regular suit which is afterwards brought for the same purpose, and to which the plaintiff was referred by the late Sudder Court.

Section 6, Regulation XV., 1793 (prohibiting the Courts from awarding as interest a sum larger than the

principal) is not applicable to a suit instituted after the passing of Act XXVIII. of 1855. Even under Regulation XV., 1793, it was the practice of the Court to allow interest in excess of principal, where the interest had accumulated owing to reasons not ascribable in any degree to procrastination on the part of the creditor.

THIS is an application to review the judgment of this Court, dated the 4th August 1863. The application was admitted, and due notice has been served on the opposite party.

It appears that a suit for enhancement of rent was instituted by the opposite party against the applicant for review, and a decree, considerably enhancing the rent of the applicant's tenure, obtained. The opposite party executed that decree, and recovered from the applicant certain monies, being the difference between the old and the new or enhanced jumma. On appeal by the applicant, further enquiry was directed to be made by the late Sudder Court, which resulted in the jumma being considerably reduced from the sum originally fixed in the enhancement suit. The applicant was declared to be entitled to a refund of the excess paid by him to the opposite party. This decision was passed on the 12th September 1847. From this period, until the present suit, which was instituted on the 17th August 1861, the applicant for review was actively prosecuting his claim in the Summary Department for the recovery of the sum paid in excess of the jumma, which was eventually fixed by the decree of the 12th September 1847.

The Judge appears to have referred the applicant to a regular suit, holding that he had no remedy in the Summary Department. The applicant appealed, and the late Sudder Court, on the 27th September 1860, confirmed the order of the Judge. The present suit was, therefore, brought on 17th August 1861.

The Principal Sudder Ameen decreed the suit. On appeal, this Court held that the provisions of Construction 1129 applied to the case, and that the applicant should have sought his remedy summarily, and not by a regular suit. The decision of the Principal Sudder Ameen was, therefore, reversed.

We have now been shewn that the late Sudder Court, on the 27th September 1860, referred the applicant to a regular suit, holding that the Judge was right in deciding that the applicant could not recover summarily. This decision was not brought to our notice when the appeal was heard, and was entirely overlooked by the Court.

We think that we are bound by this decision from which no appeal was preferred, and that the applicant, plaintiff below, has sought his remedy in a competent Court and in a proper form.

It has been contended by the pleader for the opposite party that the suit of the plaintiff (applicant for review) is barred by the Statute of Limitations, the cause of action having arisen from the date on which the monies were recovered by the defendant, and that, calculating from that date to date of suit, more than 12 years had elapsed.

This suit is governed by the old Law of Limitation, Section 14, Regulation III. of 1793. We find that the applicant for review did directly prefer his claim to a Court of competent jurisdiction ; after a long period, during which he was actively employed in prosecuting his claim, and during which he was pertinaciously opposed by the other party, he was referred by the then highest Appellate Court in this country to a regular suit. He lost no time in instituting such suit, and is, therefore, fully entitled to deduct the time occupied in the summary stage of the enquiry. The suit is, therefore, in time, the conduct and acts of the applicant having taken the case out of the operation of the Statute.

With reference to the question of interest, the pleader for the opposite party contends that the Court cannot award as interest a sum larger than the principal. Section 6, Regulation XV. of 1793, is quoted in support of this argument.

The Court observes that this suit was instituted after the passing of Act XXVIII. of 1855, by which Act the Section quoted by the pleader for the opposite party was repealed. Further, it appears that it was the practice of our Courts under the old law (Regulation XV. of 1793) to allow interest in excess of the principal in cases where the interest had accumulated owing to reasons not ascribable in any degree to procrastination on the part of the creditor (*see* Vol. III., Select Reports, pp., 270-275 ; and Vol. IV., pp., 261-262). In this case the creditor had recourse to law for the recovery of the monies due to him ; the delay in obtaining redress is in no way owing to his laches or procrastination. The judgment-debtor, the opposite party, ought to have paid in the money which, by a formal decree,

he had been declared liable to refund. For these reasons we see no reason to disturb the award of the Lower Court in the matter of interest.

No other points were pressed upon the Court by the opposite party. The decision of the Principal Sudder Ameen is, therefore, affirmed, and the two appeals dismissed; the former decision of this Court in appeal is set aside. Costs of both Courts and of this application with interest will be borne by the opposite party. This decision governs No. 560.

The 30th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Mortgage accounts.

Case No. 282 of 1865.

Regular Appeal from a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of Behar, dated the 4th August 1865.

Shah Ameerooddeen (Plaintiff), *Appellant,*

versus

Ram Chand Sahoo and others (Defendants), *Respondents.*

Moonshee Ameer Ali Khan Bahadoor and *Mr. C. Gregory* for Appellant.

Baboos Sreenath Doss and *Nil Madhub Sein* for Respondents.

To enable a Court to ascertain the amount received by the mortgagee whilst in possession, the mortgagee should file his *jumma-wasil-bakee* papers, and proceed generally in accordance with Section 11, Regulation XV., 1793.

THIS was a suit for possession of an 8-annas share of Mouzah Doorgapore from the mortgagee on the ground that the mortgage-money had been fully satisfied, and also to recover the sum of 4.478 rupees collected by the mortgagee over and above what was due to him.

The defendant pleaded that, so far from being re-paid, the amount realized from the land had not been sufficient to cover even the interest of the monies lent.

The Lower Court deputed an Ameen to make a local enquiry; but, being dissatisfied with his report, he decided the question of *wasilat* on the *patwaree's* papers, and held that, so far from the mortgagee having overpaid himself, there was still due to him about 11,000 rupees. He, therefore, dismissed the plaintiff's suit.

The point taken in appeal is, that the papers on which the Principal Sudder Ameen has decided the amount realized from the estate are spurious, and that they do not afford the kind of proof required by law.

Section 11, Regulation XV. of 1793, is the law applicable to this case, and, on going over the record, we do not find that its provisions have in any way been carried out. No *jumma-wasil-bakee* papers were filed by the mortgagee, and the documents which have been put in (long after the proper time) are unattested extracts made up from originals which are admittedly in existence, and for the non-production of which no reasons are assigned.

We find also that they were not filed before the Ameen who went to the spot, although the mortgagee had full notice of his deputation, and knew the purpose for which the Ameen had been sent.

It is absolutely impossible for the Court to come to any conclusion as to the amount received by the mortgagee whilst in possession from the papers now filed, as they do not represent each ryot's payments, and the case must, therefore, be remanded in order that the Principal Sudder Ameen may call upon the mortgagee to file his *jumma-wasil-bakee* papers, and proceed generally in terms of the Regulation above quoted. The Ameen will then proceed to the spot, and test these papers by the evidence of the ryots.

As this remand and consequent delay has been mainly caused by the mortgagee's negligence, he will pay all the costs of suit up to this date.

Regular appeal No. 283 is *mutatis mutandis* on all fours with this case, and is, with the consent of both parties, remanded for the same reasons. The order regarding costs will be the same in both cases.

The 30th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Hindoo Law (Mitakshara)—Ancestral property (Interest of Son in).

Case No. 278 of 1865.

Regular Appeal from a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of Sarun, dated the 20th May 1865.

Goor Surun Doss (Plaintiff), *Appellant,*

versus

Ram Surun Bhukut and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Kishen Succa Mookerjee* for Appellant.

Baboo Kalee Kishen Sein for Respondents.

According to the Mitakshara Law, sons have a vested interest in ancestral property, which interest is saleable at any time in satisfaction of claims against them.

THIS was a suit for cancellation of a Miscellaneous order passed by the Civil Court of Zillah Sarun, by which certain properties attached by the plaintiff in execution of a decree were declared not liable to sale.

The suit arose in this wise. Chuttaree Bhugut, the original acquirer of the property, left two sons, Ram Suhae and Sheo Suhae — the first, who is now alleged to be "*non compos mentis,*" had sons, Ablakee and others; the last (who is dead), also sons, Ram Surun and others.

These sons of Ram Suhae and Sheo Suhae borrowed money from, and executed a deed of mortgage to, one Maghessur Dyal on the 12th of November 1858, and he sold his interest to Goor Surun Doss, the plaintiff, in November of the following year.

Goor Surun foreclosed, and then sued for possession of the mortgaged property. He got a partial decree only, the sons of Ram Suhae being declared to have no right on account of their father's insanity. The plaintiff then brought his suit against Ablakee and the other sons of Ram Suhae for the money lent, and obtained a decree on the 29th of May 1863, which was confirmed afterwards by the Judge on appeal.

In execution of this decree, Goor Sarun prayed for the sale of his debtor's reversionary right in the ancestral estate then held by their father Ram Suhae Bhugut. This was refused by the Principal Sudder Ameen, and the present suit was brought to cancel this Miscellaneous order, and to declare the debtor's rights saleable.

The Lower Court has now decided that the rights in question are not "existent," but are contingent on an extremely uncertain event, the survival of the father by the sons that is, and that they are not, therefore, legally saleable.

The decree-holder appeals against this decision, and urges that, according to the Mitakshara system of law which confessedly governs this case, sons have, from the first, a vested interest in ancestral property, and that such interest is saleable at any time.

There can be no doubt, we observe, that this is a correct exposition of the law as it prevails under the Mitakshara system, and that sons can, at their pleasure, force a father, however reluctant, to divide with them property obtained from a paternal grandfather (*vide* Colebrooke's Mitakshara, Chapter I., Section 6). This right accrues to a son from the time of his birth, and is not, therefore, one contingent on the father's death, or upon any "uncertain" event; it is a vested right claimable at any time during the father's life.

It may be, as argued by the respondents' pleader, that no case of the kind is to be found in our books; but the principle is, we consider, indubitable, and we have no hesitation in declaring it. There is no necessity for our going further than this, or for stating the effect of our decision on the properties claimed. It is sufficient for the purposes of this case that we lay down the general rule, as, with the exception of Sheo Surun, none of the respondents have appealed.

With reference, however, to this respondent who claims through his ancestor, Bhayabul Singh, to have purchased the entire rights, both of Ram Suhae and of his sons, in mouzah Pachoonda, before the passing of the plaintiff's decree, we think that the case must be remanded for enquiry.

For the rest, we reverse the decision of the Principal Sudder Ameen, and declare the sons of Ram Suhae to have a vested right in

the ancestral property, which is liable to sale in satisfaction of any claims against them.

The costs of this appeal will be paid by all the respondents, except Sheo Surun Roy, whose case is remanded. The costs of that portion of the suit will follow the result of the enquiry now ordered.

The 30th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Alluvial Lands.

Case No. 264 of 1865.

Regular Appeal from a decision passed by the Judge of Rungpore, dated the 30th June 1865.

Kalee Monee Debia and others (Plaintiffs), *Appellants,*

versus

The Collector of Mymensing and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Luleet Chunder Sein* for Appellants.

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Respondents.

Re-formed lands belong to the estate to which they accrete.

Land separated from an estate by a shallow fordable stream is not dissociated from that estate by that circumstance only, but is an accretion to the estate of the riparian proprietor, the intervening water notwithstanding.

THIS was a suit to recover possession of 271 khadas of land as appertaining to plaintiff's mouzah of Pakooreah, and demarcated with it by the survey of 1853, on the allegation that the Collector of Mymensing, acting on the part of Government, had, on the re-formation of the land on the same site after diluvion in 1860, annexed it as forming part and parcel of the Government Khas Mehal Beera Pauchberiah.

The defence was that the land was and always had been an appurtenance to Mouzah Beera Pauchberiah, and that Government had held possession of it under a decree of the Resumption Court ever since 1837, and had made a settlement of the mehal with one Prannath Roy, a minor. The Collector, acting as the Court of Wards, also defended the suit on the part of the minor, urging the same pleas.

The Judge found (1) that the land did not form part of Mouzah Pakooreah, that is, it was not re-formed on land of Pakooreah previously washed away by the river; (2) that it belonged to Beera Pauchberiah as an accretion; and (3) that it was re-formed land of Mouzah Beera Pauchberiah diluviated in 1854, re-formed in 1855, and settled in 1856 without opposition on the part of the owners of Pakooreah, and that the suit was, therefore, barred by limitation.

He, therefore, dismissed the plaintiff's suit.

In appeal, the Judge's decision on all these issues is traversed, and alleged to be against the evidence.

There is no occasion for us to consider whether or not the disputed land has been re-formed on the site of land belonging originally to either mouzah, it having been ruled by more than one decision of this Court that no such claim can be sustained, but that lands of the nature now in dispute belong to the estate to which they accreted (3 Sutherland's Weekly Reporter, page 68, Mr. S. Kenny, appellant).

Nor, so far as this case is concerned, need we look to the second head of the Judge's order further than to lay down the principle that the disputed land, being separated from the appellant's estate of Pakooreah by a shallow and fordable stream only, is not dissociated from Pakooreah by that circumstance, but would be an accretion to the estate of the riparian proprietor, the intervening water notwithstanding. The maps filed by the appellant, and which are admitted to represent the present state of the disputed lands, show very clearly that these last cannot, if considered as new alluvion, be an accretion to the Government Mehal, but must appertain to the estate on the river bank. But, looking to the facts of this case, namely, that Government in 1837 obtained in this chur a certain quantity of land as an estate, Mehal Beera Pauchberiah, and has ever since remained in possession of it, the question becomes one of disputed boundary between two mouzahs, and our decision must turn on the extent of the resumption decree of 1837. The circumstances under which that decree was obtained cannot, of course, be questioned now, and by it Govern-

ment obtained possession of 608 khadas of land on the spot now claimed by the appellants as forming part of Mehal Beera Pauchberiah; and whether the appellant's allegations of diluvion and subsequent alluvion be correct or not, it is admitted that Government has been, and is, in possession of chur land on the western side of the river as Mehal Beera Pauchberiah all along, and that the land now in dispute joins on to what Government holds as part of that mouzah.

The question, therefore, as before observed, revolves itself into one of measurement, and appellant's right to claim the land in dispute must depend on whether Government is in possession of a larger area than was decreed to it in 1837.

Now, taking the appellant's own statement as the basis of calculation, we find that Government holds 5,000 beegahs of the chur without dispute as Mouzah Beera Pauchberiah, and that the disputed area covers 4,000 beegahs more, so that Government is in possession of 9,000 beegahs in the place where it has held the lands of that mouzah since the resumption decree.

The question then arises, does this quantity of land exceed that covered by the decree of 1837? Neither of the litigant parties make a khada to contain less than 16 beegahs; so that taking this as a basis of calculation, Government is entitled to 9,728 beegahs on the spot, part of which at least the apellant admits is the re-formed land of what was the original Beera Pauchberiah granted to Government under the resumption proceedings.

This being so, it is manifest that the entire disputed area, added to what Government is admitted to be in possession of, does not make up the extent of land to which the respondent is entitled under the decree of 1837, and that appellant, therefore, has no case.

The 3rd February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Benamee—Purchase at Sale for arrears of Revenue—Section 36, Act XI. of 1859—Written Statements.

Case No. 318 of 1865.

Regular Appeal from a decision passed by the Judge of Sylhet, dated the 22nd July 1865.

Jadub Ram Deb *alias* Jadub Chunder Deb (Plaintiff), *Appellant,*

versus

Ram Lochun Muduck and others, (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Ashootosh Dhur* for Appellant.

Baboo Romanath Bose for Respondent.

Suit laid at Rupees 2,536-14.

A certified purchaser at a sale for arrears of Government Revenue, suing to recover possession of which he has been ousted, is not debarred from the benefit of Section 36, Act XI. of 1859, and from pleading that the defendants were not entitled to sue him as being merely a *benameedar.* But he may be so debarred if he has acknowledged that his holding was merely that of a trustee, and the property belonged to those from whom the defendants were purchasing, whereby he induced the defendants to purchase.

To allow a plaintiff to file a written statement after having seen the written statement of the defendants, and by way of rejoinder thereto, is in direct contravention of the Code of Civil Procedure.

THE plaintiff in this case sues for a declaration of his right to, and for possession of, certain lands. The lands in question were sold by the Collector in December 1863 for arrears of Government Revenue. The plaintiff was declared the purchaser: the sale to him was ratified, he got the usual certificate, and obtained possession under it. The lands were subsequently seized as belonging to certain third parties, in execution of a decree against those third parties. The execution-creditor who seized alleged that the purchase by the plaintiff had been merely *benamee* for the judgment-debtors, and that the property, in fact, belonged to the latter.

After some litigation of a summary kind, the plaintiff brought the suit now in appeal before us. There were originally a good many defendants: several of them, however, have come to terms with the plaintiff, and as to them a compromise has been made.

The only defendants who now contest the plaintiff's claim set up a title as purchasers from the third parties, the judgment-debtors, for whom the plaintiff is said to have throughout been acting *benamee.* They allege that the plaintiff never had any beneficial interest in his purchase; that after the purchase, he executed a *ladavee* or deed of relinquishment of his rights in the property to those who were alone beneficially interested; and that when the sale was made to them by the real proprietors, the plaintiff concurred in the sale, and showed his concurrence by attesting the *kobala,* or bill of sale, which contained a recital of the *ladavee.*

The Lower Court held that the defendants, who claimed under the sale and the *kobala*, witnessed by the plaintiff, did not prove that they had ever been in possession, and that the plaintiff proved that he had had possession in virtue of his purchase. The Court, however, further held that the plaintiff's purchase was only a *benamee* one for the benefit of his master who had sold as alleged to the defendants who now claimed the land, and that the plaintiff had executed the *ladavee*, and had attested the *kobala*, and had thereby given himself out to be only a *benamee* holder, and so induced people to purchase. The Court, therefore, dismissed so much of the suit as related to the defendants to whose claim alone the present appeal relates.

The sale was a sale for arrears of revenue, and was made under the provisions of Act XI. of 1859. By Section 36 of that Act "any suit brought to oust the certified "purchaser on the ground that the "purchase was made on behalf of "another person, not the certified pur-"chaser, *shall be dismissed with costs.*" A suit, therefore, to oust the plaintiff, who is undoubtedly the certified purchaser, would not lie if instituted by these defendants, unless the plaintiff had, by any act of his, debarred himself of the right to the benefit of Section 36. The fact that the plaintiff is, by reason of what has occurred, obliged to come into Court to recover possession, does not, as it seems to us, alter the position of the parties so as in any way to deprive the plaintiff of any benefit which he might have had under Section 36, if this suit had been a suit brought against him as defendant, *to oust him, the certified purchaser, on the ground that the purchase was made on behalf of another person not the certified purchaser.*

Has, then, the plaintiff so acted as to debar him from the benefit of Section 36, and from pleading that the defendants were not entitled to oust him as being only a *benameedar?* The answer to this will depend on the further question, whether the plaintiff ever acknowledged to these defendants before their purchase that his holding was merely that of a trustee, and that the property in truth was not his, but belonged to those from whom the defendants were purchasing. In other words, the defendants' case turns on two issues — did the plaintiff execute a *ladavee* as pleaded? and did he attest the *kobala* as alleged? If these issues are decided in the affirmative, then the plaintiff has deprived himself of the right to sue, for the defendant's title would rest on the plaintiff's admission of their vendor's title, and the inducement to purchase held out to them by the plaintiff. On the other hand, if these issues are decided in the negative, the plaintiff is certainly entitled to our judgment on the strength of the position given to him by Section 36 of Act XI. of 1859.

As regards the *ladavee*, it is not in evidence: it is not produced, nor is its absence in any way accounted for. Therefore, there is no evidence legally before the Court as to what was the purport or effect of that document, which has been spoken of as being a *ladavee*. This observation is, however, subject to the consideration of the question of the attestation of the *kobala;* for, of course, if the plaintiff did, in fact, attest the *kobala*, knowing its contents, the recital which it contains as to a *ladavee* having been executed, might be read as against the plaintiff. But, save so far as it may be established by the *kobala*, there is no evidence before the Court of any *ladavee*.

The whole case thus hinges on the issue as to the attestation of the *kobala*. The Lower Court hold it to be proved that the plaintiff did attest the *kobala*, and so set himself forth as only *benameedar*, and as having no shew of title at all. It appears from the record, however, that the Judge who tried the case had no better means of forming an opinion than we have; for he had not the witnesses before him, and therefore had not that very great advantage which a Court of first instance usually has over an Appellate Court —the advantage of having the witnesses before it, and seeing their demeanour in the witness-box. The witnesses had all been examined, and their depositions recorded by a former Judge: and the Judge whose decision is now under appeal decided the case merely on the depositions so recorded. Under these circumstances, we have less hesitation than we otherwise should have had in coming to the conclusion at which we have arrived on this question of fact—the view taken by us being different from that taken by the Lower Court.

In our opinion, it is not proved that the plaintiff signed the *kobala* as alleged. No doubt, some of the witnesses say that he did; but we are not inclined to attach much weight to such statements, knowing how easily they may be procured, and how difficult they are to disprove. There are various matters which tell more in favor of the plaintiff than

of the defendants. One is (we are aware that in itself it is by no means conclusive) that whereas all the other witnesses to the *kobala* sign in the margin of the deed, the disputed signature of the plaintiff is alone found at the end of the deed. The inference suggested for the plaintiff is that the margin was fully occupied by the signatures of the witnesses who really did sign, and that the attestation of the plaintiff was fraudulently added subsequently at the end, there being no room for it with the others. Another point (also in itself perhaps not of much weight) is the difference, noticed by the Lower Court likewise, which clearly exists between this disputed signature and other avowed signatures of the plaintiff as to which there is no dispute. Then, we have the fact that the plaintiff got possession, and was in possession till ousted by the defendants, and that he not only in his own name paid the revenue for the property he had purchased, but retained in his own possession the receipts granted for the money so paid. We have gone carefully over all the evidence, and do not think we should be justified in finding as a fact that the plaintiff witnessed the *kobala*. The defendants' case thus, in our opinion, is at an end, and it is needless for us to go into any of the other questions raised.

Before concluding, we have to remark, as this Court has already had occasion to remark in regard to other Courts in other cases, that the Lower Court acted illegally in allowing the plaintiff to file a written statement after having seen the written statements of most of the defendants, and by way of rejoinder thereto. Such a course is in direct contravention of the Code of Civil Procedure.

The decree of the Lower Court (so far as it is appealed from) is reversed; and judgment is given for the plaintiff with costs.

The 3rd February 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Limitation — Suit by Lakherajdar against Talookdar.

Case No. 854 of 1864.

Application for Review of Judgment passed by Justices Trevor and Glover, on the 24th September 1864, in Special Appeal No. 1532 of 1864.

Raj Luckhee Chowdrain (Defendant), *Petitioner,*

versus

Tara Monee Chowdrain (Plaintiff), *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Sreenath Doss for Opposite Party.

When a plaintiff sues for land in the character of owner of a lakheraj estate, though at the same time he is the owner of the revenue-paying estate containing the village in which the lakheraj land is situate, it is competent to the defendant in possession as a talookdar of the revenue-paying estate to plead limitation as against the lakherajdar.

THE plaintiff sues, as the guardian of a minor, for certain lands as belonging to a *lakheraj* grant made to her ancestor in 1189. The estate in which the *lakheraj* land is situated belongs to the plaintiff, and the defendant, who is the purchaser of an under-talook in the zemindary, pleads limitation against the plaintiff as *lakherajdar*. Now, there can be no doubt that the owner of a *lakheraj* grant made before 1790, and the owner of the estate containing the village in which the grant is situated, are in point of law two distinct persons, and the accident of the two estates being held by the same person does not affect the different legal position of the proprietors of them. It follows, therefore, that, when the plaintiff sues for land in the character of owner of the *lakheraj* estate, it is quite competent to the defendant in possession as a talookdar of the whole or a portion of the revenue-paying estate to plead limitation against her; and, had the Judge rightly applied the Law of Limitation, we should have refused to interfere with his order in special appeal. But, though the case was instituted in 1861, he has wrongly applied Act XIV. of 1859, which was not then in force, and he has also wrongly interpreted the character in which the plaintiff sues. She sues not on her own right, as understood by the Judge, but as mother of a minor adopted son. If, therefore, the Judge thinks that she was not dispossessed on the date alleged by her, it will be necessary, before determining exactly whether she is out of time, to determine whether, subsequent to the dispossession, she, or some other person not affected with disability, was entitled to possession of the property sued for within a period of 12 years before the suit, during which they remained silent. Plaintiff should have an opportunity of proving this, and defendant of rebutting the proof she may produce; and, if eventually plaintiff fails to satisfy the

Court as to possession within 12 years of the institution of the suit, exclusive of the period of the minority of her son, her suit should be dismissed on limitation, otherwise it should be investigated on its merits.

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumboonath Pundit, and G. Campbell, *Judges*.

Review of Judgment—Appeal.

Case No. 1317 of 1865.

Special Appeal from a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensing, dated the 3rd March 1865, affirming a decision of the Moonsiff of Chowkee Kiklee, dated the 28th July 1864.

Bhurrut Chunder Mojoomdar (Defendant), *Appellant*,

versus

Ram Gunga Sein (Plaintiff), *Respondent*.

Baboos Mohinee Mohun Roy and *Kalee Kishen Sein* for Appellant.

Baboos Sreenath Doss and *Nil Madhub Sein* for Respondent.

If a review of judgment be applied for in proper time, and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power and is bound to proceed with the application for review.

Quare.—Whether a review can be admitted by a Lower Court after an appeal has been preferred therefrom.

This case was referred to a Full Bench by Justices Shumbhoonath Pundit and G. Campbell, with the following order:—

Referring Order.—THIS is a special appeal against the decision passed by the Lower Appellate Court in review in reversal of its former decision. The special appellant argues that the Lower Appellate Court had no authority to entertain and admit review, because a petition of special appeal had been already preferred against its first decision. This special appeal was afterwards withdrawn before the admission of the review, and, as we are told, before any notice was served upon the opposite party.

The special appellant argues that, after a special appeal petition is once registered in the High Court, whether it is afterwards withdrawn or struck off for default or dismissed on trial, or decided in favor of the special appellant, the right of the Lower Appellate Court to receive any petition of review upon any ground of fact or law from any of the parties to the suit before or after the disposal of that petition ceases altogether, and quotes a decision of a Divisional Bench of this Court, dated the 9th May 1865, Hurkoo Dabey, petitioner, in support of his argument, and refers to a previous decision of the English Department on a reference from the Patna Court.

We think that, when in Section 376 the word "admitted" was used in contradistinction to the word "preferred," used in it with regard to regular appeals, the framers of the law could not have meant either the presentation or the registration of the appeal which follows the presentation. In Section 375, where rule is provided for this registry, this registration is not called the admission of the special appeal. The respondent argues that this registration does not mean admission, and, if it means the admission mentioned in Section 376, it does not follow that the Lower Appellate Court is prohibited by that Section from receiving a review on facts after the special appeal preferred to the High Court is rejected after trial, or dismissed for default, or withdrawn. We admit freely that it is not within the power of the Lower Appellate Court, under the wording of the Section 376 cited above, to entertain any petition of review from any party upon any ground of law or fact, after special appeal on any point of law has been decided in favor of the special appellant by the High Court. The reason for this prohibition is apparent, that is to say,

by this final decree in special appeal the decree of the Lower Appellate Court must have been reversed or modified, and so the Lower Appellate Court is no longer in any position to review that which legally is not in existence. To construe the law otherwise would prove injurious to the rights of parties who may not have preferred any special appeal, and prevent even those who may have filed them in the High Court on points of law from obtaining that justice to which, but for this preferring of the special appeal, they would have been entitled. In both the decisions on the matter, the fact of the special respondent, losing a right for no fault of his, has not been taken into consideration. We are not prepared to draw any distinction between a special appeal in which notice has been, and one in which it has not been, served upon the opposite party. The respondent in this case argues that, because he withdrew his petition of appeal before the notice was served upon the opposite party, the opposite party (the present special appellant) has no right to say that any special appeal was preferred at all. If the withdrawal of a special appeal, before the review is admitted, is likely to help the party filing the review out of this difficulty arising from the fact of a special appeal being previously registered in the High Court, it must be on the fact of the withdrawal of the special appeal before the admission of the review, irrespective of the fact whether it was withdrawn before or after the notice was served upon the respondent of the special appeal. We are aware that it was decided in the English Department, on a reference from another district, that, if the review be filed first, and afterwards a special appeal be preferred to the High Court, this filing of the special appeal cannot bar the right of the Lower Appellate Court to try the review.

As the decision quoted by the special appellant is opposed to the view we entertain in this matter, and the decision of the English Department may not be supposed to have the authority of a decision in a case judicially tried after argument, we think it proper to send up this special appeal to a Full Bench of five Judges, that it may, with reference to the said Sections 375 and 376, and the decision quoted by the special appellant, decide authoritatively the validity or otherwise of the plea taken by him before us, and to lay down the construction of the law upon this right of filing review after the registration of a special appeal application.

Judgment of Full Bench.—It is admitted that the review was applied for on the 6th February 1865, and that the appeal was not filed until the 18th February 1865. The question, therefore, referred to the Full Bench, *viz.*, whether a review can be admitted by a Lower Court, after an appeal has been preferred to this Court, does not arise. It is clear that, if a review be applied for in proper time, and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power, and is bound to proceed under the application for review.

This is a special appeal from the judgment in review. The first two grounds are that the Judge had no jurisdiction to try the review, as the application was made after the presentation of appeal to this Court. These two grounds are not supported by the facts, and the objections fall to the ground. It is admitted by the pleader for the special appellant that there is nothing in the third and fourth grounds of appeal.

The decision of the Lower Appellate Court in review is, therefore, affirmed with costs.

b

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

Registration Act (XIX. of 1843)—Registered Deed of Sale—Prior unregistered Mortgage —Bona fide purchaser for value without notice.

Case No. 645 of 1865.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 21st December 1864, modifying a decision passed by Mr. S. Da-Costa, Sudder Ameeen of that District, dated the 19th July 1864.

Maharajah Moheshur Bux Sing Bahadoor (Defendant), *Appellant*,

versus

Bhikha Chowdry (Plaintiff), *Respondent*.

Baboo Kishen Succa Mookerjee and *Moonshee Ameer Ali* for Appellant.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondent.

A registered deed of sale does not invalidate a prior unregistered mortgage under the provisions of Act XIX. of 1843.

A *bonâ fide* purchaser for value without notice is not entitled to priority over a prior unregistered mortgagee.

THIS case was referred to a Full Bench with the following order:—

Campbell, J. (concurred in by Shumbhoonath Pundit, J.).—Plaintiff claims a lien on certain lands under a bond by which they were pledged or mortgaged to him. The defendant is a purchaser in possession under a deed of sale from the same proprietor of a subsequent date, but duly registered, while the plaintiff's bond was not registered. The Judge finds the plaintiff's bond to be genuine and *bonâ fide*. Two questions arise on the argument before us on the special appeal of the defendant—

First. Whether, under Act XIX. of 1843, defendant's registered deed is entitled to rank before plaintiff's deed, notwithstanding the priority of date of plaintiff's deed? and

Secondly. Whether, even independent of Act XIX. of 1843, if defendant is a *bonâ fide* purchaser for value without notice, and exercising due diligence, he is liable to plaintiff in respect of plaintiff's lien over the land?

This last question of fact has not been tried, and if the *first* question be not decided in favor of defendant, and on the *second*, his answer be held sufficient in law, it will go back to be tried.

As respects the *first* question, the contention of plaintiff, respondent, is that, while Act XIX. of 1843 gives to a registered deed of sale the preference over an unregistered deed of sale, and to a registered deed of mortgage the preference over an unregistered deed of mortgage, it gives no preference to a registered deed of sale over an unregistered deed of mortgage; and, that being the description of the two deeds before us, defendant can derive no benefit from Act XIX. of 1843. A very literal reading of the Act would be as plaintiff says, and the late Sudder Court seems to have so construed it. But, on the other hand, there can be no doubt that the effect of such a construction is to stultify and render of no avail the whole Act. In a late case of Sree Nath Bhuttacharjee *versus* Ram Comul Gangooly and others, decided 26th July 1865, the Privy Council observes, respecting Act XIX. of 1843, it "was plainly intended to be a general enactment," and—"The too common practice in India of setting up forged and fraudulent deeds, and the security against this practice which is afforded by Registration, are quite sufficient to account for this enactment extending both to sale and mortgage, and the policy of such enactment is not unknown in other countries." Now, it is evident that, if a purchaser under a registered deed is liable to be defeated by an unregistered mortgage, and *vice versâ*, the security against forgery and fraud is wholly gone. A man, who wishes to defeat a purchase or mortgage duly registered, has then only to set up an ante-dated deed of a different description, and it seems somewhat absurd to suppose that, while a registered deed of sale is a complete security against any prior deeds of sale not registered and published, it should be liable to be defeated by a deed of an inferior degree, *viz.*, a mortgage. We must, if possible, give a reasonable construction to the Act. And, notwithstanding the somewhat awkward wording, I think that, taking the Act as a general enactment, designed to secure honest purchasers, and to give validity to a registered transfer, we must suppose the true intent and meaning to be that, not only shall a registered deed of sale invalidate an unregistered deed of sale, and a registered deed of mortgage, an unregistered deed of mortgage, but also that a registered deed of sale shall invalidate an unregistered deed of mortgage. If it be otherwise, the decisions would seem

to have the effect of over-riding the Act completely by constructions of an opposite character. On the one hand, by a very liberal, as opposed to a literal, construction, it has been held that a registered deed of sale does not always invalidate an unregistered deed, and give the *bonâ fide* holder a right to come in under it; but that, if possession had passed to the unregistered holder prior to the registered sale, there was nothing to sell, and the registered purchaser takes nothing; while, on the other hand, the Sudder Court has held by a very literal, as opposed to a liberal, construction that a registered deed of sale does not invalidate an unregistered mortgage. I think that the point, being one of extreme importance, should be referred for the decision of a Full Bench of this Court.

I also think upon the *second* question that, independent of Act XIX. of 1843, if the defendant in possession under a *bonâ fide* purchaser can show that he took without notice or means of notice of the alleged lien after using due diligence, he is not liable on this private and unpublished deed of lien now produced against him, and that the case should, failing the defence on the first question, go back for a trial on the second.

Peacock, C. J.—It has been held in several cases that a deed of sale registered did not invalidate a prior unregistered mortgage under the provisions of Act XIX. of 1843. There was one case in the Sudder Court of Agra, dated 12th April 1852, Vol., VII., p 124. There was also a case of 16th May 1849, which is referred to in the decision of the 12th April 1852, and the last-mentioned decision was followed by a decision of the Sudder Court in Bengal to the same effect, dated 23rd December 1852.

I am of opinion that those decisions were correct. But, even if I had had doubt as to the proper construction to be put upon the Act, if this had been a new case, and there had been no authorities on the subject, I should not feel that I was right in overturning decisions upon the faith of which many persons may have acted, unless I saw that the decisions were clearly wrong. We can look only to the words of the Act, and must collect the intention of the Legislature by the words which they have used.

It appears to me that the bond in question did not amount to a deed of sale, either absolute or conditional, but merely to a charge binding upon the land either in the hands of the Rajah or in the hands of any other person to whom it might be transferred. The Legislature probably intended merely to get rid of the effect of notice to the holder of a subsequent deed when registered of a prior unregistered deed the investigations as to which had given rise to fraud and perjury. *See* the recital in Act I. of 1843.—That Act recites:—

"Whereas the Registry Laws now in force "in the respective Mofussils of Bengal, "Madras, and Bombay, provide that regis- "tered conveyances and other instruments, "affecting titles to land and other interests "therein, shall not take precedence of "unregistered conveyances and instruments "in cases where the party registering shall "have known of the existence of such unre- "gistered conveyances or other instruments: "And whereas a complicated system of laws "has arisen out of the construction which is "to be given to the provisions regarding the "knowledge of parties or notice had by "them in such cases: And whereas much "perjury has been committed in investiga- "tions touching the fact of such notice or "knowledge, and much of the time of the "Courts has been occupied with such inves- "tigations: And whereas, in consequence "of forgeries, perjuries, fraudulent conceal- "ments, and other practices, no person pur- "chasing or advancing money on the "security of land can safely rely on the "conveyances or other instruments affect- "ing the title to such land or other interest "therein, affording, by means of their being "registered, a security against conveyances "or instruments being set up, as of previous "date, by unregistered claimants: It is "hereby enacted that all provisions con- "tained in any Regulation or Regulations of "the Bengal, Madras, or Bombay Codes, "touching such knowledge or notice as "aforesaid of previous unregistered convey- "ances or instruments affecting titles to "land or other interest therein, shall be "repealed from the 1st day of May next."

The effect of the Regulation, therefore, was to repeal that part of the former Regulation which allowed proof of notice of a prior deed in order to prevent priority being given to a subsequent registered deed.

Act I. of 1843 was repealed by Act XIX. of 1843, which is the Act now under consideration. That Act states that:—

"Whereas doubts have arisen as to the "true meaning and construction of Act I. of "1843" (the Act does not state what those doubts were), "it is hereby enacted that "the said Act is repealed except in so far

"as it repeals all provisions contained in any "Regulation or Regulations of the Bengal, "Madras, or Bombay Codes, touching the "knowledge or notice had by parties to re-"gistered conveyances and other instruments "affecting titles to land and other interests "therein, of the existence of unregistered "conveyances or other instruments affecting "such titles or other interest therein."

The words of Act I. of 1843 were: "And "every conveyance or other instrument "affecting title to land, or any interest in "the same authorized by those Codes re-"spectively to be registered, shall, so far as "regards any lands to which the same re-"late, be void as against any person claiming "under any subsequent conveyance or other "instrument duly registered, unless the prior "conveyance or instrument shall have been "duly registered before the registration "of the subsequent conveyance or instru-"ment, any alleged notice or knowledge "of such prior conveyance or instrument "notwithstanding."

Those words were, in my opinion, sufficient to give a preference to a registered deed of sale over a prior unregistered deed of mortgage and *vice versâ;* but when we find the Legislature repealing that Act upon the ground that doubts had arisen as to the meaning and construction of it, and returning to the words of Regulation XXXVI. of 1793 instead of using those of Act I. of 1843 which they had before them, we cannot say that their intention was different from that which the words used by them import.

As to the *second* ground which has been raised for our opinion, namely, that the purchaser under the bill of sale was a *bonâ fide* purchaser without notice, and therefore entitled to priority. If the bond was really and *bonâ fide* executed before the date of the defendant's purchase, it would *primâ facie* be entitled to priority, and the defendant could not, according to the decision in the case of Varden Seth Sam *versus* Luckpathy Royjee Lallah (Marshall's Reports, p. 461), succeed without proof that he was a *bonâ fide* purchaser for value without notice. But even if the defendant were to satisfy the Court upon that point, he would not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of his bond. If he was not bound to register it in order to retain priority over subsequent purchasers for value, I do not see what notice he could give, or was bound to give. The mere charge upon an estate does not give a right to the possession of the title-deeds; and, even if it would, the plaintiff in the present case had a charge, not upon the entire estate, but only on one or two villages, which would not give him a right to the possession of the title-deeds to the whole estate.

But, if the defendant should prove that he was a *bonâ fide* purchaser for value, he would throw the *onus* on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant's purchase.

We think that the case ought to be remanded to the Judge to try—

1st. Whether the defendant was a *bonâ fide* purchaser for value.

2ndly. Whether the plaintiff's bond or deed of charge was *bonâ fide* and for value, and whether the money secured thereby was advanced to the Rajah as alleged in the bond, and whether the bond was executed, as alleged, before the date of the defendant's purchase.

As both of these deeds were executed after the Penal Code came into operation, I think the case should be sent to the Magistrate in order that he may investigate it, and consider whether there are any grounds for instituting criminal proceedings against Rajah Ramprokash under Section 415 of the Penal Code, or under Section 423 or 464 of the same Code. If the deed of 30th March 1862 (*i. e.*, the bond or deed of charge) was *bonâ fide* executed on the day on which it bears date, it would amount to cheating to sell the property to the defendant without disclosing the prior charge. *See* Section 415 of the Penal Code. That Section says:—

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to 'cheat.'

Explanation.—A dishonest concealment of facts is a deception within the meaning of this Section."

And then there is Illustration (I.), which says:—

"*A* sells and conveys an estate to *B*. *A*, knowing that, in consequence of such sale, he has no right to the property, sells or mortgages the same to *Z* without disclosing the fact of the previous sale and conveyance to *B*, and receives the purchase or mortgage-money from *Z*. *A* cheats."

That will be the case if the bond or deed of charge was a valid one and *bonâ fide* executed for valuable consideration, and the subsequent sale was effected without disclosing the prior mortgage. But, if the bond was fraudulent and ante-dated for the purpose of giving it priority over the deed of sale, and thereby defrauding the defendant, it would amount to an offence under Section 464 of the Penal Code. That Section says:—

"A person is said to make a false document, who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed, &c."

And then we have Illustration (H), which says:—

"*A* sells and conveys an estate to *Z*. *A* afterwards, in order to defraud *Z* of his estate, executes a conveyance of the same estate to *B*, dated six months earlier than the date of the conveyance to *Z*, intending it to be believed that he had conveyed the estate to *B* before he conveyed it to *Z*. *A* has committed forgery."

But if the bond was not ante-dated, but was executed on the date when it bears date or prior to the deed of sale, and fraudulently recited a loan which did not exist, the case would fall under Section 423 of the Penal Code. That Section says:—

"Whoever dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

The deeds will be impounded by the Judge until after the investigation now ordered.

Bayley, J.—At the hearing I expressed my concurrence in the views expressed by the learned Chief Justice on the *first* and *third* points, *viz.*, as to the construction of the Registration Law, Act XIX. of 1843, and its application in this case, and as to the propriety of directing an enquiry by the Criminal Authorities in regard to the conduct of one of the parties, and the character of the deeds propounded in this case.

I then also reserved my judgment on the *second* point, *viz.*, as to the right of the *bonâ fide* purchaser for value, and duly registered, to hold his purchase unaffected by an unregistered mortgage alleged to be of prior date, and of which no notice had in any way been given.

Here the purchaser, who is admitted to hold under a *bonâ fide* purchase for full value, and to have done all he could by registration to give public notice of his purchase, and thus legally to protect himself and enable others to do likewise in their dealings with the property, is met by an unregistered mortgagee who, by the production of a deed of which no one had notice, is to oust the purchaser of title and possession.

It was clearly *necessary* by law (Act XIX. of 1843) that that mortgage-deed should have been registered if it were a question of priority between *it* and *another* deed of the same description, *i. e.*, of *mortgage*. The same law enabled the mortgagee, by registering his mortgage-deed, to record its date and other particulars, so as to help to secure himself against allegations of ante-dating or other *mala fides* in the transaction. This same process was that which would at the same time have given others notice not to deal with the property as free from the lien of this alleged mortgage, and this might have been a guide to all as to the real position and real value of the property. It is not the policy of law generally, and it is not equity and good conscience that parties should be left in ignorance and without means of knowledge of the real value and real position of property by absence of such notices as are practically, and are intended to be, the legal guides to them in these transactions with property; nor is it equitable that a *bonâ fide* purchaser for value who may, having purchased without notice or means of knowledge of an alleged mortgage, find his purchase so encumbered. In this case, too, the purchaser's possession under his sale was for some time

unquestioned, *i. e.*, till this mortgage-deed was long *after* produced and alleged to have been long before executed, though always unpublished, and never heard of nor acted on. If, under such circumstances, a *bonâ fide* purchaser for full value in possession is to lose title and possession by the production of a hitherto unheard-of paper capable of being easily falsely written, and unfortunately equally capable of being easily falsely attested by oral testimony in this country, an extremely wide door to most dangerous temptations to fraud, and too often to successful fraud, would be opened, seriously and extremely affecting existing and future *bonâ fide* purchasers for value.

On this ground, I differ from the majority, and concur with Mr. Justice Campbell; and I would, therefore, not rule that the *bonâ fide* and duly *registered* purchaser for full value in possession, as in this case, may lose his title and possession by the production of this unregistered mortgage of alleged prior date, of which no notice has been given to any one in any way whatever.

Norman, J.—I agree entirely with the learned Chief Justice, and I only wish to add a very few words. To construe the Registration Act, XIX. of 1843, as giving no protection to a registered deed of sale against prior unregistered mortgages, and no protection to a registered mortgage against a prior unregistered deed of sale, is to make the Act a dead letter. If this matter had come before the Court for the first time, and I had been considering Act XIX. of 1843 or Regulation XXXVI. of 1793, Section 6, Clauses 1 and 2, of which that Act is a re-enactment, I should have had some doubt in coming to the conclusion at which the Chief Justice has arrived. The Regulation recites that one of its objects is "to prevent individuals being defrauded by "buying, or receiving in gift, or lending "money in mortgage, or taking on lease, any "such property that may have been so pre-"viously disposed of or pledged." That is the object of the Regulation, as stated in the Preamble. Section 6, Clause 1, says: "Every deed of sale or gift, of the descrip-"tion specified in Clause 2, Section 3" (that is to say, deeds of sale or gifts of lands, houses, and other real property), "that may "be executed on or after the 1st January "1796, and a memorial of which shall be "duly registered according to this Regula-"tion, shall, provided its authenticity be "established to the satisfaction of the Court, "invalidate any other deed of sale or gift "for the same property, executed subsequent "to the said date which may not have been "registered, and whether such second or "other deed shall have been executed prior "or subsequent to the registered deed."

If I were reading that Regulation for the first time, I should be strongly disposed to hold that "deeds of sale or gift of lands, houses, and other real property" included every deed of sale, whether absolute or conditional, and every gift, whether as a free gift, or a pledge, or otherwise—in the widest sense as intended to include every transfer of a charge on land.

Then comes the second Clause, which says: Every deed of mortgage of the de-"scription specified in Clause 3, Section 3" (that is to say, deeds of mortgage on land, houses, and other real property, as well as certificates of the discharge of such encumbrances), "that may be executed on or after "the 1st January 1796, and a memorial of "which shall be duly registered according to "this Regulation, and provided its authen-"ticity be established to the satisfaction of "the Court, *shall be satisfied* in preference "to any other mortgage on the same pro-"perty executed subsequent to the said date, "which may not have been registered, and "whether such second or other mortgage "shall have been executed prior or subse-"quent to the registered mortgage."

Now, I think that those words, "satis-"fied in preference to any other mortgage "on the same property, executed subsequent "to the said date, which may not have "been registered," might have had a sufficient meaning given to them by treating the 1st Clause as relating to titles to land, and the 2nd to the application of money in paying off charges on land. That construction would have given to the enactment a remedial operation as large and beneficial as the Legislature in the Preamble declared their intention to provide for. But I cannot say that that construction ought now to be given to the enactment: because, for the last 16 or 17 years, both in this Court and the Agra Court, a different construction has been put upon it; and, if we were to overrule the cases, we should be imperilling the titles of a large number of persons who may have dealt with property in reliance upon the law as stated in those decisions. They are binding upon us; and, if they are to be over-ruled at all, it can only be by the Privy Council.

The next point referred to us is whether, even independent of Act XIX. of 1843, the

defendant as a *bonâ fide* purchaser for value without notice, and exercising due diligence, is liable to the plaintiff in respect of the plaintiff's lien over the land. Now, I take the position of the two parties to be this. The plaintiff is a prior purchaser, having equal rights and equal equities with the defendant, subject to what I shall presently say on that subject; and the general rule in such a case is this, that he who is prior in time has the better right. But it is suggested that the plaintiff has failed to do something which he was bound to do. It is said that he should have given notice of his charge. But, as the learned Chief Justice has said, to whom could he have given notice? There was a particular and specified mode of giving information, *viz.*, by registering the mortgage. He failed to give information in that way, and the Legislature has distinctly and exactly pointed out what should be the consequences of that omission, and we cannot enlarge them. I do not mean to say that a case might not happen in which a mortgagee, who by his own act or default, whether fraudulently or not, has actually misled a subsequent purchaser, and induced him to believe that the estate was free from encumbrance at the time of his purchase, might be estopped from afterwards setting up his charge to the prejudice of the person so misled by him. But that does not appear to be the present case.

Shumbhoonath Pundit, J.—On all three points I agree with the Chief Justice and Mr. Justice Norman.

Campbell, J.—It appears to me that Act XIX. of 1843 is entirely adapted and imported from Regulation XXXVI. of 1793, and, as that Regulation, XXXVI. of 1793, has not been repealed to this moment, I think I am justified in considering that the two enactments may be read together, and that the Preamble of Regulation XXXVI. may be considered as if it had been repeated as the Preamble of Act XIX. of 1843. Moreover, as it seems to me, the Preambles of those days were not mere statements of objects, but parts of the Regulations themselves. They do not, in fact, stand apart before we come to the body of the Regulations, but the Preamble is numbered Section 1, and then we come to Section 2, and so on.

That being so, great doubt arises in my mind on reading that part of the Preamble which mentions one of the objects of the Regulation to be "to prevent individuals be-"ing defrauded by buying or receiving "in gift, or lending money on mortgage, "or taking on lease, any such property that "may have been so previously disposed of "*or pledged.*" I think the object of the Legislature was to provide for just such a case as we have before us. If we had been deciding the case for the first time, then reading the Preamble of Regulation XXXVI. of 1793 as part of an unrepealed enactment, I should have felt disposed to give to the enactments, as a whole, the construction which the framers intended. But reading the provisions repeated in Act XIX. of 1843 alone, I admit that they will bear, and, in fact, taken literally, do bear, a different construction; and, considering that several decisions may be said to have declared, and in some sort settled, the law according to that literal construction, I am not prepared on this point to dissent from the judgment of my learned colleagues founded on the reasons so fully expressed by the learned Chief Justice and Mr. Justice Norman.

On the *second* point, regarding the position of an innocent purchaser without notice, I am compelled in some degree to dissent from that judgment. I would go a good deal further than the Chief Justice proposes to go in favor of an innocent purchaser. The principle which I would adopt is that which has, I believe, been adopted in a long series of decisions of this Court and of the late Sudder Court, and which, if it has not been laid down authoritatively as a principle of law, has, I think, not been contradicted in the decision of the Privy Council (Varden Seth Sam *vs.* Luckpathy Royjee Lallah) which has been quoted to-day. The words I rely upon are these: "Let it be conceded "that a purchaser for value *bonâ fide* and "without notice of this charge, whether "legal or equitable, would have had in these "Courts an equity superior to that of the "plaintiff." If so much be conceded (and the Privy Council do not negative the doctrine), it appears to me that (subject to the limitations and reservations mentioned in the judgment of the Privy Council), if the defendant can prove that he is a *bonâ fide* purchaser for full value, and that he has exercised due diligence and care, and made an apparently complete title, he would be entitled to a verdict. In this Court, the only law we have to administer on such subjects is the law of equity and good conscience. The principle which protects an innocent purchaser is certainly not unknown to the law of England. There, no doubt, the working of the principle is complicated and embarrassed by

the distinctions between legal and equitable titles. That distinction is not known to our law. It is hard to say in this case whether the holding of a mere paper-lien has acquired the legal estate or only an equitable lien on the property which the Court of Equity may or may not enforce. Our Courts are (except in regard to certain special class of subjects) Courts of Equity, and of Equity only, and it seems to me that the case comes before us to be judged on equitable principles only. If that be so, the equities are, in my view, by no means equal. The man who has done nothing to protect himself is not superior or equal in equity to the man who has done everything. The maxim *Qui prior est in tempore potior est in jure*, strictly applied, is, I think, rather a Common Law than an equitable maxim, that is, in equity it may be and constantly is overridden by other rules. It is also said, *lex vigilantibus non dormientibus servat.* Here we have (supposing that plaintiff and defendant make out their respective cases) the case of one man, the plaintiff, who obtains a paper creating a lien on certain property, which he neither acts on nor publishes. He leaves in the hands of the original owner both the possession of the property and all the ordinary evidences of title, such as they are in this country, and keeps his lien as it were secret; and, on the other side, we have the defendant, a man who deals with the apparent owner in possession both of the property and of the title, whom I suppose to make all due enquiries, to turn every stone that he could reasonably be expected to turn in order to test the title, and to exercise proper caution in every way; such a man so dealing buys the property, acquires possession and an apparently complete title, and pays his money. Subsequently the secret lien-holder pulls his piece of paper out of his pocket, and says: "True you have bought "in good faith and paid your money; true you "had no knowledge or means of knowledge "of my lien: but my paper is first in date: "by that paper I am entitled to take from "you the value for which you have paid. I "claim the assistance of the Court to turn "you out, and sell the property in satisfac-"tion of my claim." In my view, the party thus claiming the assistance of a Court of Equity has an equity far inferior to that of him against whom he invokes the Court. He has taken none of the steps to secure himself, and prevent the alienation of the property in contravention of his claim which a prudent and cautious man should take. It is true that, as the law has now been construed, he was not absolutely bound to register. But every facility for, and encouragement to, registration was given to him by the law. Regulation XXXVI. of 1793, Section 5, by expressly making it optional to register or not to register the deeds specified in three Clauses of Section 3, seems to infer that the registration of the deeds mentioned in the other two Clauses was not optional; and, in fact, every prudent man would either register or publish a mortgage openly for the very sufficient reason that, if he did not do so, every subsequent mortgagee without notice would, under the express terms of the law, be satisfied before him. There are also several other modes in which a transaction, creating a right in real property, may be, and in one or other of which it should be, as I think, published. In my opinion, according to the law and practice of this country, any transfer of rights in real property should be accompanied with some sort of seizing, actual or formal and public. It is usual in case of landed property to proclaim either entry or pledge by public announcement on the estate and before the tenants; and the pledge of house-property in security for public engagements is, I think, always notified in some formal way. I think the man who omits all public formality and publication, as well as registry, record of names, or deposit of title-deeds, fails in his duty, or at least takes the risk that the property may be subsequently made away with by the owner in possession. This case may not improbably go off on another point; but I think it right fully to express my opinion on account of the apprehension which I entertain of what I may call frightful consequences which may result if it be established as law, that not only a lien on real property need not have been registered, but that, without either publication or possession or notice of any kind, it will suffice to defeat the most cautious purchaser. I should fear that, in this country, the result would be an entire insecurity of title; that it would be impossible for any man by any amount of caution to buy real property with any confidence or any security that secret lien-holders may not start up with documents (or possibly even asserting verbal engagements) proved as proof here goes, and which he cannot disprove, and may defeat or harass him. My remarks have special reference to the state of things prior to the new Registry Law. But even that law only affects

documents of date subsequent to its taking effect; and I apprehend that, for the next 50 years, no purchaser would be safe against secret lien-holders or pretended lien-holders of date prior to 1st January 1865.

I think that the Lower Court should be instructed that, if defendant proves that he is a purchaser for value, who has exercised due caution and diligence, who has made an apparently complete title, and who had no knowledge nor means of knowledge of plaintiff's lien, plaintiff's suit should be dismissed.

As regards the other points, and especially the order that the defendant Ramprokash Sing should be sent to the Magistrate for enquiring into his conduct, I entirely concur in the judgment of the learned Chief Justice.

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges.*

Evidence (parol) to vary deed.

Case No. 870 of 1865.

Special Appeal from a decision passed by Moulvie Nasimooddeen Mahomed, Principal Sudder Ameen of Hooghly, dated the 18th February 1865, reversing a decision passed by Baboo Jadub Chunder Deb, Moonsiff of Sulkea, dated the 26th May 1864.

Kasheenath Chatterjee (Plaintiff),

Appellant,

versus

Chundy Churn Banerjee (Defendant),

Respondent.

Baboos Onoocool Chunder Mookerjee, Gopeenath Mookerjee, and *Mohesh Chunder Bose* for Appellant.

Baboos Dwarkanath Mookerjee and *Taruckanath Sein* for Respondent.

Verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import—as, for instance, to show that a deed of absolute sale was intended to operate as a mortgage (Norman and Shumbhoonath Pundit, JJ., dissenting).

This case was referred to a Full Bench, with the following order, by Justices Shumbhoonath Pundit and Campbell :—

Referring Order.—In this case, the point is whether oral evidence is admissible to show that a deed of sale was really varied by a verbal promise to re-convey on re-payment of the money, making it, in fact, a mortgage.

There is no question of an innocent purchaser without notice, whose case would be very different.

The original vendee holds to his title, and refuses to re-convey. The first Court refused to hear oral evidence to prove the oral agreement. The Lower Appellate Court, considering the evidence admissible, remanded the case for re-trial, and against that order the defendant appeals.

It has been several times held that, however dangerous it may be to admit oral evidence to vary a written contract of sale (made, it may be, many years back), and however cautious the Court ought to be in dealing with such evidence, still, it being the fact that it is a frequent custom in this province so to vary or qualify contracts of sale by oral agreement, the plea is admissible as between the vendor and the original vendee, or those holding under him with notice, and must be so till the Legislature interferes, and by some provisions made publicly known alters the practice. We find, however, that some decisions, contrary to the above, have been passed by the Court, *e. g.*, one dated 6th September 1864, in the case of Kassim Mundle. We, therefore, think it necessary to refer this case for the decision of a Full Bench.

Peacock, C. J. (Bayley, J., concurring).—I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import. If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot by mere verbal evidence show that at the time of the agreement both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage.

It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the Mofussil without writing. Does this apply to Hindoos or Mahomedans only, or does it extend also to Europeans? If the rule depends merely upon the absence of the Statute of

Frauds, it applies to Europeans as well as to Hindoos and Mahomedans. If it depends upon Hindoo or Mahomedan Law, it would not extend to Europeans in the Mofussil, whether the deeds of sale are between European and European, or between a European and a Native, whether Hindoo or Mahomedan.

Regulation IV. of 1793, Section 15, enacts: "In suits regarding succession, inheritance, "marriage, and caste, and all religious usages "and institutions, the Mahomedan Laws with "respect to Mahomedans, and the Hindoo "Laws with regard to Hindoos, are to be "considered as the general rules by which "the Judges are to form their decisions. "In the respective cases, the Mahomedan "and Hindoo law-officers of the Court are "to attend to expound the law."

These words are not the same as those used in Section 17 of 2 Geo. III., c. 70, with reference to the late Supreme Court, which extended the rule to contracts between Mahomedans and Hindoos; nor does it direct that the rules of evidence of the Mahomedan or Hindoo Law shall be acted upon.

In all other cases, by Regulation III. of 1793, Section 21, the case is determined "according to justice, equity, and good conscience."

But, admitting that the law allows sales of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses and was intended to express.

That would be contrary to a well-known rule of evidence of the English Law (*see* Starkie on Evidence, pages 648, 651, 655, 658, 659, 660). The following are the words of the passages referred to:—

(P. 648.) "It is likewise a general and "most inflexible rule that, wherever written "instruments are appointed, either by the "requirement of law, *or by the compact of* "*parties*, to be the repositories and memori-"als of truth, any other evidence is excluded "from being used, either as a substitute for "such instruments, or to contradict or alter "them. This is a matter both of principle and "policy: of principle, because such instru-"ments are, in their own nature and origin, "entitled to a much higher degree of credit "than parol evidence: of policy, because it "would be attended with great mischief if "those instruments upon which men's rights "depended were liable to be impeached by "loose collateral evidence."

(P. 651.) "The same principle applies "where private parties have by mutual com-"pact constituted a written document the wit-"ness of their admissions and intentions."

(P. 655.) "Where the terms of an agree-"ment are reduced to writing, the document "itself, being constituted by the parties as the "expositor of their intentions, is the only "instrument of evidence in respect of that "agreement which the law will recognize so "long as it exists for the purposes of "evidence."

(P. 658.) "Where *A* granted an annui-"ty for his own life to *B*, which was "secured by a bond and warrant of "attorney, and judgment was entered, the "Court would not, after the death of *B*, "permit the attorney of *B* to prove a parol "agreement that *A* should be at liberty to "redeem the annuity on terms."

(P. 659.) "So in an action on a bond "conditioned for payment absolutely, the "defendant cannot plead an agreement that "it should operate merely as an indemnity."

(P. 661.) "Upon the same principles evi-"dence is inadmissible of a parol agreement "prior to, or contemporary with, the written "instrument, and which varies its terms as to "show that a note made payable in a day "certain was to be payable upon a contin-"gency only, or upon some other day, or not "until the death of the maker."

See also Taylor on Evidence, page 929. Para. 1049 says: "It is almost superfluous "to observe that the rule is not infringed by "proof of any *collateral* parol agreement "*which does not interfere with the terms of* "*the written contract*, though it may relate "to the same subject-matter."

Without holding that every rule of the English Law of Evidence is to be applied to transactions in the Mofussil, I have no hesitation in saying that a rule of evidence, allowing a contract expressed in writing in words which the parties intended to use, and of which they knew the import could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing, but something very different, would lead to the grossest fraud, and would open the widest door to perjury in support of fraud.

None of the cases which have been cited show that effect was ever given to such a verbal agreement, or that such a verbal agreement ever in fact existed: for, in every case in which such a verbal agreement was

attempted to be proved, the Court found that no such verbal contract existed. In the case* of the 30th April 1861, the Court does not admit that *verbal* agreements, such as that contended for, are usual or customary, for they say: "The Court cannot see why there was not the usual *written ekrarnamah* or agreement." My remarks apply to mere verbal agreements, and not to a contemporaneous written *ekrarnamah*. In such a case, the rule of evidence would not prevent the reception of the *ekrarnamah*.

* Jadub Sirdar *versus* Kishenhuree Chatterjee, S. D. A. Rep., 1861, p. 189.

According to the Common Law of England, a deed under seal could not be varied or altered by a written contract not under seal; but such a rule is not applicable in the Mofussil in this country, and a contract under seal might be varied by a contemporaneous contract *in writing* not under seal.

If mere verbal evidence is admissible in this case to contradict a written contract, it would apply to every other case, and a man who writes "one thousand," intending to write "one thousand," might prove that by a verbal agreement the words "one thousand" were not intended to mean "one thousand," but only "one hundred." Nothing could be more dangerous than the admission of such evidence.

Further, if it be held that such evidence is admissible, the whole effect of the new Registration Act would be frustrated. If an absolute deed of sale of land is registered, it could not be controlled or proved to be conditional by an unregistered *ekrarnamah*, because both are instruments relating to land within the meaning of Act XVI. of 1864, Section 13; but a mere verbal contract would not be an instrument within the meaning of that Section. If an absolute deed of sale could be controlled or modified by a contemporaneous verbal agreement, showing that it was intended to be a mortgage, an absolute deed of sale of land registered could be modified by an unregistered verbal agreement, as a verbal agreement cannot, and is not required to, be registered. This does not necessarily show what the law is; but it behoves us, in deciding this case, not to admit a principle which must necessarily lead to such results, unless we find it clearly and unequivocally established. A European British subject cannot make a will without writing by reason of the Wills' Acts, but a Native may. If the rule be laid down that that which is expressed and intended to be expressed in writing may be varied by verbal evidence, it might be shown that a Native, who intended to declare by his written will, executed in the presence of witnesses, that he gave 10,000 rupees to a particular individual, expressly stated, in the presence of other witnesses, that, though he intended to write 10,000 rupees as the legacy, he intended it merely to be 100 rupees.

He may make a verbal will if he please, but, if he chose to write his will, he cannot alter it by a contemporaneous verbal expression. It would be most dangerous to testators, and it would be fraught with the greatest danger to the community at large to admit such a doctrine.

I do not know that the Hindoo or Mahomedan Law allows a written document to be altered by contemporaneous verbal statements, it is unnecessary to enter into that question here. It is sufficient to say that, if they did, we are not bound by the Mahomedan or Hindoo rules of evidence, and that they were far more stringent than ours.

I agree with the decision of 1859, which has been cited from the Sudder Decisions of 30th March 1859, page 362, Roychund Bemik (plaintiff), appellant, *vs.* Greesh Chunder Goho and others (defendants), respondents. That was a case in which an absolute deed of sale was attempted to be controlled by verbal evidence as against a purchaser from the original vendee, and it was held that parol testimony was not admissible to alter or contradict a valid written instrument.

The case of 11th March 1863 (Mohunt Joyram Gir *vs.* Lalla Bungshee Adhur) laid down the same rule as between the original parties to the contract. The case of Nundkissore Koowar and others *vs.* Zureefa Beebee and others, cited from the Legal Remembrancer, page 140, is not in point. In the case cited from the Weekly Reporter, Vol. I., p. 76 (Kassim Mundul *vs.* Sreemuttee Noor Beebee), it was held that verbal evidence was admissible to prove fraud or mistake, but not to prove that an absolute deed of sale was intended to operate merely as a mortgage. If persons will write things in unmistakable language, intending that the writing shall convey a meaning by which they do not intend in reality to be bound, they must have some improper or underhand object, and they cannot be surprised, or, with any reason, complain, if the Courts refuse to allow them to contradict their writing by mere verbal evidence.

The case of Hedayut Ali and Quadir Ali, appellants, *vs.* Prem Sing, respondent (3 Select Reports, p. 250), merely held that parol evidence was admissible to prove the contents of a written *ekrarnamah* which had been accidentally burnt, and which controlled another written contract contemporaneously executed. There is no doubt that such evidence was admissible.

In the case of Doorga Doss Roy *vs.* Ramjeebun Doss (2 Reports published by Hay, page 209), the verbal evidence was disbelieved. The same remark applies to the case of Ram Coomar Roy Chowdhry *vs.* Kashee Chunder Sein (1 Vol. of the same Reports, page 325). In the latter case, the verbal evidence seems to have been admitted to explain a written document; but the evidence was not believed, and the written document was construed without reference to the verbal evidence. It is, therefore, no authority on the question now under consideration.

It can scarcely be supposed that, in either of the two last-mentioned cases, the Court intended to act in opposition to the rule laid down in the first two cases which I have above cited, *viz.*, those of the 30th March 1859 and the 11th March 1863, as two of the Judges in the case decided on the 25th September 1862 were Mr. Justice Trevor, who was one of the Judges in the case of the 30th March 1859, and Mr. Justice Seton-Karr, who was one of the Judges in the case decided on the 16th March 1863, and as one of the Judges in the case of the 25th February 1863 was Mr. Justice Seton-Karr.

The case of Mutty Lol Seal, appellant, *vs.* Anundo Chunder Sandle and Jogender Chunder Sandle, respondents (5 Moore's Indian Appeals, page 72), was cited, but that case did not lay down the broad rule now contended for. It was decided upon the documents themselves and the acts of the parties. In that case, the appellant Mutty Lol Seal agreed to lend money to Muddoosoodun Sandle at 17 per cent. interest. He lent 5,000 rupees, and he took an absolute Bill of Sale of certain property, stating that it was in consideration of 25,000 rupees paid; and, by lease of same date, he let the property to Muddoosoodun Sandle at a rent of rupees 425 per month, which was equal to the precise amount of interest on the 5,000 rupees and 25,000 rupees, amounting to 3,000 rupees at 17 per cent. per annum. One question in determining the case would necessarily be to ascertain whether the 25,000 rupees was a loan or purchase-money. Part of the money was afterwards paid off by Muddoosoodun, and then the rent under the lease was, in pursuance of an agreement to that effect, reduced in the proportion of 17 per cent. on the money paid off, and there were other circumstances in the case tending to show that the 25,000 rupees was a loan only. There can be no doubt that the whole was a colorable transaction to secure the money lent with usurious interest.

The Supreme Court held that the transaction was a mortgage.

The Privy Council concurred. Lord Langdale, in delivering the judgment, said: "In "this appeal, although we think it is not "without difficulty, and our opinion, if given "in detail, might not have been altogether "in accordance with the decision of the "Court below, yet, giving our best consider-"ation to the whole matter, we do not find "any reason which appears to us sufficient "to alter that decision. Under these circum-"stances we must dismiss the appeal with "costs."

This case, as I have observed, shows merely that the Judicial Committee of the Privy Council upheld the decision of the Supreme Court, but we cannot say for what reasons. There were ample reasons for upholding it, without introducing or upholding such a rule as that now contended for, which was never laid down in the judgment in the Supreme Court, or ever contended for in the arguments of Counsel.

In Taylor on Evidence, page 921, para. 1039, it is said: "Parol evidence may also "under the proper plea be offered to show "that the contract was made for the fur-"therance of objects forbidden either by "Statute or by Common Law."

In the case above cited from the Privy Council, it was alleged, at the time of the transaction therein referred to, to lend money at 17 per cent., and it was, therefore, quite in accordance with the rules of evidence to show that the transaction was really a usurious loan, colorably represented as a sale for the purpose of avoiding the Usury Laws then in force.

The plaintiff in the present case alleged that he took possession in 1266, and that in 1270 the defendant forcibly dispossessed him. The defendant says that plaintiff never took possession, and that he was never forcibly ousted. If possession did not accompany or follow the absolute Bill of Sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it, therefore, becomes material to try whether the plaintiff was ever in possession, and forcibly

deed, except one of an out-and-out-sale, is executed, and a verbal promise made to return the property or the deed of sale after the money advanced is paid off with interest.

I admit this custom is rather dangerous, and that the Legislature should soon try to set it aside. But, as long as it is in existence, Courts of Justice are required to take it into consideration.

There can be no difficulty in a case where there is an *ekrar*. As to those cases in which merely a verbal promise is pleaded, it is certain that it is one thing to disbelieve parol evidence produced to contradict the written terms of a deed, and another to deny to receive such evidence at all. The rule adopted by the English Courts, with reference to the rejection of parol evidence to vary and contradict a deed, is undoubtedly based on sound principles; but with reference to the circumstances of this custom with regard to conditional sales, it will be unfair for a Court of Justice to adopt that rule of evidence in transactions made when it was not recognised as any part of the law in force.

Practically, such parol evidence, though received by our Courts, was not generally believed, as the Judges trying such cases were always disinclined to countenance such a dangerous custom. The Judges could not, however, ignore the existence of the custom, and so did not refuse to hear evidence, which, in many cases, might turn out to be credible. In one sense the additional verbal agreement is not perhaps inconsistent with the deed of sale. The deed, as worded, is intended to be one for a sale out and out, and the transaction is a sale, but conditional so far that there is an additional promise for the return of the property if the money paid is returned with interest within a period fixed. The law has, however, construed these transactions to be mortgages, and which cannot be foreclosed merely on the failure of the mortgagor to pay within the time fixed in the deed. I wish the Legislature may pass a law to the effect that, in future transactions of this kind, no parol testimony shall be received to prove that, at the time of writing a deed of sale, it was agreed that the transaction is to be one, different from the terms of the deed. The Legislature may even, if it think proper, order the rule to apply retrospectively. Rules of evidence have from time to time been passed by our Legislature in the form of laws. In the absence of such a law, by following the rule as adopted in English Courts, we are likely to injure many who might have executed deeds of sale when the contracts made by them were simply mortgages, and were known to be so by ostensible vendees. The supposed vendors, *viz.*, the mortgagors, may never have originally received full value of their property, are by the terms of the original contract entitled to redeem, and were hitherto quite assured that, if the mortgage be denied, they have a right to prove the real nature of the transaction by parol evidence regarding what had passed at the time of the contract.

One or two of the earlier decisions of the late Sudder Court, quoted by the Counsel for the respondent, show that the Judges trying those cases had considered that such conditional sales are usually supported by *ekrars* from mortgagees. But the records of our Civil Courts might, if searched, show the existence of numerous cases in which, for such conditional sales simply, deeds of absolute sale were executed in which the creditor, not denying the nature of the transaction, litigated with his debtor on other grounds.

There might also be found several cases in which, on the fact of the mortgage being denied, and an absolute sale pleaded, both the parties were allowed to bring evidence to support their respective assertions, and were not prevented on such occasions from producing parol evidence as to what passed at the time of the execution of the deed. As the application of the rule of exclusion of this evidence was never pleaded before, there was no opportunity to overrule it. As a question of fact, I can state from personal experience that I have seen and known of many deeds of conditional sales executed as of absolute sale not followed by any written *agreement* by the mortgagee to return the property.

I now notice the argument that this misnaming of the transaction of a mortgage must be from some fraudulent motive. Fraud may not have anything to do with the original introduction of the custom. It is not denied that, in many cases, the written *ekrars* taken from the mortgagee were registered simultaneously with the deed of sale. From this it would appear that the form of writing a deed of sale, and accompanying it with a written or verbal promise to return, appears to have been generally considered as the one adapted for these transactions of *bye-bil-wuffa*.

It may also be that, as the selection of this form is not almost invariably a voluntary act

of the mortgagor, but is the condition dictated by the creditor to a person *pressed* hard for money, the design of a cunning creditor to take advantage of the possibility of the failure of the mortgagor to prove by parol evidence the fact of the transaction being merely a mortgage or vain hope of getting rid of the tedious proceedings of foreclosure under Regulation XVII. of 1806, might have originally given rise to the custom of keeping the promise merely verbal. Ordinarily, persons so mortgaging their property are not actuated to execute deeds of sale with a view to protect their rights of redemption from any other creditor. In many cases the mortgagor may not have any other debts, or may not have in contemplation to incur any from any other person besides the advance he is receiving from the mortgagee.

As to the mortgages altogether fraudulent, where there is no *bonâ fide* sale or mortgage at all, the fact of fraudulent debtors executing such deeds cannot justify the adoption of a rule which will injure many who had never heard or thought of it. Further, if the meaning of the rule in question is allowed to be what the Court of first instance has held it to be, it would go beyond what it is according to the English authorities. It would give an undue advantage to many creditors, and make over to them, on the bare wording of deeds, property which was never intended to be conveyed absolutely, which they might all along have held only in trust, and from the proceeds of which, as originally agreed, they may have fully paid themselves. It is only since 1862 that the rule in question has begun to be adopted in this Court with regard to these cases of conditional sales.

The case of 1859 was rightly decided as it related to the rights of a third party to whom different rules apply. I would therefore in this case allow the parol evidence to be taken even to prove the exact nature of the original transaction, and therefore reject the special appeal. The English rule of evidence does not appear to have been disallowed in any other transaction except that of conditional sales, in which the deeds are drawn as for out-and-out-sales. I myself would not exclude the operation of this rule, except from cases of conditional sales with verbal promise to return. I would not also make any such consideration in favor of a party who, by a voluntary or forced adoption of the custom of misnomer, may have been the cause of leading a third person to purchase out and out a property from the ostensible vendee, believing him on the wording of the deed executed to be a purchaser under the same. In the present case, even if the English rule is adopted, it will simply prevent the respondent from proving by parol evidence that, at the time of the execution of the deed of sale, it was contracted by verbal agreement that the transaction is not to be what it is described in the deed. It cannot prevent the reception of parol evidence regarding other matters mentioned in the defence of the special respondent, which, if proved, might legally and satisfactorily prove that the deed of sale is simply a mortgage (*see* page 72, Vol. V. of Moore's Indian Appeals). There is no such law in English Courts, or in Courts where English Law prevails, which declares that, when a deed is in the form of an absolute sale, it is to be considered as such, irrespective of all legal evidence which the party executing it may have in his power to produce to show that it was not a sale. If a party can prove, as is alleged in this case, that the value of the lands is higher than the consideration paid when the deed was written, or that the plaintiff had never held possession of the property, these and other facts connected with the dealings of the parties with the property might prove that the transaction was a mere mortgage, and not one of absolute sale.

The order of the Lower Appellate Court in this case is a remand to the Court of first instance for trying the statements of the defendants. I would therefore reject this special appeal with costs.

Campbell, J.—It seems to me clear that, in a case of this kind, we are not to administer Hindoo or Mahomedan Law, but only the law of equity and good conscience applicable to all, Natives and Europeans alike. That being so, on so broad a question as that before us the decisions of the Courts must come very near in character to legislation, and in this matter I should think that we were bound to follow any uniform and well-established series of decisions. When I referred the case to a Full Bench, and when the argument in this Court commenced, I was certainly under the impression that the decisions had during many years gone to establish the admissibility of parol evidence in such a case as that before us. I have been surprised to find how little this view can be supported in argument by the citation of cases. The cases cited, when examined, are either not properly in point,

or are of doubtful effect, down to the decision of 15th August 1864. On the other hand, the opposite doctrine has been several times laid down, and on the whole the balance of authority seems to be on that side.

I also think that the rule which excludes parol evidence contradictory of the plain and intentional terms of a written and published document, such as that before us, is consonant to equity, good conscience, and public policy. It is not equitable or right that parties should be allowed by a formal instrument to place on record one thing when they mean another. There can in no case be any doubt that a third party, acting on the faith of the written instrument, could not be affected by any parol engagement; and, even as between the parties themselves, I think that if, in any case, there really is any understanding or expectation contrary to the terms of a deed which has been acted on, this can only result from one of two things, *e.g.*, either the object is (as is commonly the case in this country) to deceive others, and to retain the means of cheating others; or the vendor, whatever hope of re-conveyance he may retain, deliberately puts himself as it were out of the pale of the law, and cuts off from himself all legal right or remedy. If it were otherwise, what additional security would a mortgage in this shape give to the lender as compared to a mortgage in the ordinary form? And an additional security is the only object suggested. But then comes the decision of the Privy Council cited to us. That case, when examined, seems, I think, as shown by the learned Chief Justice, to amount in brief to this, that, when there are actings of the parties at variance with the written instrument, and especially when possession of the property has not been transferred, nor full value paid, then parol evidence to explain those facts may be admitted. I would hold that, although parol evidence may not be admitted purely and simply to contradict the terms of a formal and public written instrument duly acted on, it may, as between the original parties themselves, be admitted in support of substantial acts and facts which negative or detract from the effect of the instrument. In this case, then, the question whether the possession was transferred to the purchaser is most material. If it was not—if possession was retained by the vendor—then I think he may be permitted to show (there being no third party in the case) that the transaction was merely of the nature of a deposit of title-deeds as security for a loan.

I concur in the decision of the learned Chief Justice.

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

Evidence (parol) to vary deed—Pre-emption.

Case No. 1978 of 1865.

Special Appeal from a decision passed by Moulvie Syud Ahmed Bux, Principal Sudder Ameen of Sylhet, dated the 4th May 1865, reversing a decision of Baboo Ram Chunder Dhur, Moonsiff of that District, dated the 28th January 1865.

Moolook Chand Surma (one of the Plaintiffs), *Appellant*,

versus

Kooloo Chunder Surma and others (Defendants), *Respondents*.

Baboo Woomesh Chunder Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Oral evidence is not admissible to show that the parties did not intend that an absolute sale in writing should operate? not as an absolute sale, but merely as a conditional sale, in order to defeat a right of pre-emption (Norman and Shumbhoonath Pundit, JJ., dissenting).

Peacock, C.J. (Bayley, J., concurring).—It appears to me that this case is governed by the ruling in Special Appeal No. 870 of 1865, that mere verbal evidence is not admissible to show that the parties did not intend that an absolute sale in writing should operate as an absolute sale, but intended it to operate merely as a conditional sale.

This case is still stronger than the former one: for in this case the absolute deed of sale was registered, and the plaintiff is a third party who claims a right of pre-emption.

If the sale was absolute as expressed in the registered deed, the plaintiff was entitled to

pre-emption; but if it was merely conditional as attempted to be shown by the verbal evidence, he was not entitled to pre-emption. The plaintiff, acting upon the registered deed as he found it published to the world upon the registry, asserts his right of pre-emption, and endeavours to enforce it by suit; but he will be defeated, and the suit must be determined against him if the verbal evidence be admitted and acted upon.

The acts of the original parties or their statements cannot be admitted as against a third party to prove that their intention was not that which their written deed expressed, and was intended by them to express. It is unnecessary, therefore, to send this case back to have an issue tried, whether the vendor took possession or not.

The parties to the bill of sale can no more use verbal evidence to defeat the right of the plaintiff, than they could to defeat a purchaser from the vendor if the latter had sold for a valuable consideration.

The Principal Sudder Ameen has not tried the question, whether the requisitions of the Law of Pre-emption were fulfilled by the plaintiff. The case must be remanded to him to try the *fourth* issue as laid down by the first Court, which raises that question, and which the first Court has decided in favor of the plaintiff; and the Principal Sudder Ameen is directed to return his finding upon that issue to this Court, together with his reasons in detail for such finding.

Norman, J.—This is a suit to enforce an alleged right of pre-emption, the plaint stating that Ramruttun, the alleged purchaser, had taken possession.

The defendants, by their answers, as well as upon oath as witnesses, allege that the sale was conditional; that, though the deed of conveyance is absolute in its terms, there was a verbal agreement that the *kobala* should be taken back if the party conveying paid to the purchaser 100 rupees within a year. They also deny that possession was taken by the purchaser.

The Lower Appellate Court has found that the sale was a conditional one, and consequently that there was no right of pre-emption.

It is objected before us that parol evidence was not admissible to contradict the deed of sale which is absolute in its terms. I have already stated my view on that subject in No. 870 of 1865.

I think that the Principal Sudder Ameen should have enquired into the truth of the allegation that possession was taken by the purchaser; that, if no possession was taken, the evidence that the deed was subject to a verbal condition for rendering it void on payment of the money within the time stipulated, would be properly admitted.

But there is another consideration to which attention has not been given by the Principal Sudder Ameen, which would be deserving of the greatest weight if possession followed the execution of the deed, *viz.*, whether the plaintiff was not so far misled and injuriously affected by the acts of the defendants in becoming parties to a deed purporting to be one of absolute sale, as to entitle him to say that they are not now at liberty to set up that the deed is not one of absolute sale as against their own admission. If he was misled, and in good faith brought his suit in the *bond fide* belief that the deed was one of absolute sale, I think that the defendants ought not now to be allowed to deny it. If they could do so, the plaintiff might lose his right of pre-emption altogether. If he delayed taking the necessary steps till the end of the year when the sale is to become absolute, the defendants would have the answer—"The sale was absolute, and not "conditional. You were warned by the "registered deed, and are now out of time "under Section 1, Clause 1, of Act XIV, of "1859." To hold the parties so bound appears to me the only mode in which the interests and rights of the pre-emptor can be effectually protected. I would remand the case to the Principal Sudder Ameen for the trial of the issues to be raised with reference to these points. It is admitted that the case must go back to the Lower Court for the trial of the *fourth* issue.

Shumbhoonath Pundit, J.—The judgment of the case No. 870 of 1865, decided today, affects this suit. The plaintiff in this case sued for pre-emption on the ground of a deed drawn as one of out-and-out sale. He may have been misled to suppose the contract to be a sale; but his mistake cannot give him a right to alter the precise nature of the original transaction. The plaintiff cannot be considered to have incurred any such loss by his mistake that he can in return ask for a decree of the property. If he had purchased from the ostensible purchaser, he was clearly entitled to be protected from any demand made against him by the mortgagor.

I think, however, that, if not satisfied with the denial of the vendor and the vendee regarding the transaction being a sale, and relying upon the wording of the deed, he institutes a case under a belief that his opponents will fail in establishing before a Court of Justice that the transaction was merely a mortgage,

he may, notwithstanding his calculations proving wrong, be entitled to be protected from the liability of paying any costs to his opponents. Even if the English rule of evidence be considered as applicable to this case, as in this suit also, the question of possession is at issue, and as proof of it is likely to throw great light upon the nature of the transaction, and as this evidence is not the parol evidence which is considered inadmissible, and as it is necessary to enquire whether the plaintiff knew the real nature of the transaction, I agree in the order of remand proposed by Mr. Justice Norman on the points therein mentioned.

Campbell, J.—In this case, as distinguished from the last (No. 870 of 1865), I have had a good deal of doubt, *first* as regards the point whether, as between the original parties or those standing in no higher position, it would be necessary to try the question of possession; and, *secondly*, regarding the position of the plaintiff as a third party. In the last case it was alleged that, during several years subsequent to the sale, possession was retained by the vendor, and that was so material an act and fact that parol evidence might well be admitted in support of it. In this case the cause of action arose so soon after the transaction that the retention of possession (if it was retained) may hardly have attained the character of a positive act. Still, I think, I should be inclined to hold that, till possession is delivered in terms of the deed of sale, the transaction is not a complete transaction; and that, if possession has not been given, it might be shown (in a suit between the original parties) that it never was intended to transfer possession, and that the transaction was a mere deposit of title as a security.

The plaintiff, though a third party, is not a purchaser for value; he is in the very peculiar position of a person claiming the right of pre-emption on the faith of the deed of sale, and the question, to my mind, is whether he is a third party in the sense that in his favor effect must be given to the deed without respect to the disputed question of possession. Upon the whole, I think it most important to maintain in all cases the right of third parties acting upon solemn instruments formally published and registered; and considering that plaintiff, on the faith of the registered sale, may have raised money, made his arrangement for the purchase, and brought his suit, while the combined defence of the vendor and vendee, if admissible, could hardly be disproved by him, I on that ground concur in the decision of the learned Chief Justice.

The 5th February 1866.

Present:

The Hon'ble W. S. Seton-Karr, L. S. Jackson, and E. Jackson, *Judges.*

Hindoo Law (Mitakshara)—Joint undivided family (Presumption of)—Rights of Widow.

Case No. 1332 of 1865.

Special Appeal from a decision passed by the Judge of Sarun, dated the 23rd March 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 18th December 1864.

Badamoo Koer (Defendant), *Appellant,*

versus

Wazeer Sing and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Kali Kishen Sein* for Respondents.

Held by the majority of the Court (E. Jackson, J., dissenting) that, where (notwithstanding a separation in food and residence) no formal partition of the family estate has taken place, the family must be considered joint and undivided, and that in such a case a widow cannot succeed to or retain possession of her husband's share as against his surviving brothers, but is only entitled to maintenance.

E. Jackson, J.—This is a suit by the brothers of a deceased Hindoo to recover possession of his landed estate, which is in the possession of his widow. The plaintiffs allege that the family were joint in estate, and consequently under the Mitakshara Law, which applies to their family, they are prior heirs to the widow. The answer of the defendant is that the families of the brothers were separate both in estate and in food and residence. Both Courts have apparently come to the conclusion (and there seems no further contest upon this point) that the two families were separate in food and residence. But they consider that they were joint in estate; and have determined that, being joint in estate, the brothers are heirs to that estate before the widow.

This special appeal is preferred on two points: *first*, that, on the question of fact as to whether the family estate was joint or separate, the Lower Courts have wrongly been of opinion that it is necessary to prove an actual separation of land, and that the Principal Sudder Ameen has given no judgment of his own; and, *secondly*, on the point of Hindoo Law, that they are in error in holding that, when the family is separate in

residence, though joint in estate, the widow does not succeed to the estate.

On the latter point the decision of the Privy Council, reported at pages 31 to 42 of Sutherland's Weekly Reporter, No. 12, April 1865, Vol. II., contains a full argument and a final ruling which this Court is bound to follow. That decision follows the quotation from Macnaghten's Hindoo Law, Vol. I., page 53, containing the following words: "If, at a general partition, any "part of the property was left joint, the "widow of a deceased brother will not par-"ticipate, notwithstanding the separation, "but such undivided residue will go exclu-"sively to the brother." Carrying out this principle, the Privy Council laid down as the law "that what property is divided "goes as separate property; what is undi-"vided follows the family property; that "which remains, as it was, devolves in the "old line; that which is changed, and be-"comes separate, devolves in the new line. "In other words, the Law of Succession fol-"lows the nature of the property, and of the "interest in it." The decisions of the Lower Court in this case, being founded on the above view of the law, are therefore correct.

On the question as to whether the family were joint or separate in estate, the decisions of the Lower Courts are not equally satisfactory. The first Court found that there was no separation in estate, because there was no division of the land, and because the brothers had acted together in suing for rents, and in petitioning the Courts in matters connected with the estate; at the same time it found that the brothers managed their affairs separately. It gave no details or particulars as to the management. The Appellate Court supports this decision, but gives no grounds for its approval of it. It is said that evidence was adduced to prove that the brothers paid in the Government revenue for their respective shares separately.

I think that the decision of the Principal Sudder Ameen on this point cannot be affirmed as it stands. He must carefully consider the whole of the evidence, and record a distinct opinion upon it. The presumption is that, when a family is separate in residence and food, it is also separate in estate. The presumption in the case of the family now litigating is corroborated by the fact that the brothers have allowed the widow to succeed and take possession of her husband's estate. If, in addition to this, it is proved that each brother managed his own affairs respecting the estate, and collected his own rent, either separately or through one general agent for all the brothers, and paid his revenue separately, it will be proved that the brothers had separated in estate, as well as in residence. It is not necessary that there should have been any actual *butwarra* or division of the lands. A division of shares and separate possession of those shares is sufficient. As to the evidence which is relied on by the first Court as proving a joint estate, it, if anything, supports separation, that is, if one rightly understands its purport. The two brothers may have joined in one petition to the Courts, and may have the same servants; but it does not follow that the estate is joint. If it was joint, the petition would probably have been presented by the managing member of the joint family on behalf of that family. The same remarks will apply to suits preferred jointly by the brothers for rents.

I would reverse the Principal Sudder Ameen's decision, and remand the case to him for a full and careful decision on this point. The *onus* of proof that the family was joint in estate rests on the plaintiff. The Principal Sudder Ameen will require him clearly to prove that fact.

The costs of this appeal will be paid by the party who ultimately loses the case.

Seton-Karr, J.—The plaintiff sued to deprive the defendant, a widow, of her husband's share in the family property, on the allegation that the property was held jointly, and had never been formally separated. It is admitted that, if the property was held jointly, the defendant would be entitled only to maintenance, and not to her husband's share.

The Principal Sudder Ameen, in a careful judgment, and after visiting the spot himself, found that the families had been separate in food and residence, but that no proof of regular partition had been adduced by the defendant, while, on the other hand, the plaintiff had adduced abundant proofs to show that the families had been joint in estate. The Principal Sudder Ameen added that, when in the village, the agent of the defendant could not point out to him the alleged separate share of the deceased husband.

In this view, under the Mitakshara Law, the suit was decreed to the plaintiff, the widow being, of course, declared entitled to maintenance.

In appeal to the Judge it was merely urged that, as the families lived and ate se-

parately, it was quite unnecessary to enquire whether a division of land had taken place or not. The Judge reviewed the precedents for such cases, and decided that a division of estate was still required to be proved, even though separation as to food and residence was admitted; and so the appeal was dismissed.

Mr. Justice Jackson would remand the case to the Principal Sudder Ameen for the reasons given in his separate decision. I regret that I am unable to concur with him.

The Principal Sudder Ameen has given a very full and careful decision, and has actually been to the village himself, and what more he need be required to do, or what more is wanting to the decision of the case by us, I am at a loss to conceive.

Neither can I think the position sound that "the presumption is that, when a Hindoo family is separate in residence and "food, it is also separate in estate." The Privy Council ruling quoted seems to me to apply to a different state of things altogether, *i. e.*, where one shareholder has acquired separate property of his own. The contrary presumption, moreover, has been, I believe, the course of the rulings of our Court, and of the late Sudder Court; and not to multiply instances, in a case decided by Justices Trevor and Macpherson on the 30th of April 1864, No. 1715 of 1863, those learned Judges ruled that "where no formal "partition of the family estate has taken "place, the family must be considered joint "and undivided, and the succession descends "accordingly, and this, notwithstanding a "separation in food and residence." The Judges add: "We come to this opinion, relying not only on texts and precedents, but "also on the very theory of Hindoo Law "by which the family and the property held "by it are indissolubly connected, and "the order of succession is regulated accordingly."

But, in the present case, the first Court has found, on full evidence, that there had been no division of estate, so that, even if the presumption of law had been the other way, no error in law has been committed. In appeal to the Judge, nothing was taken up but this, namely, what was necessary to show separation in a Hindoo family; and the Judge ruled that separation in food and residence was not enough, as the appellant contended it was.

As the case has been laid before us, I see no reason to think the judgments of the Lower Courts either judicially defective, or legally erroneous. On the contrary, they seem to me sound and correct in principle, and I would, therefore, dismiss the special appeal with costs, as we cannot consider anything but a point of law.

L. S. Jackson, J.—In this case I concur with Mr. Justice Seton-Karr.

It appears to me that the Lower Courts found, as a matter of fact, that the family was not separate in estate, and that the special appellant, by the form of his contention in the Lower Appellate Court, virtually admitted this to be so.

I think that, unless there has been a definitive separation in estate, indicated by separate enjoyment and distinct liabilities, the family must be held joint, and it will not establish a separation in estate to show that the different members of the family dealt separately with their shares of the proceeds, or even that they collected rents or profits from different parts of the estate; for that might simply result from some arrangement made for the general convenience of the family, and would not indicate any cessation of the joint rights or responsibilities.

I am, therefore, of opinion that the widow, having failed to show that a separation in estate had taken place, cannot be permitted to retain possession of her husband's share; and that, therefore, the decision of the Court below must be affirmed, and the special appeal dismissed with costs.

The 5th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Authority of Vakeel to bind his client—Vakalutnamah.

Case No. 381 of 1865.

Regular Appealfrom a decision passed by the Judge of Beerbhoom, dated the 12th June 1865.

Ram Coomar Roy and others (some of the Defendants), *Appellants,*

versus

The Collector of Beerbhoom and others (Plaintiffs), *Respondents.*

Baboo Umbica Churn Banerjee for Appellants.

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Respondents.

A *vakalutnamah* given by a plaintiff, and couched in general terms, suffices *primâ facie* to authorise the vakeel to apply on behalf of the plaintiff for leave to withdraw from the suit; and in the absence of

anything to show that the vakeel acted contrary to his instructions or otherwise was guilty of misconduct in making the application, the client is bound by the act of his vakeel.

Seton-Karr, J.—THIS is in some respects a peculiar appeal. Two suits had been brought by two separate plaintiffs—Kasheenath and Lokenath Roy—for money due on an agreement. The cases were referred to arbitration; but, for certain irregularities and illegalities, the proceedings of the arbitrators were quashed by the High Court in an elaborate judgment on the 9th of July 1864.

The Judge was then directed to take up the case *de novo*, and he accordingly gave a decree to the plaintiff Kasheenath for the full amount of the claim. Against this decision, no defendant has appealed. This appeal is preferred under the following circumstances: On the very day of the trial, the appellant, who had formerly appeared as an intervenor before the arbitrators, but had taken no further steps whatever, appeared before the Judge by his pleader, Baboo Ashootosh Chatterjee, and simply requested that the case should be tried in his presence. On that very same day, his vakeel withdrew, under the permission of the Court, according to Section 97 of Act VIII.

The appeal is simply preferred on the ground that the act of the vakeel is not binding on the appellant, and that no formal petition of withdrawal was filed, and no specific permission to withdraw from the suit was granted by the appellant to his vakeel.

I am of opinion that these pleas constitute no ground for our interference. The *vakalutnamah*, which we have read, is broad and general in its terms, and empowers the pleader to act and take any steps in the case. The withdrawal is not in the nature of a regular compromise by *razeenamah*; and, looking to the sudden and irregular way in which the appellant came before the Court, and to his as sudden withdrawal, I should say that, in this particular instance, the client is bound by the acts of his vakeel, especially when nothing appears on the face of the proceedings to disclose any bad motive on the vakeel's part, or to show that the Lower Court acted improperly.

Under any circumstances, the appellant had better have applied for a review. I concur with my colleague in opinion that the withdrawal should be without prejudice to any rights which the appellants may have against the real plaintiffs.

I am of opinion that we cannot, and ought not to interfere, and this appeal is dismissed with costs.

Macpherson, J.—The appellant seeks to have it declared that an order permitting him to withdraw from the suit in the Lower Court is not binding upon him, and ought to be set aside. His appeal rests on the ground that the order permitting the withdrawal was made on the application of his vakeel orally in Court and without due authority. The Lower Court in its judgment remarks—"At the request, by written petition, of the second plaintiff, and verbally by "the co-plaintiff (the appellant before us), and "others' vakeel Baboo Ashootosh Chatterjee, "they were permitted by the Court to withdraw under Section 97." No application has ever been made to the Lower Court to set aside the order complained of, nor has any attempt been made in that or this Court to show, nor is there anything in the record to show, that the vakeel had not full authority to apply for the permission to withdraw. The appellant relies simply on the point that the *vakalutnamah* does not warrant such an application. But, in my opinion, the *vakalutnamah* contains sufficient authority—*primâ facie* at any rate. And in the absence of anything to show that the vakeel acted contrary to his instructions, and of any allegation even of fraud or misconduct on his part, there is nothing to lead to the conclusion that the vakeel acted otherwise than properly and in accordance with his instructions.

Considering, however, the special circumstances of this case, I think the Court may interfere in the appellant's behalf so far as to declare distinctly that his right (if any) to the money which is the subject of this suit, or to a share of that money, is not prejudiced in any way by the withdrawal. I think him entitled to this declaration, because, although the Lower Court calls him co-plaintiff, I doubt much whether he ever was legally or formally made a party to the suit at all. Certainly, the provisions of Section 73 of Act VIII. of 1859, under which alone he could be added as a plaintiff, were not complied with. Moreover, if, in fact, he was made a co-plaintiff, it is very doubtful whether he ought to have been so, more especially at the very latest stage of the case. The whole proceedings, so far as the appellant is concerned, have evidently been of an irregular and undecided character. Under the circumstances, while it is clear to me that the appellant is not in a position to claim the full relief he seeks, I would declare that any rights he had are not prejudiced by his having applied to be made a party to the suit.

The appellant must pay all the costs of the appeal.

The 31st July 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Evidence (Death-bed Gifts)—Onus probandi (Alleged separate acquisitions by a member of a Joint Hindoo Family).

Case No. 145 of 1864.

Regular Appeal from a decision passed by Mr. C. Hobhouse, Judge of Midnapore, dated the 10th February 1864.

Bipro Pershad Mytee (Defendant), *Appellant,*

versus

Kena Dayee, Mother of Hem Chunder Vayea, Minor (Plaintiff), and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter, Onoocool Chunder Mookerjee, and *Sreenath Doss* for Appellant.

Baboos Ashootosh Dhur, Hem Chunder Banerjee, and *Mohendro Lal Shome* for Respondents.

Suit laid at rupees 17,138-6-8.

The fullest proof is requisite to support a trust which is declared by word of mouth by a person at the point of death, and is in terms (not clearly indicated) an intention on the part of the donor to deprive his family of all substantial enjoyment of his property. Ordinarily, in such cases, a further opportunity should not be allowed to supply any defects in the evidence adduced at the original trial.

The burden of proof in cases of alleged separate acquisitions by a member of an undivided family possessed of joint estate is on the person who advances such a claim, though not to the extent of tracing the very fund with which each purchase was made, from the time of their acquisition in a given year, to the moment when they were paid to the seller of the property. Though an important criterion in such cases is to consider from what source the money comes with which a purchase was made, yet there is no rule as to any particular mode of proof.

THE defendants in the suit, Bipro Pershad Mytee and others, are the appellants here, and their appeal is from a decree pronounced by the former Judge of Midnapore (Mr. Russell) in the plaintiff's favor. This appeal was partly heard by us in December 1864, * when we deemed it necessary to frame two additional issues, and to refer them for trial by the Zillah Court. The finding of the Court, together with the evidence, has been returned, and the appeal has now been again heard.

The plaintiff in the suit, Kena Dayee and her two unmarried sisters, are the only children of Sham Soondur Mytee who, with his brothers Rammohun and Muddun Mohun, were the sons of Brindabun Mytee, who died in 1239 possessed of property in land acquired by him at various times, sometimes in his own name, and sometimes in the name of an idol called "*Janookeebullub*" which he established. His three sons are now dead. Sham Soondur, the plaintiff's father, died in 1262. Rammohun died in 1263, leaving a son, the defendant Bipro Pershad; and Muddun Mohun died in 1268, leaving a son, the defendant Debnarain.

The plaintiff sued as a pauper, on behalf of herself, and, it would seem, of her minor son also. She states in her plaint that her father died possessed of self-acquired property and of his one-third share in the joint paternal property; that she, since her mother's death in 1268, has been excluded from the latter; that she has obtained, under Act XIX. of 1841 (the Curator's Act), an order of Court in her favor respecting this property; and she asks for absolute possession of a one-third share "of the joint property, *Deb Sheba* with the idols, rent-free lands, &c."

Bipro Pershad, the principal defendant, alleges, in answer, that his grandfather devoted the whole of his property to certain religious and charitable purposes in the name of the idol; that these trustees were really declared by his grandfather immediately before his death in the presence of many persons, including his three sons; and that the purport of this declaration was (after endowing the idol with his whole property) that his eldest son Rammohun, and after him, his eldest son, and so on in succession, should alone manage the property (which was to remain always undivided), and conduct the *Sheba* alone, the joint family receiving only from the temple their daily food. He further claimed in his written statement a portion of the property specified in a schedule as the separately acquired property of his father and of himself.

The Zillah Court, on the first hearing of the suit, confined itself chiefly to the consideration of the plaintiff's right to sue for the whole one-third share belonging to her father, and to obtain a decree authorizing a separate collection by her in respect of that share; and the Court's decision was that the plaintiff was entitled to collect in common with the defendants, but not separately; and that she had also some right in the management of the *Deb Sheba;* and, further, that the order, which the plaintiff had obtained under Act XIX. of 1841, entitled her to a decree in this suit for the one-third, her two sisters' rights

* See Weekly Reporter, Vol. I., p. 341.

being recognized but left for enforcement against her (if necessary) in a future suit. It was rather taken for granted, than decided, that the property, though subject to some religious trust, was still joint family property, which all the members had a right to enjoy for their own benefit.

We thought, when this decision was before us in appeal, that distinct issues should be framed regarding (*1st*) the alleged separate acquisitions of Biprò Pershad and his father; and (*2ndly*) the existence of the alleged religious endowment; and those issues have been found, the *first* against the defendant, negativing any separate acquisition by him or by his father; the other in his favor, that is, establishing the existence of the endowment substantially as alleged by him. The result of the suit will be, if these findings stand, that, although the true character of the pretended separate acquisitions may have been ascertained (that is, that they belong to the endowment), yet the plaintiff's rights and the rights of the whole joint family are reduced to receiving their daily food (the "*cheeda*") from the temple, the members living at their own separate cost in the matter of marriages, shrads, clothing, &c.

The endowment, whatever may be its precise nature and extent, was established on its present footing without a writing of the founder Brindabun on the day of his death. That it was in fact then formally established by him is, we think, sufficiently proved, and it is also shown that for many years previously the idol existed, and that lands were acquired and held by Brindabun in its name, and that the expenses of the ceremonies, charities, &c., were defrayed from the rents of these lands. His intentions must be mainly gathered from the various accounts given by the witnesses of his last instructions. The views which his sons took of the matter during their several lives may also be important, they being persons who knew their father's intentions, and who, presumably, acted in conformity to them, though, as to this evidence, it must be borne in mind that they may in their conduct have disregarded his directions or mistaken their own rights.

The evidence appears to show generally the time and the mode in which the several properties, which are the subject of the alleged endowment and of this dispute, were acquired.

The chief part of the property was purchased at different times by Brindabun. These purchases were frequently made in the idol's name. The dates of these several acquisitions range from about the year 1214 to the year 1239.

During Brindabun's lifetime his eldest son Rammohun acquired some lands, partly in his own name, and partly in the name of his son. Rammohun, after his father's death, made several further acquisitions. Since Rammohun's death, Bipro Pershad has, at various times, also purchased lands. These purchase-deeds have, in many instances, but not always, been registered.

Of all the property thus acquired, the chief part is that which Brindabun possessed at his death. After their father's death, the three brothers lived, and their descendants still continued to live, as a joint family.

The plaintiff's father, Sham Soondur, is shown to have taken his part in the management of the property, the accounts of which were kept (at least as to a considerable portion) in the idol's name. The office of *shebait* was borne pursuant to the supposed directions of Brindabun, *first* by his eldest son Rammohun, and afterwards by Rammohun's eldest son Bipro Pershad. We think it is established that both Rammohun and Bipro Pershad had profitable employment as agents to collect, or as managers of certain properties belonging to minors and neighbouring zemindars; and that, by such means, each of them may have acquired money by his own exertions and without the aid of other members of the family, or of the family funds.

The evidence adduced upon the trial of the first issue, concerning the alleged endowments, is, in several important particulars, consistent, and appears to be entitled to credit. Many witnesses speak to the words used by Brindabun to express his intentions respecting the dedication of his property to religious and charitable purposes, and that the management should be solely in the hands of the eldest male representative of the family. That portion of the plaintiff's case, which asks for the possession and control or management of one-third of the property and of the *sheba*, is, we think, disposed of by this evidence. Whether the fair result of their evidence is further to establish that Brindabun dedicated his whole property absolutely and entirely to the idol's use and for purposes of charity, excluding his family from all beyond a daily allowance of rice from the temple, is more doubtful. The evidence of two witnesses, Kalikeenkur Mullick, a neighbouring talookdar, and Gooroopersad Misree, the *purohit* of the family, has

been much relied on. The former, who was a mohurrir in Rammohun's time, deposes to Brindabun having declared, on the day referred to, in the presence of his relatives and neighbours, that he had dedicated or given all his property to the idol, and that his desire was that the eldest son for the time being should be the *shebait* and *kurta*, and that the family should not separate or dispute concerning shares, but that the younger brothers should receive *prosaud* from the temple. Gooroopersad Misree, the *purohit*, says that, on the day of Brindabun's death, there was a talk of the *Deb Sheba;* that Brindabun said he made Rammohun his eldest son the *malik*, and conferred on him the charge of the worship of the *thakoor*, and desired his other sons not to oppose Rammohun, but to continue to live as they had previously done, receiving the *cheeda* from the temple. This witness states, in cross-examination, that no provision was made for the families of the three, and that, so long as the three lived, they were in one family. Several other witnesses give evidence to the same effect, stating that the whole property and proceeds were given to *Deb* and *Ateet Sheba* by Brindabun, who directed that the property should not be divided, and that his sons should not receive any parts or shares.

In support of the defendant Bipro Pershad's allegation, that his grandfather's intention was to devote his property absolutely and exclusively to *Deb* and *Ateet Sheba*, evidence is given by the same persons of the application of the net proceeds to those purposes.

The net income thus expended is variously stated at from 4,000 to 6,000 rupees yearly. In order to ascertain the nature of the disposition thus orally made by Brindabun of his property on his death-bed, it is, we think, important to see how the proceeds of the property, which is the subject of the gift, had been dealt with by him, and how they were subsequently applied by his descendants in fulfilment of his injunctions. It is probable that Brindabun contemplated a scale of expenditure on the idol, &c., by his sons not unlike or less than that which he had himself followed. A witness, Radamohun Ghose, states that Brindabun prepared a list of the expenditure on the idol's account. If any such list exists, it was not produced, nor were any written accounts of the expenditure offered in evidence. We have, therefore, at present nothing but oral evidence of a vague and general kind to support the defendant's assertion as to the application of the net proceeds of the property. We shall not now advert more fully to the evidence. But we may observe that the certificate applied for and obtained after Brindabun's death appears to have been granted to his three sons; that all three in different capacities would seem to have shared in the management of the property; and that each of them, by some means, was able to establish, if the evidence is correct, some separate business. When the trust itself is one declared by word of mouth by a person at the point of death, and is in terms (by no means clearly indicated) an intention on the part of the donor to deprive his family of all substantial enjoyment of his property, the Court may fairly require the fullest proof in support of such a trust. It cannot be said that the defendant has given such proof hitherto, and, in an ordinary case, we should not be disposed to allow a further opportunity of supplying any defects in the evidence. But, in the present suit, the defendant has perhaps been somewhat misled by the form of the plaintiff's suit.

The plaintiff in her plaint ignores any religious trust whatever, and asks for possession of a share of the property. In the progress of the suit, the existence of an endowment has been ascertained; and it is not until a late stage of the suit that the question, as to the exact extent of the endowment, has formally arisen. We think that an opportunity should even now be given to the defendant Bipro Pershad and those in the same interests to produce any evidence, other than oral, which may be in their power to show the actual account of expenditure in *Deb* and *Ateet Sheba* during Brindabun's time, and subsequently, during the time of Bipro Pershad and his father, and especially the written account (if any exist) of such expenditure. We shall not finally decide the appeal until the evidence (if any such can be adduced) has been given.

With respect to the *second* issue concerning the alleged separate acquisitions of Bipro Pershad and his father, it is said that the Court appears to have been under some misapprehension as to the amount in value of these acquisitions relating to the value of the other property. The Court speaks of the list as a "specification of a very great deal of property, *talooks* and *lakheraj*," and also "of the acquisition of large and valuable estates." The lands thus claimed are stated to be about 80 beegahs of lakheraj and several portions of talooks, the aggregate

sudder jumma of such portions amounting to 600 rupees. Whatever the value of the property, the Court rightly held, seeing that Bipro Pershad and his father were members of a joint family having the management and control of the joint property, that Bipro Pershad was bound to prove his allegation that the lands claimed by him had been acquired by his father and himself by means of their own separate funds and on their own account.

The appellant objected, and we think justly, to that part of the judgment in which the Court states, in the following terms, the extent of proof incumbent on him: "The Court holds that it has a right to require from Bipro Pershad the clearest and most unmistakable proofs, *first*, that in such and such years, he and his father, by such and such means, acquired such and such private funds; and, *secondly*, that it was out of these very funds that the alleged self-acquired estates in dispute were, from time to time, acquired." The burden of proof, in cases of alleged separate acquisitions by a member of an undivided family possessed of joint estate, is upon the person who advances such a claim. But he may fairly, we think, be deemed to have sufficiently acquitted himself of it by evidence falling far short of that required by the Court below, which would impose upon Bipro Pershad the task of tracing the "very fund" with which each purchase of his father and himself had been made from the time of their having been acquired in a given year to the moment when they were paid to the seller of the property.

It had been stated in several decisions that the mere purchase of property in the name of one member of a joint family, and the taking receipts in his name, are insufficient to support a claim by that person to an exclusive right of property; for they are as consistent with the notion that the property belongs to the joint family, as that it is separate. Acts of ownership openly exercised by, or on behalf of, the individual member within the knowledge of the other members of the joint family, and assented to or not opposed by them, may be equally equivocal; for the acts may be of such a description as are beneficial to the joint estate, or necessary for its protection. But when the acts of ownership amount to assertions of sole ownership in exclusion of all joint rights or interest in others, and are of a kind beneficial to the individual members alone, the acquiescence of the other members, unless clearly explained, is a strong admission in support of the separate and exclusive right, whether it may arise from purchase or partition. An important criterion in cases of alleged separate acquisition (by private funds) has been said to be to consider from what source the money comes with which the purchase was made. But no rule is stated as to any particular mode of proof in such cases. If *A*, being a member of a joint Hindoo family, is shown to have a separate employment yielding him a given income, and he buys land in his own name at a price not wholly out of proportion to the sum which his own separate income may fairly be supposed to place at his command, the deed being registered, and the land held openly by him as his own exclusive property, and the proceeds applied to his own use without the interference of other members of the joint family, it might, we think, be fairly deduced from these facts, if established to the Court's satisfaction, that the land was *A's* separately-acquired estate, although no proof was forthcoming to show that the very money separately acquired was that which was afterwards paid to the vendor. In the present case it would scarcely be possible for Bipro Pershad to adduce such proof with respect to his father's acquisitions in former years; and we concur that in no case can it be stated (without regard to peculiar circumstances) that the Court is bound to require proof of the strict kind stated by the Court below, before coming to a conclusion in favor of the alleged separate acquisition.

But, while rejecting the Judge's rule as unfair to Bipro Pershad, we still have to determine, according to what we understand to be the established tests, whether he has established his case of separate acquisition from private funds.

There is evidence of some weight on both sides. Bipro Pershad and his father had separate means of acquisition, and may have acquired lands in their own names; but they were the managing members of a joint Hindoo family, all being together under injunctions from their father concerning the estate left by him, and the mode in which it should be used. On one occasion, at least, it is shown that a part of the alleged self-acquired estate was mortgaged with other property

to secure money borrowed to pay the Government revenue on the property which had come from Brindabun. The mode in which the proceeds of the self-acquired property were applied is not shown. Although accounts of the collections have been put in, we think it important that the written accounts (if any exist) of the application of the rents of this property should be produced before we pronounce any final opinion on this issue.

The plaintiff furnished a list of the names of certain witnesses whom she desired to summon and examine, in order to show that the property claimed by her was joint family property; but these witnesses were not summoned, the Court not being satisfied, after taking the evidence of the plaintiff's husband and of the manager of the suit, that the witnesses were material. Neither of those two persons had any certain knowledge from conversation with the persons whose attendance was desired that the latter could give material evidence concerning any of the matters at issue. They appear to be persons living in the neighbourhood. One is described as a pundit of Brindabun, another as the koberaj who attended him, another as a talookdar, another as a mohurrir of the family, &c. It is probable that these persons have some knowledge of the matters in question. If the plaintiff or her advisers conceive that their evidence is material, they should be duly summoned, and their evidence heard.

The record will be transmitted to the Lower Court, in order that the additional evidence, which we have indicated, may be given. It is needless further to define the points to which the evidence is to be confined. It has already been stated that the defendant Bipro Pershad and others should be permitted to produce and prove such written accounts and books and papers as they may be able to produce, to show the applications of the proceeds of the trust property; and that Bipro Pershad may further be allowed to give the like evidence as to the expenditure of the proceeds of the alleged self-acquired property of himself and his father. The evidence of the plaintiff's witness, mentioned in the *issim morasee*, and marked with a cross, should also be fully heard. The whole of the evidence, together with the opinion and finding of the Court, should then be transmitted to this Court. On the return of the record here, both parties may, within two weeks, file such objections as they may think fit.

The 5th February 1866.

Present:

The Hon'ble C. Steer, L. S. Jackson, and Shumbhoonath Pundit, *Judges.*

Right of action (by Endorser of dishonored Hoondee).

Case No. 1170 of 1865.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 8th February 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 8th July 1864.

Byjnath Sahoo and others (Plaintiffs), *Appellants,*

versus

Racharam and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Appellants.

Mr. C. Gregory for Respondents.

HELD by the majority of the Court (Steer, J., dissenting) that, when a hoondee returns dishonored to the hands of the endorser, he may sue the drawer upon it, and, if it appears that he is the lawful holder, may recover.

Shumbhoonath Pundit, J.—THE case of the special appellant, as understood by both the Courts, is that the plaintiff purchased, from the defendant's firm at Jungeepore, a hoondee in his favor; that it was payable by the firm of the defendants at Benares; that he sold the hoondee to two persons to whom it was endorsed by him; that the defendants' firm at Benares having refused to accept or pay the hoondee on presentation, it was returned to the plaintiff by the said purchasers; and so the plaintiff, filing the same, sues the defendants for the value paid by him. It is further said by the special appellant that the sale by him to those two persons to whom the hoondee is endorsed was *without* a consideration. The first Court thought it was immaterial to enquire whether the plaintiff had received any consideration or not from the said purchasers, and for this reason did not write much upon the issue framed for this matter.

The Lower Appellate Court said there is no proof that no consideration was received by the sale of the hoondee, and held that the plaintiff having sold the bill to others has no right to sue upon it.

It appears to me that the plaintiff has a right to sue, if he succeeds in establishing, as he asserts, that the hoondee was returned to him by the purchasers. It is really immaterial whether the purchasers had or had not

paid him a consideration, because, even if they had, they have a right to return the hoondee to the plaintiff on its not being accepted, and they may sue the special appellant for money paid by them. Whether they also could or could not sue the defendants is another question. Their right, however, to return cannot be denied, and if they return it to the plaintiff, he acquires a right to sue the defendants. Whether the said purchasers had or had not returned the hoondee to the plaintiff is a fact not enquired into by the Lower Appellate Court. The Court of first instance perhaps thought that the fact of its production by the plaintiff was a *primâ facie* proof of its return to him by the recorded purchasers.

It is not fair to dismiss the claim of the plaintiff because there is no endorsement in favor of the plaintiff by the alleged purchasers. The absence of such an endorsement may perhaps be explained by the special appellant, if he is allowed an opportunity to prove that the sale was without a consideration. I should think the plaintiff could have himself erased the endorsement and then sue the defendants. The want of this erasure, or the non-existence of a formal re-endorsement, cannot injure the actual rights of the plaintiff. The Lower Appellate Court should have, in a case like this, allowed the plaintiff either to erase at his own risk the endorsement, or call upon him to prove in the best manner possible that the hoondee had been returned to him by the purchasers, and that they had no longer any desire to sue upon the same. The Court should have, while trying this issue, given full weight to the effects of the fact of the production of the deed by the special appellant. It might have also ordered the said purchasers to be made defendants or summon them as witnesses to state whatever they may have to urge on this matter. It was not proper to dismiss the case of the plaintiff altogether upon the ground that the plaintiff had no ground of action. If at all necessary, it may allow the special appellant to prove that the sale was without a consideration. I would remand the case to the Lower Appellate Court to re-try the case with reference to the above remarks.

Steer, J.—*A* obtains an order from *B* for a sum of money to be paid to him by *B's* firm at Benares. *A* makes the order payable to *C*. *C* is unable to realize the order, as *B's* firm at Benares refuses to honor it.

A then, with the order still standing endorsed to *C*, sues *B* for the sum for which he granted the order to *A*.

The Judge has decided that *A* has no right of action, as he endorsed the order to *C*, and no authority is shown from *C* to *A* whereby the latter is in a position to sue on the order.

Is this, or is this not, a legal decision? This is all we have to look to. It is no concern of ours, sitting as we are, merely to try the case on a law-point, to say that the Judge should have made *C* a defendant, or have given *A* an opportunity of proving that the endorsement by him in favor of *C* was without consideration, and that *C* returned him the order. *A* has come into Court, demanding payment of an order the right to which he has parted with to *C*, and he gives no evidence to show how in the face of this fact he has become entitled to sue to recover the amount of the order. It is not our province, sitting in special appeal, to help suitors out of the difficulties occasioned by their own laches, nor can we under any provision of Act VIII. hold that in this case there is any legal ground for a remand. In this view I would uphold the decision which, as the case stood at the time of trial, was conformable to law, and, therefore, not open to special appeal.

Jackson, J.—In this case I concur with Mr. Justice Shumbhoonath Pundit.

The Judge hearing the first appeal appears to me to have thrown out the plaintiff's suit upon a technical ground, which was not even urged in the written grounds of appeal, the defendant's main contention being that he never made the hoondee.

When, in circumstances like those of the present case, we find the hoondee to have returned into the hands of the endorser who sues upon it, and when there is no suggestion that he has got it by other than fair means, I think the Gourt will readily believe that it has lawfully come into his hands, and that he is really the person interested.

In this case there was a witness called to show what the character of the transfer meant by the word *becha* was, and though his evidence, as it reads in the papers before us, is not very explicit, it appears to have satisfied the Principal Sudder Ameen that the endorsees were merely agents for the plaintiff.

In my opinion, the Judge should have enquired whether the fact was so, and if, on the evidence as it stands, he saw any reason to doubt, the witness who apparently had full knowledge ought to have been re-called and further examined upon the point.

I am, therefore, of opinion that the decision of the Lower Appellate Court should be reversed, and that the case should be remitted with directions to enquire, *first*, whether the

plaintiff has actually parted with his interest in the hoondee; and, *secondly*, whether the defendant is liable upon it or not.

The 7th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

Regulation XVII., 1806 (Commencement of operation of)—Onus probandi—Redemption of Mortgage.

Case No. 1990 of 1865.

Special Appeal from a decision passed by Moulvie Itrut Hossein, Pincipal Sudder Ameen of Sarun, dated the 28th April 1865, reversing a decision of Moulvie Syud Mahomed Furreedooddeen Khan, Sudder Ameen of that District, dated the 14th July 1863.

Surreefoonnissa (one of the Defendants), *Appellant*,

versus

Sheik Enayet Hossein (Plaintiff), *Respondent*.

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboo Gopal Lal Mitter for Respondent.

Regulation XVII., 1806, took effect, not from the date on which it was passed by the Governor-General in Council, namely, 11th September 1806, but from the date of its promulgation.

Suit in 1863 for the redemption of certain property in Zillah Sarun conveyed to the defendant by a deed of conditional sale in 1801, the day of payment on failure of which the sale was to become absolute being the 28th September 1806. HELD that the *onus* of showing that the Regulation was promulgated in Sarun prior to the 28th September lay on the plaintiff who sued for redemption; and that, as he had failed to give such evidence, his suit must be dismissed.

THE defendant in this case is the special appellant. The suit was brought by the plaintiff to redeem a mortgage of lands in Sarun. The mortgage was dated on a day corresponding with 30th November 1801, and the mortgage-money was payable on a day corresponding with the 28th September 1806; if not paid, the property was to vest absolutely on the mortgagee without foreclosure. The suit was commenced on 31st December 1861. The defendant admitted that he had not foreclosed, but stated that Regulation XVII. of 1806 was promulgated in Sarun on 7th January 1807, and consequently that the money became due before the Regulation was promulgated. The Principal Sudder Ameen, on the 28th December 1863, found that the Regulation was promulgated on 7th January 1807, and dismissed the plaintiff's suit. Afterwards, on review, he gave judgment for the plaintiff, upon the ground that the Regulation came into force on 11th September 1806.

The case is very clear. The Principal Sudder Ameen, in his first decision, held that Regulation XVII. of 1806 was promulgated in Sarun on the 7th of January 1807, and he dismissed the plaintiff's suit. That decision was correct if the Regulation was promulgated as he stated, and had not been promulgated prior to the 28th September 1806. Unfortunately, in another case, special appeal No. 2418 of 1863, decided on 27th April 1864, Sheik Bux Hossein and others, appellants, *vs.* Beebee Fuzloonissa and others, respondents, which came before a Division Court, the attention of the Judges was not called to the following words in Section 1 of the Regulation: "The following rules have "been enacted to be in force throughout the "whole of the provinces subject to the "immediate Government of the Presidency "of Fort William, from the date of their "promulgation;" and they held that the Regulation took effect from the date on which it was passed by the Governor-General in Council, *viz.*, 11th September 1806. The decision was passed under a mistake, and cannot be upheld by the Full Bench. But the Principal Sudder Ameen, acting upon that judgment, granted a review, and reversed his first decision.

Now, the Principal Sudder Ameen must have been either right or wrong in finding that the Regulation was promulgated in Sarun on 7th January 1807, acting upon the statement of the Judge of the Zillah in another case between other parties. If he was right, the Act was promulgated after 28th September 1806. If wrong, there was no evidence that it was promulgated at an earlier date. The *onus* of showing that it was so promulgated rested on the plaintiff; and, as he gave no evidence upon the subject, he was not entitled to a decree. There is a strong presumption against the plaintiff arising from the fact of his not having brought the suit for nearly 60 years after the 28th September 1806.

We think there are no grounds for remanding the case as we are asked to do. The decision on review must be reversed, and we decree that the plaintiff's claim be dismissed with all costs in the Lower Courts, and the costs of this appeal with usual interest.

The 7th February 1866.

Present:

The Hon'ble C. B. Trevor and F. A Glover, *Judges.*

Section 170, Act VIII. of 1859—Refusal of party to appear as a Witness.

Case No. 2788 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 12th August 1865, reversing a decision passed by the Additional Sudder Moonsiff of that District, dated the 1st June 1864.

Gopal Lal Bose and others (Plaintiffs), *Appellants,*

versus

Kaleenath Mookerjee and others (Defendants), *Respondents.*

Baboo Nil Madhub Bose for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Section 170, Act VIII. of 1859, is discretionary. Under it the first Court may decide against a defendant on the ground of his failure to appear, even without going into the plaintiff's evidence; and the Lower Appellate Court is equally within the law in going into the whole case on its merits.

THE point taken in special appeal is that the Principal Sudder Ameen was wrong in looking at the defendant's evidence, and should have decided his case, as the first Court did, under Section 170, Act VIII. of 1859, on the plaintiff's evidence alone.

It appears that the defendant was summoned to give evidence, but neglected to attend. The Moonsiff, therefore, refused to look into the evidence, of his witnesses, and decided the case solely on the proof adduced by the plaintiff. The Principal Sudder Ameen, however, went into the whole case, and held that the evidence preponderated in favor of the defendant.

We see no reason to interfere with his decision. Section 170 of Act VIII. gives the Civil Court a discretion either to pass judgment against a defendant refusing or failing to appear as a witness, or to pass such other order in relation to the suit as the Court may deem proper. There was no reason, therefore, why the Appellate Court should not have looked into all the evidence, if it considered that the most proper course. The words of the Section are permissive and not peremptory, and under them both Courts were acting legally in doing what they have done. The Moonsiff would have been justified in deciding against the special respondent on the ground of his failure to appear, even without going into the plaintiff's evidence, and the Principal Sudder Ameen was equally within the law in going into the whole case on its merits.

We dismiss the special appeal with costs.

The 7th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Review of Judgment (No appeal from order rejecting or granting).

Case No. 1881 of 1865.

Special Appeal from a decision passed by the Officiating Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 6th April 1865, affirming a decision passed by the Moonsiff of Manicktollah, dated the 28th February 1862.

Radhakant Bhuttacharjee (Plaintiff), *Appellant,*

versus

Kishen Pershad Chuckerbutty and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

The High Court cannot interfere with a review granted by a Lower Court. Under Section 378, Act VIII. of 1859, an order for rejecting or granting a review is final, and not open to appeal.

As regard the first point urged, we cannot interfere with the review granted by the Lower Court. An order, whether for rejecting an application for review, or for granting a review, is, by Section 378 of Act VIII. of 1859, *final*, and not open to appeal. Moreover, in the present instance, we may observe that the review appears to have been rightly granted.

The next point raised is purely one of evidence, that due weight has not been given to certain papers, which is no ground for special appeal.

Then it is said that a decree made in certain resumption proceedings proves the plaintiff's right to possession. But, in the present suit, it is the fact of possession, not the right to it, that is in issue; and the respondents in this suit were no parties to the prior proceedings, and are in no way bound by them.

The appeal is dismissed with costs.

The 7th February 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Res judicata—Ijmalee property (Mode of enjoyment of).

Case No. 2666 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 22nd August 1865, reversing a decision passed by the Moonsiff of Jehanabad, dated the 20th March 1865.

Romesh Chunder Bhuttacharjee and others (Defendants), *Appellants,*

versus

Soorjo Coomar Bhuttacharjee and another (Plaintiffs), *Respondents.*

Baboos Tara Prosunno Mookerjee and *Nil Madhub Bose* for Appellants.

Baboo Bama Churn Banerjee for Respondents.

A suit cannot be maintained for a declaration of the plaintiff's right to occupy one-half of a *Chundee Mundul* for *pooja* purposes, to a joint right in which he had been previously declared to be entitled. If, in the former suit, the plaintiff failed to obtain a separate share of the *Chundee Mundul*, his present suit is barred by Section 2, Act VIII. of 1859. But regarding it as a means of obtaining from the Court an order as to the mode in which an *ijmalee* right should be exercised, it was held that the mode of enjoyment of *ijmalee* property is a matter for private arrangement, and not for judicial determination.

PLAINTIFF sued for a declaration of his right to occupy one-half of a *Chundee Mundul* for *pooja* purposes, to a joint right in which he had been previously declared to be entitled.

The defendant pleaded that the present is an attempt to reverse a previous decision passed in a suit in which plaintiff claimed a separate share of the *Chundee Mundul*, but in which the Courts declared him entitled to a joint possession of it; that consequently it should, under Section 2 of Act VIII. of 1859, be dismissed as a *res adjudicata.*

The first Court dismissed plaintiff's claim, being of opinion that it was a *res adjudicata.*

The Principal Sudder Ameen gave plaintiff a decree, adjudging to him the enjoyment of one-half of the *Chundee Mundul.*

Defendant now appeals specially on the ground taken below, and we have no hesitation in saying that, in whatever view the present suit is regarded, it cannot be successful. Looking at it as an attempt under different words to obtain what was refused to plaintiff in the first case, it is clearly not maintainable under Section 2 of Act VIII. of 1859; but regarding it as a means of obtaining from the Court an order as to the mode in which an *ijmalee* right should be exercised, it is equally untenable. The mode of enjoyment of *ijmalee* property is a matter for private arrangement, and not for judicial determination. The right having been declared a joint one by the Courts, the particular mode of its enjoyment must be left to the parties themselves, there being no rule of law by which that enjoyment may be regulated, save and except the general one that joint owners must occupy jointly. Under this view, we reverse the order of the Principal Sudder Ameen, and, reviving the order of the first Court, decree this special appeal with costs.

The 7th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Ejectment of Lakherajdar—Onus probandi.

Case No. 2844 of 1865.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd December 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 21st December 1860.

Oottum Churn Dutt and others (Plaintiffs), *Appellants,*

versus

Ram Lal Dan and others (Defendants), *Respondents.*

Baboo Kalee Prosunno Dutt for Appellants.

Baboos Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Respondents.

In a suit for possession of land from which the plaintiff has been dispossessed by the defendant, if the defendant admits the plaintiff's possession as lakherajdar up to the time of dispossession, and justifies his proceedings by pleading that the lakheraj was created subsequent to 1790, and that the land is part of his *mál* land, it is not necessary to try the plaintiff's title, but the *onus* is on the defendant to prove his allegation.

THE defendant admits that the plaintiff, special appellant, was in possession of the lands in dispute as a lakherajdar until the defendants dispossessed him, and justifies his proceedings by pleading that the lakheraj was a creation of a period subsequent to 1790. The order of remand by this Court was not intended to settle any question of *onus* between the parties so as to fix who had to prove his allegations regarding the time of the creation of the tenure. The Court below, having simply on the ground of the fact that the special appellant was holding as a lakherajdar, decreed the case in favor of the plaintiff, this Court, remanding the case, brought it to the notice of the Court below that the plaintiff can only recover on its being proved that the tenure existed before 1790 as lakheraj.

The *primâ facie* case of the plaintiff is admitted by the respondent, and it is for him to prove his allegation that the lands are a portion of his *mál* lands. It is not at all necessary in this case to try the validity of the title of the plaintiff (*vide* Sudder Dewanny Adawlut Decision, 15th April 1861, Loch and Steer, JJ.). Plaintiff simply puts the defendant to the proof of the justification that is pleaded by the latter. We accordingly decree the appeal, and remand the case to the Lower Court for re-trial with reference to the above remarks.

The 12th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges.*

Limitation (may be pleaded after, though not pleaded before, remand).

Case No. 273 of 1865.

Application for Review of Judgment passed by Justices Bayley and E. Jackson on 25th April 1865 in Special Appeal No. 3053 of 1865.

Mirza Himmut Bahadoor, *Petitioner,*

versus

Gobindo Panday and others, *Opposite Party.*

Mr. C. Gregory for Petitioner.

Mr. R. E. Twidale and *Baboo Mohindro Lal Shome* for Opposite Party.

The first Court's decision dismissing the suit on the ground of limitation was reversed by the Lower Appellate Court, who remanded the case for trial on the merits. The first Court on remand decreed the suit on the merits. The defendant appealed, and the Lower Appellate Court dismissed the suit on the merits, refusing to try the issue of limitation, because no special appeal had been preferred against his former order. The plaintiff appeals specially, and the defendant, by way of cross-appeal, contends that the suit is barred by limitation. HELD that, although the defendant might have appealed against the first decision of the Lower Appellate Court on the question of limitation within 90 days from that decision, he was at liberty to appeal against it within 90 days from the time of the final decree disposing of the whole case.

This case was referred to a Full Bench by Justices Bayley and Jackson, with the following order:—

Referring order.—IN this case the petitioner urges that we have decided the case on the merits without fully hearing the

arguments of pleaders, which were only partially opened when the Court intimated its decision to refer to the Full Bench the question whether the plea of limitation could be heard for the first time after a remand order on the merits had been carried out, when it had not been made subject-matter of appeal at a previous stage.

We find two conflicting decisions on the point, *viz.*, Marshall's Reports, Vol. I., page 66, Beechen Koer, in which the Judges held that the plea could and ought to be preferred when the Judge gave the adverse decision, and the case of Wuzeerun Beebee, page 51, Vol. I., Sutherland's Reports, in which the Judges held the contrary.

Both parties agree that, without reference to the fact whether the plea of limitation prove a valid one or not, they wish for the reference to the Full Bench for a decision on the conflicting cases noticed.

We refer it accordingly without prejudice to the right of the parties to be fully heard on the merits hereafter.

The judgment of the Full Bench was delivered by Peacock, C. J., as follows:—

In this case the plaintiffs are the special appellants. The suit was brought by a mortgagee for foreclosure. The defendant pleaded that the mortgagor had become a rebel, and that his property had been confiscated by Government, and purchased by the defendant from the Government, and that, as the suit had been brought more than one year after the sale, it has been barred by Section 20, Act IX. of 1859. On the 18th February 1863 the Moonsiff dismissed the suit on the ground of limitation. On the 30th September 1863 the Principal Sudder Ameen on appeal held that limitation did not apply, and remanded the case to try whether the mortgage was collusive or not. On the 18th January 1864 the Moonsiff decreed the suit for the plaintiff on the merits, holding the mortgage to be *bonâ fide.* The defendant appealed against that decision, and on the 15th July 1864 the Principal Sudder Ameen dismissed the suit upon the merits, refusing to try the issue of limitation upon the ground that no special appeal had been preferred against his former order.

A special appeal was preferred to the High Court against this last judgment by the plaintiff whose suit had been dismissed, and by way of cross-appeal under Section 348 the defendant (respondent) contended that the suit was barred by limitation.

On the other hand, the plaintiff contended that the issue of limitation had been determined by the Principal Sudder Ameen before the remand, and that as no appeal had been preferred against that decision, the defendant could not now object.

Section 363, Act VIII. of 1859, enacts as follows:—

"No appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree; but, if the decree be appealed against, any error, defect, or irregularity in any such order affecting the merits of the case or the jurisdiction of the Court may be set forth as a ground of objection in the memorandum of appeal."

The decision reversing the decree of the Moonsiff on the issue of limitation was not a mere order prior to decree. It was itself a decree as shown by Section 351 of the same Act. That Section enacts:—

"If the Lower Court shall have disposed of the case upon any preliminary point so as to exclude any evidence of fact which shall appear to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court upon such preliminary point shall be reversed by the *decree in appeal*, the Appellate Court may, if it think right, remand the case, together with a copy of the decree in appeal, to the Lower Court, with directions to restore the suit to its original number in the Register, and proceed to investigate the merits of the case, and pass a decree thereon."

It is clear that the decision, reversing the first decree of the Lower Court, was a decree of the Principal Sudder Ameen in appeal, and not a mere order prior to decree.

It appears to us that the defendant might have appealed against the first decision of the Principal Sudder Ameen reversing the first decree of the Moonsiff on the issue of limitation. But he did not do so. The case went down to trial on the merits under the remand. When the defendant appealed against the decision of the Moonsiff on the merits, he could not ask the Principal Sudder Ameen to allow him to appeal to the Principal Sudder Ameen himself from the former decision of the Principal Sudder Ameen on the issue of limitation; and, when the suit was dismissed by the Principal Sudder Ameen upon the merits, there was no occasion for the defendant to appeal to the High Court against his decision. If the Principal Sudder Ameen had upheld the decision of the Moonsiff on the merits, the defendant might clearly have applied to the Court to enlarge

the time for his appealing against the decision of the Principal Sudder Ameen upon the plea of limitation; and, if he had done so, the Court might have granted his application if he had shown sufficient cause, and, in all probability, the remand would have been deemed a sufficient cause. But when the plaintiff appealed to the High Court against the decision of the Principal Sudder Ameen on the merits, the respondent had the right under Section 348 of Act VIII. of 1859 to rely upon any objection as if he had preferred a separate appeal. The words of Section 348 are :—

"Upon the hearing of the appeal, the "respondent may take any objection to the "decision of the Lower Court, which he "might have taken if he had preferred a "separate appeal from such decision."

The word "decision" in this Section must, in our opinion, mean a decision upon the whole case; and we are of opinion that the defendant (respondent) had the right, upon the hearing before the Division Court, to object to the first decree in the suit, which was against him on the issue of limitation. I had some little doubt whether, upon the strict wording of Sections 332 and 333 which relate to regular appeals, and of Sections 372 and 373 which relate to special appeals, the defendant could, without leave of the Court, have appealed against the first decision of the Principal Sudder Ameen upon the plea of limitation within ninety days after the last decision of the Principal Sudder Ameen upon the merits, and after the expiration of ninety days from the date of his decision upon the plea of limitation, if the last decision of the Principal Sudder Ameen had affirmed the last decision of the Moonsiff, and had conseqently been adverse to the defendant. But I agree with the rest of the Court, who entertain no doubt on the subject, that he might have done so even without satisfying the Court that there was sufficient cause for not having presented it within ninety days from the time of the first decision of the Principal Sudder Ameen. It appears to us that the judgment and decree, from which the ninety days are intended to be reckoned, are the final judgment and decree in the suit between the parties.

The result is that, although the defendant might have appealed against the first decision of the Principal Sudder Ameen, on the question of limitation, within ninety days from that decision, he was also at liberty to appeal against it at any time within ninety days from the time of the final decree disposing of the whole case.

The case will go back to the Division Court to be decided with reference to the opinion now expressed upon the point referred to us.

The 12th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, Shumbhoonath Pundit, and A. G. Macpherson, *Judges*.

Review of Judgment (Second or other subsequent applications for).

Cases Nos. 24 and 25 of 1865.

Applications for review of an order rejecting applications for Review of Judgment passed by Justices Bayley and Macpherson in Special Appeal No. 2240 of 1864, and Regular Appeal No. 162 of 1864, respectively.

Nusseerooddeen Khan (Plaintiff), *Petitioner*,

versus

Indurnarain Chowdhry (Defendant), *Opposite Party*.

Mr. R. E. Twidale and *Baboo Gopeenath Mookerjee* for Petitioner.

Baboo Chunder Madhub Ghose for Opposite Party.

An order rejecting or admitting a review is not final, but the Court may, in the exercise of its discretion, admit a second review even after a prior order rejecting it (Seton-Karr, J., dissenting).

Applications for review dismissed for mere default may be re-admitted like appeals dismissed for default.

This case was referred to a Full Bench by Justices Bayley and Macpherson with the following order :—

Referring order.—In these cases, which are applications for a review of an order rejecting an application for review, it is pleaded that the judgment of Mr. Justice Bayley and Mr. Justice Macpherson refers only to two or three cases as showing that the Hindoos of Zillah Chittagong have adopted the custom of pre-emption according to Mahomedan Law: whereas some sixteen decisions, proving the custom, were on the records.

On this point, all we can say is that no such number of decisions, beyond the two or three mentioned in our judgment, were cited at the hearing. But at this stage, Mr. Lingham, for the opposite party, takes the preliminary objection that a review of an order passed on an application for a review, or on an admitted review, cannot lie, under the terms of Sections 376 and 378 of Act VIII. of 1859. We find that the decisions of the Division Benches conflict on the point—*viz.*, Mr. Justice Steer and Mr. Justice Jackson held on the 8th December 1864 (W. R., Vol. I., p. 287), that a second application for a review of judgment can be admitted, although the first application has been rejected as founded on insufficient grounds; whereas Mr. Justice Loch and Mr. Justice Seton-Karr held in the case of Kant Lal Sing, petitioner, 24th April 1865 (Sevestre's Reports, Vol. VIII., p. 1, page 102), that no petition for a review should be received in the office, but its admissibility were matters of motion to the Court.

We learn that such motion was made, and the case admitted on the review file of Mr. Justice Bayley, but judgment has not been given owing to some documents not having reached the Courts.

We think that, as there is a conflict of decisions as to whether a review of an order rejecting an application for review, or of a review, can be heard; and, as we doubt whether, under the terms of Section 378 of Act VIII. of 1859, the decision of Mr. Justice Jackson and Mr. Justice Steer is correct, the point should be referred for an authoritative ruling by a Full Bench.

Refer accordingly.

Peacock, C.J.—The question which has been submitted for the opinion of a Full Bench is whether an application for the review of an order rejecting a previous application for review can be entertained by the Court, or whether the order made upon the first application for rejecting the review is final and binding upon the Court which formerly rejected it.

The answer depends upon the proper construction to be put on Act VIII. of 1859, Section 376, and the other Sections of Chapter XI.

The question, although it arises upon an order for rejecting a review, must also be considered in other points of view, because, whatever is the proper construction of Section 378 with reference to an order for rejection, appears also to be the proper construction with reference to an order for admitting a review and to a judgment given after such admission. The words are "and its order, in "either case, whether for rejecting the application or granting the review, shall be "final." The words "shall be final" apply, not only to an order for rejection, but also to an order for granting the application. I will, therefore, consider the case in four different points of view—

1st. When an application for review is dismissed upon default of the applicant.

2ndly. When the application is admitted, and the judgment is altered on re-hearing.

3rdly. When the application is admitted, and the judgment is not altered on re-hearing; and

4thly. Where there is an order for rejecting the application.

Although the question now before us has reference to an order for rejection, I think the case will be made clearer if, before we deal with the question as regards an order for rejection, we consider the case in the other points of view which I have mentioned.

1st. I shall consider an order of dismissal on the ground of default of the applicant.

Section 376 of Act VIII. of 1859 (the first Section of Chapter XI.) states when an application for review may be made. It enacts that "any person, considering himself aggrieved by a decree of a Court of Original Jurisdiction from which no appeal shall have been preferred to a Superior Court, or by a decree of a District Court in appeal from which no special appeal shall have been admitted by the Sudder Court, * * * and who, from the discovery of new matter of evidence, which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree."

Section 377 enacts that "the application shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period."

Then comes the Section upon which the case turns. Section 378 says—

"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but,

"if it shall be of opinion that the review de-
"sired is necessary to correct an evident error
"or omission, or is otherwise requisite for the
"ends of justice, the Court shall grant the
"review; and its order in either case, whe-
"ther for rejecting the application or granting
"the review, shall be final."

That Section applies only to two cases, *1st*, when the Court is of opinion that there are not sufficient grounds for granting the application; and, *2ndly*, when the review is granted. No express provision is made by that or any other Section for the case of the dismissal of an application for default of an applicant who fails to appear on the day appointed for hearing the application, and who afterwards comes forward and satisfies the Court that there was good excuse for his non-appearance. As the point is not provided for by the Act, there is nothing, one way or the other, to show whether the order of dismissal is final or not. It appears to me that the Court would have the power to re-admit the application upon grounds similar to those laid down in Section 347 for the re-admission of an appeal dismissed for default. That Section says—

"If an appeal be dismissed for default of
"prosecution, the appellant may, within
"thirty days from the date of the dismissal,
"apply to the Appellate Court for the re-
"admission of the appeal; and if it shall be
"proved, to the satisfaction of the Court,
"that the appellant was prevented by any
"sufficient cause from appearing when the
"appeal was called on for hearing, the Court
"may re-admit the appeal."

By parity of reasoning, I think that, if an application for review is dismissed for default, and the party can satisfy the Court that he was prevented by any sufficient cause from appearing on the day fixed for hearing the application, the Court may re-admit the application. I would not say that the application for re-admission should be made within thirty days, because there is no express enactment to that effect; but I would allow it to be re-admitted, on sufficient cause shown, within such time as the Court may deem reasonable.

2ndly. I come to the case when the application for review is admitted, and the judgment is altered on re-hearing. If the Court admits the review, there must be a re-hearing. Section 380 enacts—

"When an application for a review of
"judgment is granted, a note thereof shall
"be made in the Register of suits or appeals
"(as the case may be), and the Court shall
"give such order in regard to the re-hearing
"of the suit as it may deem proper in the
"circumstances of the case."

Now, upon a re-hearing, I apprehend there must be a fresh judgment, and a fresh decree according to the new judgment; and it appears to me only reasonable, just, and proper that, when a new judgment is given altering the former judgment, the opposite party should have an opportunity of applying for a review of that judgment. Suppose, upon a re-hearing upon a review, a decree for the plaintiff should be altered, and a decree given for the defendant, the plaintiff would have a right to appeal against the new decree; and the time for appealing would be reckoned, not from the time of the original judgment, but from the time of the new judgment. If an appeal would lie from the new judgment, there can be no reason why an application for reviewing it should not be allowed. Suppose a judgment originally given in favor of the plaintiff should, upon review and the admission of newly-discovered evidence, be given for the defendant, and suppose that, after the judgment on review, the plaintiff should discover new evidence, there is no reason why he should not obtain a review of the second judgment, nor is there anything in Section 376 to show that it ought not to be granted.

3rdly. When the review is admitted, and the judgment is not altered on re-hearing. Upon this point it must be remarked that, after the admission of review, there must always be a re-hearing and a new judgment, whether the judgment be in accordance with, or different from, the original judgment. If it is a new judgment, it is so as regards appeal and the time for appealing, and also as regards an application for a review.

4thly. When there is an order for rejecting the application. I think that an order for rejection is not absolutely final, and that it is in the judicial discretion of the Court to say that, notwithstanding it has rejected the application on one ground, it is not precluded from admitting it upon another ground. It may happen that, after a review has been rejected on a point of law, new evidence may be discovered which was not within the knowledge of the applicant at the original hearing, or at the time of the re-hearing on review. Surely, there is no reason for refusing to admit a review upon the ground of the new evidence, simply because it has been rejected upon a point of law, if the Court thinks that a review is necessary for the ends of justice.

In construing an Act, it is always right to look at the consequences of the decision for the purpose of ascertaining the intention of the Legislature. If a particular construction would lead to inconvenience, it may fairly be supposed that the construction is not in accordance with the intention of the Legislature in cases in which the words used are susceptible of a different construction. In the present case, I am of opinion that the words "shall be final" in Section 378 are used with reference to appeal, that is to say, that no appeal shall lie from an order of rejection upon the ground that a review ought to have been admitted, or *vice versâ*. I do not think that any inconvenience will arise from this construction, if applications for review be confined to their legitimate object; whereas injustice might be done if a different construction were put upon the words.

On several occasions applications for review have been made before me upon grounds which showed great misapprehension of the real object of a review. The late Sudder Court, in a decision to which my attention has been called by Mr. Justice Bayley (S. D. A. Rep., 1858, p. 1539), rejected an application for review upon the ground that the suit, which altogether depended upon a question of fact, had been disposed of after due consideration of the evidence, and that the objection urged in the petition of review as to the weight attached by the Court to that evidence was not a sufficient ground for admitting the review. I have called attention to this case, because I have, on more than one occasion, observed that an attempt was made to obtain a review of judgment upon the ground that, upon the first hearing, the Court had determined the facts contrary to the weight of evidence. This is matter for appeal, not for a review. But the attempt has frequently been made for the purpose of having the case re-argued by fresh Counsel when parties have been dissatisfied with the first decision.

It appears to me that the question which has been propounded to us ought to be answered by stating that an order rejecting a review is not conclusive, and that the Court may, in the exercise of its discretion, admit a review even after a prior order rejecting it.

The case will go back to the Division Court which referred the question, in order that it may be determined by them.

Bayley, J.—I am of the same opinion, and think that there is nothing in the law which prohibits a second application for a review of the order rejecting the first one. I would add, with reference to the judgment of 25th September 1858 (S. D. A. Rep., p. 1539), that I think now, as I did then, that the law never contemplated, and our practice never sanctioned, those applications for review which are simply and solely to serve the mere purpose of a re-argument by new Counsel of the former case on the facts and points of law before duly considered and adjudicated.

Seton-Karr, J.—I concur with the learned Chief Justice in thinking that we should look, in such cases, to the probable or possible consequences of our acts; but I also think that we are bound to look to the whole spirit of our Legislature, to the temperament of the people, and to the character and complexion of the cases which crowd our Courts. This is especially necessary in a case where the wording of the law may give rise to different interpretations. We may then fairly look to the spirit and intent of the Legislature. Most heartily, too, do I agree with what has fallen from the Chief Justice as to the principles on which reviews should be entertained. I wholly condemn the pernicious practice, which is constantly attempted to be introduced, of endeavoring to get a case not reviewed, but entirely re-heard on the same grounds, facts, and evidence by different pleaders from those who argued the case at the original appeal. Such could never have been the object of the Legislature in providing for reviews.

The Chief Justice has delivered his judgment with reference to four points. I have considered the subject with reference to the three questions which were argued consecutively by Mr. Twidale, but I believe that my remarks will be found to embrace the whole subject which has been raised before us.

The points which have been argued are, then, in order of argument, as follow:—

1st.—Can a second application for a review of judgment be admitted, after the first has been rejected?

2nd.—Can an application for review of judgment be re-admitted, after it has once been dismissed for default, by the absence of the pleader or the appellant, the dismissal not having been on the merits?

3rd.—Can an application for review be admitted or entertained, of any order passed, when an application for review has been actually granted, whether the new order in

review confirms, modifies, or reverses the original judgment in appeal?

As regards the *first* point, I hold that the order of a Civil Court, rejecting an application for review, is final in the sense that such order is conclusive, not only on the particular point then raised, but absolutely conclusive against any further steps in the Court which passes such order. The words of the law seem to me sufficiently clear and positive on this head. Cases have, indeed, been shown to us to prove that such *reviews of reviews*, or rather such second applications when the first had failed, had been entertained by the late Sudder Court, and, on one or two occasions, by Divisional Benches of our Court. But what we have to look to is, not past practice under either the old or the present law, but the legality of such a practice under the Code which we are bound to interpret and administer; and I am forced to the conclusion that both the letter and the spirit of Section 378 of Act VIII. of 1859 are against the admission of any such second application. The letter of the law cannot, it seems to me, as has been contended, apply to possible appeals, or to the mere finality of the order itself, passed on some particular point pressed on the Court at the time. We are scarcely warranted, I think, in interpreting the law to mean that an order is final in one particular sense, and not final in another. Our Legislators in 1859 used language with reference to its fair and ordinary construction. Had what is contended for been the intent of the law, it would, I think, have discriminated and would have said "final" and "not subject to appeal," or would have used additional words to illustrate its meaning. But the finality intended is, to my mind, evidently that of the Court itself passing the order of rejection. As regards the spirit of the law and the intent of the Legislature, the conclusion seems to me equally unavoidable. Once admit a second application after a first had failed, and there is no reason why ten, twenty, or even endless applications should not be made on new points of law, or on the alleged discovery of new evidence. The pleader, who contended for this second application, admitted that this was the fair, logical, and inevitable deduction from his contention. If we rule that the first rejection is not final and conclusive, according to the ordinary interpretation of language, there may be, literally, no conceivable limit to fresh applications made by wealthy, determined, and litigious clients. On this point, then, I hold that an order of a Civil Court, rejecting an application for review, puts an end to everything as far as that Court itself is concerned.

On the *second* point, I am glad to think that there is no material division of opinion. We may reasonably and lawfully in the spirit of the Code, and without violating or altering its letter, apply to reviews the provisions of Sections 346 and 347, which relate to appeals dismissed for default. If the application for review be dismissed for default, because the appellant does not appear in person or by a pleader, he may be allowed to apply within 30 days for the re-admission of the review. The application has not been heard on the merits, and Section 378 would not apply until it had been so heard. But I would strictly limit this period to the 30 days mentioned in the above Sections.

It is as regards the *third* point that I feel great difficulty and doubt, and that I think it necessary to explain my views at some length.

My learned colleagues, I understand, are of opinion that, when a review is once granted, and not rejected, the case, from that time, assumes a different phase; and that, whether the original order of the Court be affirmed or be modified or reversed, the order passed after the review is granted becomes a new order or judgment. The case, it is said, is not merely reviewed. It is re-heard, and a fresh judgment follows, to which the ordinary rules of pleadings apply. A review of such a judgment passed on the discovery of new matter or evidence, not within the knowledge of the party, or on other good and sufficient cause, as contemplated in Section 276, would consequently be an entirely distinct and separate judgment, of which a review might be granted in ordinary course, as if the first proceedings had been wholly obliterated and nullified.

After very careful consideration, I own that I am unable to find such a conclusive warrant for any such proceeding in the Sections of the law as to satisfy me that this can be the correct judicial practice of the Court. The Chapter on Reviews is very short, and consists only of five Sections. The *first* Section (376) explains for what "a review of judgment by the Court which passed the decree" may be granted, being new matter or evidence not within the knowledge of the party, or "any good and sufficient reason." The *next* Section relates to the time prescribed for filing such applications, and to the stamp required, and does not bear on the

point before us. The *third* Section (378) says that, "if the Court shall be of opinion that the *review* is desired to correct an evident error or omission, the Court shall grant the review; and its order in either case, whether for rejecting the application or for granting the review, shall be final." The *next* Section (379) merely prescribes that the application for review must be made to the Judge or Judges who passed the decree, if he or they are not precluded by absence or other cause, for a period of six months after application, from considering the judgment to which the application refers. And the *last* Section (380) prescribes that, "when an application for a review of judgment is granted, a note thereof shall be made in the Register of suits or appeals (as the case may be), and the Court shall give such order in regard to the re-hearing of the suit as it may deem proper in the circumstances of the case."

It is, I understand, on the words of Section 378 and Section 380, taken together, that the argument for considering an order passed, when an application for review has been granted, to be a new order or a new judgment, mainly depends. It was argued by the pleader for the respondent, against the view taken by Mr. Twidale, that an order of rejection of an application was final, while an order "granting a review" might be open to further consideration. I confess that I do not see any way at present to any division of Section 378 into two distinct Clauses or provisions, one of which shall prescribe that the order rejecting the review shall be final, while the other shall mean that, when a review has been granted, and a re-hearing takes place, as contemplated in Section 380, the order shall not be final, but shall again be open to a fresh review. It is true that the difficulty which I feel is attempted to be met by an argument that "granting the review" and "re-hearing the suit," which are the words used in Sections 378 and 380 respectively, relate not to one operation, but to two distinct operations. But I cannot think that the law contemplated any such distinction, or that it intended that the order, when once admitted to review, should be looked on as a new order, whether it endorsed or whether it reversed or altered the old order. Section 378 talks of the "review," that is, the re-hearing and re-consideration being necessary to "correct an evident error or omission." But, by correction of an error or omission, a new judgment, such as my colleagues contemplate, would at once start into existence. And yet, in the very same Section, we are told that this very order for "granting the review," and consequently, as I argue, for correcting the error or omission, is final. Again, if the new order affirmed the old order or judgment, then, practically, and to all effect, there would be no new order at all. The case would be the same case; with the same interests, between the same parties, and with precisely the same results. The old order would not, as I understand it, have been wiped out, but would be merely re-affirmed with the additional weight and strength which the fresh arguments, the new view of the law, or the additional evidence lent to the winning side. In many instances, the confirmation of the old order would necessarily be brief and terse. It would be in the old order that the main exposition of the reasons for the conclusion of the Judges would be found. How could it then be said that the new order of ten or twenty lines superseded the elaborate previous judgment of several pages? If, on the other hand, the new order should take the form of either reversing or modifying the old order, still it would, in my opinion, amount to nothing more than "the review of judgment" contemplated in the first Section of the Chapter (Section 376) which would have been granted on the discovery of new matter or evidence, or for some good and sufficient reason. Then, again, when we look into Section 378, I find myself, as I said, unable to draw the distinction between the finality intended to be applied to rejections of applications, and the finality of orders granting the review, which review had become necessary to correct an evident error or omission. The Legislature contemplated both contingencies, and provided for them both by making the orders *final.*

We seem agreed that to admit fresh applications after the first had been rejected may be inconvenient, if largely resorted to and not checked.

Reading the whole Chapter together, and considering its language and object, I find myself unable to draw any other inference than that the law intended to put an end to all such litigation. In special appeals the rejection of a review would be the fourth time of hearing, without making an allowance for remands. In regular appeals it would be the third time of hearing. What more did the exigencies of litigation require, or the law-makers intend to supply?

I admit that there is something which may be taken to favor the opposite view, in the words "re-hearing of the suit" used

in the last Section of the Chapter. But they are not sufficiently clear and explicit to satisfy me that it was the deliberate intention of the Legislature with its eyes open to the prevalence of litigation, and looking to the ends of justice, that, when a review had been granted for the reasons prescribed by law, the whole case should again and again be opened to review. Litigation in this view might be more endless, harassing, and uncertain than ever; and it is a well-known and a long-established legal maxim, tested by experience, consonant to reason, and sanctioned by the highest legal authorities, that in the interests of the State there should be some end of litigation. This maxim acquires treble weight and force in this country. If the opposite doctrine now contended for be adopted, it is perfectly possible that we may see a train of litigation just such as the following—A plaintiff, after a local investigation and a long contest, obtains a decree in a case of *chur* land or accretion in the Zillah Court. The decree is afterwards reversed on appeal by the High Court, and judgment is entered for the defendant. The plaintiff then discovers a new map or other important document which would entirely alter the whole aspect of the case, and files an application for review. The review is granted, and the case is re-heard by the light of the additional evidence, and with argument reenforcing argument. After a long hearing, in which appear different Pleaders or Counsel from those who had argued the case at the appeal, the original decision is set aside, and the accreted land is given to the plaintiff. This being treated as a fresh decision, with which the first judgment had nothing whatever to do, the defendant then applies, in his turn, for a review, on the ground that the Court had wholly misread or misinterpreted the law of accretion. A review is granted, the second decision on the fresh evidence is, after due formalities, set aside on a law-point, and we have a third decision, which, after all, is not in any way final, in place of the two others. Where, I earnestly ask, is this litigation-spirit to stop, or to what security are litigants to look? When I remember the eager zest and animosity which we see so constantly displayed by wealthy, pertinacious, or unscrupulous litigants in this country, I must be clearly satisfied of the intentions of the Legislature and of the precise directions of the law, before I can consent to sign or endorse any ruling, which, though only on particular occasions, may be followed by consequences not in keeping with that certainty and definitiveness of judicial administration which is the avowed aim of those who make, and of those who administer, the law in Bengal. The cases put by the Chief Justice might involve hardship; but hard cases make bad law, and I must consider, not the discretion of the Court in such hard cases, but the policy of the State, and the general effect on litigation.

The word "re-hearing" used in the last Section of the Chapter, on which stress is laid, appears to me inserted merely in order that the Court, which has admitted the review, may either then and there reverse its first order, or, not to take the respondent by surprise, if new evidence has been filed, may put off the hearing, and the review or reversal of its own order, to some future day. And I do not see any real difference between the review of Sections 376 and 378, and the re-hearing of Section 380. There is, no doubt, some little difficulty as to the appeals from orders on reviews which alter former orders; but this is not conclusive, and it may be a *casus omissus* of the Legislature. It may be that, from an order on review which modified or reversed a former order, an appeal would lie to the Appellate Court, though a fresh review of that second order ought not to be admitted in the same Court. Such an appeal, though not distinctly provided for in the Chapter on Reviews, ought to be and would be admitted on the principle which governs appeals in ordinary cases. But where the case in any one Court had been decided twice in favor of the plaintiff or the defendant, or once in favor of the plaintiff and once in that of the defendant, I should certainly say that, in that Court the case had been sufficiently heard. If the second order re-affirmed the first, then an appeal from the first order would be all that was necessary. If the second altered or reversed the first order, then an appeal ought to lie from the altering or reversing order. I am also able to perceive a clear distinction between cases in which a Court passes a preliminary judgment on a point of law, without going into the merits, as follows: A Court dismisses a suit, either in the first instance or on appeal, because the plaintiff is barred by limitation, or has no *locus standi* in Court. A review is afterwards granted, on the ground that the ruling in law is wrong. This review, being admitted, is, to my thinking, final; but the case, when so reviewed, may, of course, be heard on the merits in the same Court, simply because those merits have

never been enquired into at all. According to the view taken by my colleagues, the order of review, admitting that the plaintiff was not barred, and had a *locus standi*, would not be final, and it would be the interest of the defendant to pray for review of review in endless succession, in order to harass and keep the plaintiff out of Court, and prevent his case being heard on the merits. It would be easy to multiply instances of this kind, which, I conceive, would not conduce to the good administration of justice.

I should have had much greater pleasure had I either been able to agree with my learned colleagues, or had they thought fit to take up my view of the question. and I can most sincerely and conscientiously say that I dissent from them with great respect for their varied talents and long judicial experience. But I have thought it absolutely essential to explain my own views, and to scrutinise the law narrowly, as the point raised is one which appears to me to involve an important principle. If my arguments appear partial, strained, or likely to work injustice, then the decision of my learned colleagues will only thereby derive additional weight and authority, because the opposite view will have been set out with such ability as I can bring to bear on the subject. The result is that I would answer the *first* and the *third* questions in the negative, and the *second* in the affirmative.

Shumbhoonath Pundit, J.—I agree with the Chief Justice.

Macpherson, J.—I concur in the judgment of the Chief Justice. I shall only add that, as a general rule, no second or other subsequent application for review should be granted, except under special circumstances. Such applications should not, in my opinion (save in very exceptional cases), be granted on the ground of any question of fact or of law which has been, or might have been, brought before the Court in any previous application for review.

The 12th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, Shumbhoonath Pundit, and A. G. Macpherson, *Judges.*

Limitation—Cause of action—Execution of Decree against immoveable property—Regular suit under Clause 4, Section 12, Regulation VIII., 1819 (after failure to recover in summary suit under Regulation VII., 1799).

Case No. 2444 of 1865.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 21st June 1865, reversing a decision passed by Syed Saadut Hossein, Sudder Ameen of that District, dated the 26th November 1864.

Sreenath Ghosal (Plaintiff), *Appellant,*

versus

Kenaram Sing and others (Defendants), *Respondents.*

Baboos Dwarkanath Mookerjee, Kalee Prosono Dutt, and *Turucknath Sein* for Appellant.

Baboos Mohendro Lal Shome and *Romanath Bose* for Respondents.

Regular suit against a gomastah's immoveable property under Clause 4, Section 18, Regulation VIII., 1819, after failure to recover in execution in a summary suit under Regulation VII., 1799. HELD that the cause of action in the regular suit was the same as that in the summary suit, and that the period of limitation must be reckoned from the time when that cause of action accrued, and not from the time when the summary decree in respect of it was given, or the time at which the plaintiff first discovered that he could not obtain satisfaction of the decree in the summary suit.

This case was referred to a Full Bench by Justices Bayley and E. Jackson with the following orders:—

Jackson, J.—THIS is a suit against a gomastah and his sureties to recover certain sums of money alleged to be still due from them. The plaintiff had already instituted proceedings under the old summary suit law as contained in Regulation VII. of 1799, but failed in execution to recover the amount. The execution in those proceedings could not extend to the *immoveable* property of

the defendant. The plaintiff, therefore, under the power allowed to him by Clause 4, Section 18, Regulation VIII. of 1819, has brought this *regular* suit in order to enable him to act against the defendant's immoveable property. The Judge on appeal has held the suit barred, as the plaintiff has allowed six years to elapse from the date on which the cause of action accrued to him. The Judge has considered that the cause of action in this regular suit is identical with the cause of action in the summary suit. It is in special appeal contended that the cause of action in this suit is the discovery of the plaintiff that he could not recover the money in the summary suit. I think the Judge was right. The plaintiff was at liberty from the first to institute summary or regular suits. He chose the least expensive mode of action. This did not debar him from taking other proceedings subsequently, but gave him no new cause of action. That remained as it was at first.

I would, therefore, dismiss the appeal with costs.

Bayley, J.—I regret that I cannot concur in this view. The cause of action arises in this case, in my opinion, from the date on which the summary decree suit failed to be satisfied by its execution in the Summary Suit Department.* The law provides that, when this is the case, other property than that against which alone execution could proceed in the Summary Suit Department may be followed by another process. The failure of satisfaction could only be discovered when the property available in *execution* in the Summary Suit Department was found insufficient. I would, therefore, hold that the cause of action arises from the last effectual process in execution in the Summary Suit Department. Send the papers to a Full Bench.

* This was on the 30th December 1857, *before* Act X. of 1859, Section 1 of which repeals Section 18, Regulation VIII. of 1819.

Judgment of Full Bench.—We think it is clear that the cause of action accrued when the original demand accrued. Clause 4, Section 18, Regulation VIII. of 1819, which was referred to, says: "If the zemindar "or other plaintiff should be desirous of "having any other estate, or house, or landed "property of a defaulter, brought to sale "in satisfaction of his claim of rent, it will "be necessary for him to institute a regular "suit for the purpose, notwithstanding the "existence of the summary award in his "favor." It does not say "if he is desirous to have his decree in the summary suit enforced against other land;" but "if he is desirous to have other land brought to sale in satisfaction of his claim." This is not a suit for rent at all. It is a summary suit against a gomastah The party was at liberty to bring either a summary or a regular suit. It appears to us perfectly clear that the cause of action in the regular suit was the same as the cause of action in the summary suit, and that the period of limitation must be reckoned from the time when that cause of action accrued, and not from the time when the summary decree in respect of it was given, or the time at which the plaintiff first discovered that he could not obtain satisfaction of the decree in the summary suit.

The case will go back to the Division Court for final decision.

The 6th February 1866.

Present:

The Hon'ble G. Campbell, *Judge.*

Ghatwalee Tenures—Istemraree (Meaning of).

Cases Nos. 407 and 410 to 413 of 1865.

Applications for Review of Judgment passed by Justices Trevor and Campbell, on the 29th June 1865, in Regular Appeals Nos. 299, 300, 301, 304, 353, and 399 of 1864.

Rajah Leelanund Singh and others, *Petitioners,*

versus

Thakoor Monorunjun Singh and others, *Opposite Party.*

Mr. G. C. Paul for Petitioners.

Moonshee Ameer Ali Khan Bahadoor for Opposite Party.

Ghatwallee tenures are perpetual holdings subject to condition of service.
Meaning of the term "*istemraree.*"

THIS case was most fully argued, most fully discussed, and most fully considered before judgment was delivered. That being so, I should not think myself justified

in admitting a review except on some very new matter not then before the Court. As respects the merits of the case, I am clear that nothing new is urged. The whole question is, whether these ghatwallee tenures are mere service-tenures resumable at pleasure, or perpetual holdings with condition of service annexed; those are two very different things. The Court has decided that they are perpetual holdings subject to condition of service.

Two points are more especially urged by the petitioners—*1st*. That the decision is at variance with the decisions of the late Sudder Court; and *2ndly*. That we have misconstrued the word "*istemraree*." On the *first* point, the principal reliance of the petitioners is on the decision of 1857. But that case was very fully considered at the hearing. The Court was clearly of opinion that the former case was totally different, the suit having been brought on the ground of breach of the conditions of the tenure, and no question of right to resume under the circumstances now put forward having been in issue. My colleague, Mr. Justice Trevor, was himself a party to the previous decision, and had no doubt on this point. It is said that there are other cases; but, when they come to be quoted, I find only one of 1858, page 1669, in which the suit of the zemindar, to resume the ghatwallee tenure, was dismissed on the ground that, so long as the services are required, the zemindar cannot resume. The petitioners only rely on a brief remark in the midst of the judgment which would seem to imply that, if the service were no longer required, the tenure would be liable to resumption. But that remark is at any rate clearly to the utmost degree *obiter*. One or two other cases quoted are mere cases of *chowkeedaree* lands and such like, and in no way applicable.

On the *second* point, we held that the word "*istemraree*" meant "perpetual" in point of time, and that in this respect its use was evidence of the perpetual character of the tenure. The petitioners urge that *istemraree* only means a life-tenure. Now, it seems to me pretty clear that these cases have never been put mainly or distinctly on the ground that the ghatwals hold for life only, and that they lapse on the decease of each ghatwal independent of other grounds, and the decision of 1858, quoted by petitioners, seems conclusive on the point that, so long as the service is required, these tenures cannot be resumed. I also think that there can be no doubt whatever that the proper and correct meaning of the word "*istemraree*" is "perpetual." The decision of 1853, page 654, on which the petitioners rely, says that in "lexicography" that is the meaning, so does Wilson's Glossary put forward by petitioners. Still, however clear the meaning of the word, and however strong my own opinion that, in the ordinary transactions of the country, the term *istemraree* is understood to mean *perpetual for ever*, and not for life only, it might have required consideration, if it had been shown to be the settled law of the Courts, that the term *istemraree* is held to be as an artificial and customary, as distinguished from its lexicographical, meaning, and so to import a life-tenure only, and not a perpetual tenure. Now, the whole that is to be said on this point seems to be contained in the *resumé* in the judgment of 1853 (Mussamut Ameeroonissa, appellant) relied on by petitioners. From this it appears that there had been two decisions in which "*istemraree mookurruree*" grants had been set aside by a majority as not hereditary; and another case in which the Judges unanimously held the other way, considering that the intent of the parties was to create by the disputed words a perpetual hereditary holding. It was also noted that, in the Regulations of 1793 and 1815, the words were taken to import perpetuity for ever. The result was that, in 1853, the Judges did not think it necessary to decide that the words always meant either "perpetual for ever" or "for life" only, but deemed it most proper to look to the true intent and meaning of the parties as shown both by their acts as well as their writings, and the case was decided on that evidence. I should probably be by no means disposed to dissent from such a view, and if we had decided this case on the ground that, *istemraree* meaning perpetual, no evidence to show that the parties did not use it in that sense was to be admitted, I should on the decision of 1853 have admitted a review. But we by no means held anything of the kind. We simply remarked on the use of the word *istemraree* as among other things tending to show the *status* of the ghatwals in the last century; and we translated the word "perpetual" which a reference to any Dictionary shows to be the correct translation. Richardson gives "*istemraree* (from *Marra*) proceeding, going on, persevering, persisting, being rendered perpetual (rent)," and "*istemraree* perpetual"

I dismiss the petition.

The 16th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Sale by Guardian of Minor—Necessity—Bona fides.

Special Appeals from a decision passed by the Judge of Sarun, dated the 10th July 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 3rd May 1864.

Case No. 2977 of 1865.

Sheo Pershad Ram (Plaintiff), *Appellant,*

versus

Thakoor Pershad and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Kishen Succa Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Case No. 2704 of 1865.

Gour Pershad Narain (one of the Defendants), *Appellant,*

versus

Sheo Pershad Ram and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Sale by the guardian of a minor set aside, although there was no finding of actual fraud on the part of the purchaser, but substantially a finding that he did not act *bonâ fide, i. e.*, that, if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at that belief.

THE guardian of three minors sold a portion of their ancestral lands. One of the minors, having attained his majority, instituted the suit out of which these appeals arise, on behalf of himself and of his surviving minor brother (the other minor having died), to cancel the sale. The suit is also brought for the recovery of mesne-profits from the purchaser, and for an account from the guardian.

The Lower Court found that, although the estate of the minors did not seem to have been substantially injured by the sale (the greater portion of the purchase-money having been re-invested in land by the guardian), still the sale was not warranted by law, being made without necessity. The sale was set aside, the purchaser was ordered to pay *wasilat*, and a certain sum was declared to be due by the guardian to the minors on the accounts between them.

The plaintiff appeals from the finding of the Lower Court as to the amount due to him from the guardian on taking the accounts. But we dismiss this appeal (No. 2977), as no question of law arises in it, the points decided being merely matters of fact.

The purchaser appeals (in appeal 2704) from the decree setting aside the sale to him, and ordering him to pay *wasilat*. He appeals on the ground that he acted *bonâ fide*, and that there is no finding of the Lower Court that he acted otherwise. We think the finding of the Lower Court—although it does not amount to a finding of fraud or collusion on the part of the purchaser—is substantially a declaration that he did not act *bonâ fide*, that is to say, that, if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at that belief. The Court has found that the sale was made ostensibly for the purpose of raising money for the minors' marriage, but not in fact for that purpose: that the money, when raised, was not applied towards their marriage, and that there were ample funds belonging to the estate from which the marriage expenses might and ought to have been paid. The Court declares such a sale unwarrantable, and orders it to be set aside. Under the circumstances, it seems clear that the purchaser cannot have made, and it is not shown that he did make, any real attempt to satisfy himself as to the necessity for the sale. He is, therefore, not a purchaser who is protected by the ruling of the Privy Council in the case of Hunooman Pershad Pandey (6 Moore's Indian Appeals, p. 393), and the sale is rightly set aside: and the purchaser must give up possession to the plaintiff. It follows almost as a necessary consequence that the purchaser must pay *wasilat* for the term during which he has been in possession.

In this suit, we cannot determine any further question which may arise as between the purchaser and the guardian who improperly sold to him, or as between the plaintiff and his minor brother and the guardian, with reference to the other lands in which a part of the money received from the purchaser (appellant) was invested. The various parties are possibly entitled to further relief as between each other; but that relief cannot be granted in this suit.

Both appeals are dismissed with costs.

The 16th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Suit against Magistrate.

Case No. 2297 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 20th June 1865, affirming a decision passed by the Moonsiff of that District, dated the 9th May 1863.

Hureehur Mookerjee (Plaintiff), *Appellant,*

versus

The Magistrate of Howrah on behalf of Government and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Greeja Sunkur Mojoomdar* for Appellant.

Baboos Kishen Kishore Ghose and *Tarucknath Dutt* for Respondents.

No suit will lie against a Magistrate acting in his judicial capacity and *bonâ fide* for having fined the plaintiff for illegally exacting tolls.

THIS is a suit brought against the Magistrate of Howrah and others. The cause of action stated is that the plaintiff is injured by an order passed by the Magistrate fining the plaintiff for illegally exacting tolls from natives passing through a certain *khal.* No cause of action whatever is alleged in the plaint to exist as against the other defendants.

Such a suit will not lie, the fine imposed by the Magistrate having been imposed by him acting in his judicial capacity and *bonâ fide.*

The appeal is dismissed with costs.

The 16th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Deed of Sale—Mortgage—Construction.

Case No. 2925 of 1865.

Special Appeal from a decision passed by Baboo Tarakant Bidyasagar, Principal Sudder Ameen of Jessore, dated the 31st July 1865, reversing a decision passed by Baboo Roy Modhoo Soodun Ghose, Sudder Ameen of that District, dated the 25th February 1864.

Kasheessuree Dossee (Plaintiff), *Appellant,*

versus

Wooma Churn Doss and others (Defendants), *Respondents.*

Baboo Anund Chunder Ghosal for Appellant.

Baboos Banee Madhub Banerjee and *Kaleé Prosunno Dutt* for Respondents.

A Court is not bound to consider a deed of sale to be a deed of absolute sale, and not take into consideration the acts and conduct of the parties in their own view and dealing in regard to the transaction. Thus, where the parties treat a transaction as a deed of conditional sale, the Court must not necessarily hold it to be a sale.

THE ground of special appeal in this case is that there has been an error in the Lower Appellate Court in the investigation of this case affecting the merits, as the Lower Appellate Court has not met the cogent reasons given by the Court of first instance for decreeing to Kasheessuree half of the property claimed under foreclosure-proceedings by Baboo Saroda Prosunno.

We are inclined to think this is so, for the following reasons. The production of the deed by which the property is said to have been conveyed by Bhobanee, the father of Woomesh and Nobeen, the late husband of Kasheessuree, to Radha Mohun, might be strong evidence to determine that this conveyance was *not* a deed of out-and-out sale, but only a conditional sale, although the deed was drawn as one of out-and-out sale. The late decision of the Full Bench, February 1866, did not decide that Courts of Justice must invariably consider a deed drawn as

such to be one of out-and-out sale, and not take into consideration the acts and conduct of the parties in their own view and dealing in regard to the transaction. If Radha Mohun treated the transaction as one of conditional sale, the Courts must not necessarily hold it to be a sale. There is no charge of fraud or collusion against Radha Mohun. If the conveyance to Radha Mohun was merely a conditional sale, the re-conveyance by deed or otherwise to Wooma Churn, even if in return for money solely paid by him, cannot prejudice the rights of his brother Nobeen, if Wooma Churn is proved to have been substantially acting as trustee for Nobeen in a joint family interest.

Wooma Churn says that he paid the consideration himself, and then realized the share of it due from his brother from his portion of the proceeds of this property. Kasheessuree says her husband paid his share, and it is quite immaterial which of these two allegations is considered true.

The Lower Appellate Court disbelieves both of these allegations, on the supposition of collusion between Kasheessuree and Wooma Churn; but, before it could be justified in assuming this, it should have taken into consideration that it is alleged there is proof of these two persons having among themselves quarrelled about this very property before 1259, from which year Kasheessuree admits she was out of possession. The conditional sale by Wooma Churn to Ram Dyal, the vendor of Baboo Saroda Prosunno, is long anterior to these disputes. It is true the Lower Appellate Court also finds that Kasheessuree had no possession before 1259, but it has done so without taking proper notice of the acts and proceedings noticed above.

Even if it be proved that the original conveyance by the father of Woomesh was a deed of out-and-out sale, as the property was acquired by Woomesh at a time in which he is perhaps admitted to have lived jointly with Nobeen as in a joint undivided Hindoo family, he could not merely, by the fact of the purchase, get the property exclusively for himself.

If the fact of joint partnership between the two brothers at that time be denied by Baboo Saroda Prosunno, he may be entitled to make an issue of the point. If the joint partnership be proved, it may then be for Saroda Prosunno to prove that the property when so acquired was the exclusive property of Wooma Churn.

It is not alleged by Baboo Saroda Prosunno that the mortgage was made by Wooma Churn for the joint benefit of himself and his brother Nobeen. Moreover, Saroda Prosunno Baboo may be allowed to prove any such fact before he can bind Kasheessuree by the acts of Wooma Churn with regard to a property in which the latter may not have exclusive rights.

While trying these points, the Court may, on the other hand, attach all due weight to the silence of Kasheessuree for a long period—a silence which, if not satisfactorily explained, may go to weaken her case.

We accordingly remand this case to the Lower Appellate Court to re-consider it with regard to the rights of Kasheessuree with reference to the above mentioned remarks.

The 16th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Joint Hindoo Family—Mortgage by Manager—Onus probandi.

Case No. 2939 of 1865.

Special Appeal from a decision passed by Baboo Koonj Lal Banerjee, Principal Sudder Ameen of the 24-Pergunnahs, dated the 9th August 1865, affirming a decision passed by Baboo Nilmonee Mitter, Moonsiff of that District, dated the 18th March 1865.

Shama Churn Chatterjee and others (Defendants), *Appellants,*

versus

Tarucknath Mookerjee (Plaintiff), *Respondent.*

Baboo Opendro Chunder Bose for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

A nephew, who is living with, and has always acted as agent of, his uncle, the manager of a joint family, cannot repudiate a mortgage by the uncle without proof or denial that the money so received by the uncle was not applied by him towards the expenses of the joint family.

THE whole of the property, half of which is claimed by the special appellant, was

acquired in the name of the uncle of the special appellant, by whom it was mortgaged to the special respondent, the mortgagee, who has foreclosed. It is proved that the special appellant knew of this conveyance by his uncle; that he was and is living with him, and has all along, since his majority, acted as an agent of his uncle, and has even deposed that he took money sent by his uncle to pay for the redemption of the property, merely because, while appointing pleaders for his uncle, he chose also to file a petition on his own behalf in the foreclosure-suit denying the right of his uncle to convey the half share of the special appellant. We cannot give a decree to the special appellant, in the absence of any proof or even denial, that the money originally received by the uncle, who is proved to have been the manager of the joint family, was not applied by him towards the expenses of the joint family. We accordingly reject the special appeal with costs.

The 16th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Special Appeal (against decision on co-defendant's appeal).

Cases Nos. 2926 and 2927 of 1865.

Special Appeals from a decision passed by Baboo Juggobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 29th June 1865, affirming a decision passed by Baboo Bishen Chunder Banerjee, Moonsiff of that District, dated the 30th December 1864.

Modhoo Soodun Roy (Defendant), *Appellant,*

versus

Shurmo Moyee Debee (Plaintiff), *Respondent.*

Baboo Anund Gopal Paleet for Appellant.

Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, Khetturnath Bose, and *Banee Madhub Banerjee* for Respondent.

A defendant cannot appeal specially against a decision passed on the appeal of his co-defendant, affirming the decision of the first Court which was not appealed against by the former.

In these two cases, the special appellant appeals against a decision passed by the Lower Appellate Court against the special appellant, landlord, who alone had appealed against a decision for possession and mesne-profits passed against the said landlord and his tenant, the special appellant, in a case instituted by the plaintiff against both of them.

By a petition, by way of cross-appeal, the special appellant wanted to raise an objection against the decision of the Court of first instance, on the ground that he had paid his rents to the landlord, and should not have been held liable for mesne-profits jointly with his landlord, and the Lower Appellate Court decided against him in his so-called cross-appeal.

It is clear that, on the appeal of the landlord, the special appellant was a merely formal party, and might not, without any prejudice to the appeal of his landlord, have been made a respondent. As co-respondent to such an appeal, he does not appear to us to have any right to raise any objections regarding his liability as distinguished from the liability of his landlord heard under Section 348, which affects only the principal and contesting respondent. When he did not appeal separately against the decree passed against him by the Court of first instance, he cannot be allowed to appeal to this Court on the ground of his so-called cross-appeal which raised questions of inter-pleadings between him and his landlord, his co-defendant.

Therefore, as we do not think that the special appellant is in a position to appeal to us against a decision passed on the appeal of his co-defendant, by which the orders of the Court of first instance not appealed against by the special appellant are upheld, we dismiss the special appeals in both the cases with costs.

The 28th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Re-sale of Putnee—Defaulter not to be Purchaser—Joint default.

Case No. 2827 of 1865.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 10th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 20th December 1864.

Gouree Komul Bhuttacharjee (Defendant), *Appellant,*

versus

Raj Kishen Nath and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Banee Madhub Banerjee* for Appellant.

Baboo Dwarkanath Mitter for Respondents.

Not merely recorded shareholders, but all actual defaulters (such as joint putneedars), are prohibited from being purchasers of a putnee.

In this case, plaintiff sued for possession of a certain putnee by setting aside a putnee sale, on the allegation that in fact a defaulter was the purchaser, and such purchase was illegal. It was further urged by plaintiff that certain other irregularities vitiated the sale.

Defendant denied that the purchase was for the defaulter, or that the alleged irregularities existed or vitiated the sale.

The first Court held that there was no material irregularity in notifying or conducting the sale, and that there was no purchase by a defaulter.

The first Court (the Principal Sudder Ameen's) accordingly dismissed plaintiff's suit.

The Judge on appeal by the plaintiff recorded the following remarks:—

"But the sale was an invalid one, owing "to the prescribed forms not having been "carried out, and to the fact of Judonath, "the purchaser, being a defaulter as admitted "by the Collector. Granting, however, that "the *second* sale was ordered on the ground "of non-payment of the purchase-money on "account of the *first* sale, it cannot be held "valid, as the purchase was made by one "Ram Lochun Koond, gomashtah of Kishen "Komul, ostensibly for the latter's brother, "one Gouree Komul. That the two were "own brothers, members of a joint undivided Hindoo family living in commensality, is not denied; nor the fact that one "of them, Kishen Komul, is a defaulter. "The Principal Sudder Ameen was of opinion that it was for plaintiff to show that "the property was bought for money from "the common fund of a joint undivided "family, but on this I differ; and it has "been held by the late Sudder Dewanny, in "the case of Doorga Goopto and others, "decided on the 14th June 1862, that the "purchase by a member of a joint Hindoo "family is one from the common fund, and "on behalf of the other members of that "family, unless there be proof to the contrary. "This being admitted, the purchaser at the "*second* sale must be considered a defaulter, "even though the share is not recorded in "the list of shares." The Judge, then, considering a defaulter to be prohibited from purchasing, and the prescribed processes not to have been duly carried out, held the putnee sale to be null and void, and decreed plaintiff's case accordingly.

Against this decision, defendant appeals specially, urging—

I. That the defaulter was not the purchaser; and

II. That there was no such irregularity in the processes and notices as to vitiate the sale.

We need not go into the *second* plea, if we agree with the Lower Appellate Court upon the *first*.

After hearing and considering the argument of Counsel for the special appellant, we concur in the conclusion arrived at by the Judge. The law does not provide that the recorded shareholder, and he only, shall be considered the defaulter, but that those who have been "actual" defaulters, that is, directly responsible either as joint or separate putneedars for the rents, shall not re-purchase, so that the zemindar may not again be exposed to liability of further default by, or have to deal with, those who have before defaulted. In this view, there is no doubt that Gouree Komul was one of the joint putneedars; and, therefore, that he or those who stand in his shoes would not by law be entitled to purchase at the auction-sale.

We accordingly dismiss this special appeal with costs.

The 20th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Damages (Principle of Assessing).

Case No. 370 of 1865.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 30th August 1865.

Bulobhuddur Singh and others (Defendants), *Appellants.*

versus

Mr. R. Solano (Plaintiff), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboos Juggadanund Mookerjee and *Dwarkanath Mitter* for Respondent.

In assessing damages caused by a wrongful act committed by the defendant, the injury sustained by the plaintiff should alone be considered, and not the punishment of the defendant.

WE see no reason to interfere in this case. The only real question raised is as to the amount of damages which have been awarded to the plaintiffs, and there is ample evidence to warrant the decree which has been given. The Judge is, no doubt, wrong in saying that the case is one "in which damages must be awarded as a punishment to the offenders concerned, and an example to others, as well as a compensation to the party injured." The injury sustained by the plaintiff could alone be legally taken into consideration in assessing the damages: and the punishment of the defendants ought to have been wholly excluded. But, although the Lower Court thus erred in its view as to the measure of damages, the amount decreed has, in fact, been fixed with reference to the actual injury proved. The amount awarded, though large, is not excessive; nor, indeed, is it as great as the amount of damage of which there is proof on the record. Under these circumstances, we should not be justified in disturbing the decree which has been passed, merely because the Court has laid down the law as to the measure of damages inaccurately.

On behalf of some of the appellants it is contended that there is no evidence against them. But we think they have very rightly been made liable for the acts of their sons and dependents who were acting for them, and wholly for their benefit.

The case seems to have been well tried by the Lower Court, and the whole proceedings have been presented to this Court in an unusually clear and accessible form.

We dismiss the appeal with costs.

The 20th February 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover,

Judges.

Erections on land (Pulling down of).

Case No. 2712 of 1865.

Special Appeal from a decision passed by the Judge of Dacca, dated the 9th August 1865, affirming a decision passed by the Moonsiff of that District, dated the 4th March 1865.

Kalee Pershad Dutt (one of the Defendants),
Appellant,

versus

Gouree Pershad Dutt and others (Plaintiffs),
Respondents.

Baboo Gopeenath Mookerjee for Appellant.
No one for Respondents.

Suit by *A* to recover possession of certain land, and to pull down straw huts erected thereon by *B*. *A* having proved his objection to *B*'s building on the land, on failure of *B* to show any permission from *A* to build the huts—HELD that *B* was rightly ordered to pull them down.

SPECIAL RESPONDENT in this case sued to recover possession of certain land, and to have a house, which had been erected on it by the special appellant, pulled down.

Both Lower Courts decreed this suit.

It is urged in special appeal that the Judge has thrown the *onus* on the wrong party, and decided against special appellant, on the ground that he ought to have proved a permission from the special respondent to build, whereas the special respondent should have been called upon to show that the building took place without his consent and without his knowledge.

We see no reason to interfere. The Judge has found as a fact that there had been disputes between the parties regarding their respective shares of the land; that the special respondent lost no time in objecting to the special appellant's building, but brought a suit against him immediately he knew of it; and that the houses themselves are mere straw huts, easily erected, and easily removed. We have been referred to a precedent of the late Sudder Court (28th August 1856, page 761, Jankee Singh and others, appellants) as supporting the special appellant's case; but there is, we observe, no analogy between the two suits. In that the special appellant had slept on his rights, and had taken no steps to prevent the erection of a large and expensive brick-building, and the Court, therefore, held that he could not, at the eleventh hour, sue to have the house demolished. In the present case, the special respondent took immediate steps to secure his rights, and the houses themselves are mere temporary structures.

We think, therefore, that the special respondent sufficiently proved his objection to the special appellant's building on the land, and that the latter not having been able to show any permission on the part of his co-sharer was rightly ordered to pull down his houses.

The appeal must be dismissed with costs.

The 21st February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 73 of Act VIII. of 1859—Orders to be passed on Interlocutory Petitions.

Case No. 310 of 1865.

Regular Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Backergunge, dated the 14th June 1865.

Koylashnath Roy and others (Defendants), *Appellants,*

versus

Nurendur Koomar Dutt Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Pearee Lal Roy, Kalee Mohun Doss, and *Chunder Mohun Ghose* for Appellants.

Baboo Dwarkanath Mitter for Respondents.

Suit laid at Rupees 14,757-8.

It is the duty of every Court to pass distinct orders upon all petitions and applications properly presented to it in connection with any suit pending before it.

When an application is made in due time by a person who has an interest in the result of the suit, praying to be added as a defendant under Section 73 of Act VIII. of 1859, the application ought to be granted.

THIS is a suit to obtain possession of certain lands, and to recover mesne-profits. The question at issue is, to which of two zemindaries the lands belong?

The defendants on the record, in their written statements, say that they and certain other persons, whom they name, are in possession, having distinct shares in the lands, and they submit that these other persons ought to be also made defendants. These other persons themselves moreover presented a petition to the Lower Court, stating that they were in possession of portions of the lands, and praying that they might be made parties to the suit, and be permitted to defend their interests. The Court, instead of passing any definite order on this petition, simply directed that it should remain with the record —a direction alike meaningless and useless. Why the Court should not have disposed of the petition either by granting or by refusing its prayer, we are at a loss to conceive. But there can be no doubt that, upon every such petition, it is the duty of the Court to which it is presented, to pass some distinct order, and that a Judge, who neglects to do so, neglects his duty none the less, because he directs the petition to be placed with the record. In the present instance, the conduct of the Lower Court has caused great expense and delay to the parties; for it is the opinion both of the appellants and of the respondents that the case cannot be fully or conclusively disposed of in the absence of the other shareholders who claim to be entitled to hold along with the appellants. It is clear that, so long as the claims of these third parties are left undisposed of, the present suit may be either wholly or partially infructuous in its results, as no decree made in it will be binding on them, and it will be open to them to litigate the matter afresh.

Under these circumstances, and with the consent of the vakeels, both of the appellants and of the respondents, we, without going into the merits of the appeal, remand the case to the Lower Court, and direct that the Court do make defendants in the suit all those who claim a share or interest in these lands, and who may be likely to be affected by the result of the suit. The Court will issue the necessary notices as provided by Section 73 of the Civil Procedure Code; and, having heard what the various claimants have to urge, and having considered any evidence which they may adduce, will adjudicate upon their claims distinctly. The Court will also make a distinct finding on the issue as to the mesne-profits, showing with precision to what extent it deems the several defendants to be liable for them.

The case is to be taken up out of its turn, and to be disposed of as soon as possible.

The 21st February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Deed of Sale—Subsequent Liens.

Case No. 345 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 20th July 1865.

Maharaja Muhessur Buksh Singh (Plaintiff), *Appellant,*

versus

Lalla Soomur Chand and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondents.

Suit laid at Rupees 6,169-1-8-2.

The delivery of a deed of sale to *A*, the vendor, after the making by the vendor of a fresh bond in respect of the same property in favor of *B*, will not render the deed inoperative, or subject *A* to fresh liens not within his knowledge, and not existing at the time of his purchase.

THE main facts out of which this appeal arises are, in reality, not in dispute, and are as follow:—

The plaintiff, the Maharaja Mohessur Singh, obtained a mortgage of Mouzah Hurpore, with certain other mouzahs, from Ram Prokash Singh, Raja of Buxar, as far back as the 8th of Kartick 1257. On the 19th of July 1863, the same plaintiff obtained a deed of sale of the above property from this Ram Prokash Singh, and the deed was duly registered on the 1st of August following. For some reason the deed of sale remained for some time with Ram Prokash, and was only delivered to the plaintiff on the 14th of May 1864.

In the meantime, the respondent in this appeal, Lalla Soomur Chand, had obtained a bond from Ram Prokash on the 15th of January 1864, and on that bond he obtained a decree on the 13th of July following, making the property now claimed by the plaintiff, or Mouzah Hurpore, liable for the debt. The bond in question is impugned as fraudulent and collusive by the plaintiff in the present action, but has been found to be genuine by the Lower Court. This matter, however, does not and need not enter into our consideration. The intervention of the plaintiff against the attachment of the mouzah by the defendant Lalla, in satisfaction of his bond, was rejected in the Miscellaneous Department on the 10th of March, and the plaintiff immediately afterwards brought this action. The vendor and borrower, Ram Prokash Singh, though made a defendant, never appeared in the Lower Court.

The Lower Court has now ruled that the plaintiff, by accepting the deed of sale after his mortgage, has made himself liable for all liens and encumbrances created on the property, and, further, that the defendant, now respondent, acquired his lien over the property at a time when the deed of sale in favor of the plaintiff lay dormant and inoperative.

It is on this point, and this only, that the appeal has been fully argued before us. We are of opinion that the decision of the Lower Court must be set aside as wrong in law.

We have perused the deed of sale by which Mouzah Hurpore, together with other valuable properties, is made over absolutely to the Maharaja, plaintiff; and we find in it no stipulation whatever that the deed was to remain inoperative until any other circumstances or contingencies should arise. The said deed was regularly registered, and the sale completed on the 1st of August 1863. It states that the mortgagor had got back other properties not included in the deed of sale, though previously mortgaged. It specifically recites that the plaintiff had actually liquidated considerable sums due to other debtors by the vendor, and had handed over to him receipts for the same. And the Maharaja having thus fulfilled a large part of the contract, and having taken on himself all the then existing liabilities of the debtor, as specified, there is no reason whatever why the sale should not be held complete and absolute from the day when the deed was registered in August 1863.

That the deed may not have been finally delivered to the plaintiff until May 1864, after the creation, as it happened, of a fresh bond in favor of the respondent, will not render it inoperative, nor will it subject the plaintiff to fresh liens not within his knowledge, and not existent at the time of his purchase.

Mr. Allan, we observe, has endeavoured before us to raise a contention as to the identity of the mouzah now in dispute, the plaintiff claiming the same as Huripore, and the defendant calling it "Hurpore." No such contention was raised in the Lower Court, where the defendant only incidentally stated that there were two mouzahs of the name of Hurpore, over one of which he held a lien. No regular issue was drawn up on this point, and the case was allowed to go to trial without any question as to the identity of the mouzah claimed by both parties. We, therefore, overrule this objection altogether. The Principal Sudder Ameen in the intervention case of the 10th of March treated the mouzah as identical, and remarked on the Sudder Jumma of 247 rupees.

As regards the law point raised, we are clear, as already intimated, that the decision should have been in favor of the plaintiff, and, this being so, it is wholly unnecessary for us to consider the genuineness or good faith of the bond on which the defendant relies, for allowing it to be good and valid, it can give the defendant Lalla Soomur Chund no lien on property which, before the creation of the said bond, had absolutely passed to the plaintiff.

We reverse the decision of the Lower Court, and decree the appeal with all costs.

The 21st February 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Witnesses—Power of Court to refuse Summonses for.

Case No. 380 of 1865.

Regular Appeal from a decision passed by Baboo Nuruttum Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 17th August 1865.

Gora Chand Ghose and others (Plaintiffs), *Appellants,*

versus

Raj Koomar Doss and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Moonshee Ameer Ali Khan Bahadoor and *Baboo Unnoda Pershad Banerjee* for Respondents.

Although a party to a suit may not be entitled as of right to ask for a postponement to enable him to procure the attendance of his witnesses, yet, when the trial of the case is delayed, the Court has no discretion to refuse an application for summonses for witnesses at any time before the case is tried.

THIS is a suit upon a bond. The case was originally appointed for final disposal on the 30th March without any previous settlement of issues. On the 28th of March, the defendant filed a written statement, totally denying the execution of the bond, and entering into various particulars. On the same day the plaintiff applied for summonses for certain witnesses. On the 30th March, the Principal Sudder Ameen passed this order: "The case has been appointed "for final disposal on this day; and, although "on account of press of business it cannot "be tried, still I do not deem it proper to "comply with the application for summoning "witnesses, and the application is refused."

In fact, the Court did not proceed to hear the evidence till the month of June following. The witnesses in attendance were examined on various dates from the 21st to the 28th June, but plaintiff's application for summoning witnesses filed by him on the 28th March was never complied with; nor was the petition to send for certain papers from the Collectorate for the purpose of testing the handwriting of certain witnesses granted. The case, in fact, was not decided till the 17th of August.

We think that the Court was entirely wrong in refusing to issue summonses for the witnesses, and also in refusing to send for the papers asked for. It is quite clear that, under Section 149 of the Code of Civil Procedure, a party is entitled to obtain summonses for witnesses at any time before the case is tried, although he may not be entitled to ask for a postponement, as of right, to enable him to procure the attendance of his witnesses. The parties, and not the Judge, may properly decide on what evidence they rely for the support of their case, and it is not for the Judge to exercise any discretion in the matter by refusing to summon witnesses.

In the present suit, the conduct of the Court was particularly unjustifiable, as in fact very great and irregular delay seems to have occurred in the proceedings of the Court itself, so much so that the evidence of the witnesses in attendance was not taken till three months subsequent to the date when the plaintiff applied for summonses, and the case not decided till five months subsequent to that date.

The case is remanded for re-trial to give both parties an opportunity of summoning their witnesses, and producing the papers necessary for the support of their respective cases.

The 22nd February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Hindoo Widow—Maintenance.

Case No. 3006 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 4th August 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 19th November 1864.

Bhyrub Chunder Ghose and another (Defendants), *Appellants,*

versus

Nubo Chunder Gooho and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

A Hindoo widow's right to maintenance out of lands which belonged to her husband, and have devolved on

her son; is a purely personal right which cannot be sold in execution of a decree or otherwise transferred.

It is contended in this case that the right of maintenance which a Hindoo widow has out of lands which belonged to her husband, and have devolved on her son, may be sold in execution of a decree against her.

We know of no authority to support this contention, and are of opinion that, although the widow may be entitled to maintenance out of the lands in question, she has no "right, title, or interest" in the lands which can be sold in execution of the decree against her. Her right to maintenance is a purely personal right, and cannot be transferred to another.

The appeal is dismissed with costs.

The 26th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Suit for contribution of Government Revenue—Butwara papers—Principle of Distribution—Prior and subsequent purchasers of shares.

Case No. 2578 of 1864.

Special Appeal from a decision passed by Mr. H. B. Lawford, Additional Judge of Jessore, dated the 11th July 1864, reversing a decision passed by Mr. J. Weston, Principal Sudder Ameen of that District, dated the 7th August 1862.

Poorno Chunder Gangooly and others (Plaintiffs), *Appellants,*

versus

Kishen Chunder Ghose and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellants.

Baboos Banee Madhub Banerjee and *Unnoda Pershad Banerjee* for Respondents.

In a suit for contribution of Government revenue, the previous paid and recognized quotas must be taken as the proper data for distribution until a regular *butwara* is made by the Collector and duly sanctioned under Regulation XIX., 1814, as between the co-sharers of the original estate. Without a legal *butwara*, mere priority of purchase of a portion of the estate cannot entitle the purchaser to look to subsequent purchasers of the remainder for the Government revenue payable for the estate in excess of the sums defined for them by their own respective deeds of sale.

In this case, the plaintiff sued to recover from his co-sharers Government revenue alleged to have been paid by him in excess of his share. He had purchased some portion of the estate from its original proprietor, and in the deed of sale he was stated to be liable to pay as Government revenue a sum mentioned in it. Others also subsequently purchased portions of the remaining property with specified liabilities for the several shares of the *sudder jumma.* Ultimately the proprietor mortgaged under a conditional sale the remaining portion of the estate with a specified liability for the remainder of the *sudder jumma.*

The mortgaged property was left with the heir of the original proprietor on proof of the transaction being only a conditional sale, and of the debts being discharged from the usufruct. Meanwhile, the rights and interests of the heir in the remaining property being sold in execution of decree were purchased by Muddun Mohun Roy (defendant's vendor), and from him passed to the said defendant.

It appears that Tweedie, one of the earliest purchasers from the original proprietor, applied for separation of his lands by a formal *butwara* through the Collector, and succeeded in getting his purchased lands legally partitioned, and so constituted into a separate estate.

When the Collector thus fixed the share of the revenue payable for Tweedie's newly-separated estate, he did so on the report of an Ameen, and at a sum considerably lower than that stated in the deed of sale under which the lands were originally purchased by Tweedie.

The Collector did this under the *butwara* law, which provides that the separate estate shall bear only such portion of the original revenue as with reference to the proportion of its assets in land appears fair and proper.

But this *butwara* at the same time left the remaining lands the joint property of the other sharers as before, *i. e.*, exclusive of Tweedie's separated share. Thus, the difference between the revenue paid *before* and that made payable *after* the *butwara* of Tweedie's portion became, as far as Government was concerned, a joint liability of the holders of the then remaining estate.

The Ameen, in order to find out the sum of revenue properly payable by Tweedie for his separate estate, had occasion to make calculations of the assets of all the shares, and to distribute the *sudder jumma* which remained, in corresponding portions between the remaining shares. By this distribution,

the share of the Government revenue payable by the plaintiff was rated in this estimate at the sum he had agreed to pay on that account by his deed of purchase; further, a large addition was by it made to the revenue payable by Muddun Mohun, defendant, and some reduction made from the liabilities of nearly all the other remaining shareholders.

The plaintiff in this present action asks for a decree against his other co-sharers of the joint mehal for the excess paid by him over and above his share from 1261 (which is subsequent to the *butwara*) up to 1267, B. S., and has relied on the *butwara* papers to support his claim.

The Court of first instance gave a decree to the plaintiff against the several defendants according to their proportionate amounts of *jumma* in the *butwara* papers.

Muddun Mohun, defendant, objected to these *butwara* papers being taken as the proper data, inasmuch as the *butwara* affected only Tweedie's separated estate, and had not been sanctioned or adopted by any public officer as to the joint mehal of the co-sharers, and therefore were not binding upon any party in any way. This was the ground of his appeal to the Lower Appellate Court, and that Court admitted this objection.

The plaintiff has, therefore, appealed to this Court. Here, too, plaintiff relies upon these *butwara* papers. It is, however, our clear and decided opinion that the *butwara* proceedings were final and binding only as to the separated and distinct estate of Tweedie's share, and the fixing of its revenue as on that new mehal on the rent-roll. The *butwara* papers are of no further avail, and in this case are no evidence on which to give a verdict for plaintiff. Indeed, this, as a suit for contribution, depends upon the proof of what each co-sharer had been paying as Government revenue, and for which each had been considered by all the shareholders to be liable before the incomplete *butwara*. In other words, a suit for the adjustment of the liability of the Government revenue, in excess of these previous payments fixed by the original proprietor, cannot succeed, either if stated to be one under Section 12 of Act XI. of 1859, or any other revenue law, until a regular *butwara* shall have been made by the Collector, and duly sanctioned under Regulation XIX. of 1814, as between the co-sharers of the old estate. The liability of each for Government revenue must remain till then as it was before the separation of the share of Tweedie and its creation into a new mehal.

Had we been trying a case in which we had to find what share of the Government revenue should for the first time be fixed for the different shares by an equal distribution of the respective amounts according to the respective assets of the lands of each share, the items in the *butwara* papers might have been received as proof of the extent of the assets then supposed to be those of each co-sharer. But in a case, as this is, for contribution, the previous paid and recognised quotas must be taken as the proper data, and not the incomplete *butwara* papers.

The special appellant's pleader next pleads that Muddun Mohun, defendant, is not, as it were, a separate new purchaser, inasmuch as *he* represents the *original proprietor;* and that, even if Muddun Mohun be considered to be only as others, *viz.*, an ordinary purchaser from the original proprietor, still the plaintiff, as having purchased previous to the others, is entitled to plead that, as between him and the original proprietor, the latter, and all those who may have separately derived from him after plaintiff, should be held jointly liable to plaintiff on the ground that these subsequent conveyances are not binding upon plaintiff, and should not therefore be considered.

With reference to this plea, we still think plaintiff's case is bad. Admitting that by no subsequent act of the plaintiff's vendor could plaintiff be made to pay more as Government revenue than he had agreed to pay under his deed of purchase, still he cannot, in our opinion, successfully contend that the subsequent sales by his vendor, with allotments of certain shares of the remaining Government revenue, cannot affect his case. We hold that the original proprietor was entitled to alienate his remaining lands, and his subsequent acts are as much binding upon the plaintiff as his previous acts on plaintiff's behalf. And, further, we hold that the plaintiff's mere priority of purchase cannot enable him to look to any of the subsequent purchasers to pay anything more than the share of the revenue defined for them by their own respective deeds of sale.

There might have possibly been a difference if plaintiff's case had been the extreme one that, in order to defraud plaintiff, and prevent his realizing any portion of the money he had paid for Government revenue

over and above his liability, parts of the estate had been fraudulently conveyed to others with such *disproportionate* shares of the *sudder jumma* that plaintiff could *not* realize *any* sums found due to him from any of the shareholders by the sale of the lands assigned to him or otherwise. But this is not so, nor stated to be so. Again, if special appellant had proved that the different allotments did *not* make up the *total* sum of the *entire revenue*, there might have been more strength in his case, but neither is this in plaintiff's case.

We may further observe that plaintiff's pleader's latest argument before us now is that Muddun Mohun, defendant, *is not* a purchaser from the proprietor; but this is, in fact, incorrect; and, even if it were correct, the case would not, we think, be in any wise different. The plaintiff, in fact, has no right to a *joint* decree against *all co-sharers*, who may have acquired rights subsequent to his own purchase, *so long as they can show what portion of the revenue was fixed as the defined quotas by their respective purchases, and that they have been paying such quotas since as their recognised respective liabilities.* Thus, plaintiff cannot ask for a decree for his entire demand, either singly or jointly with the subsequent purchaser against the original proprietor, on the ground that he (the plaintiff) is not affected by the subsequent proceedings of his vendor.

Further, plaintiff did not appeal against the order of the first Court, which did not give him a joint decree; he cannot, therefore, now raise that question.

As regards the difference between the sum that was formerly payable by Tweedie before *his* sanctioned *butwara*, and that far lesser sum fixed as the Government revenue of his separated new estate, it is clear that this difference must be rateably distributed over all the shareholders of the remaining *joint* estate, including the plaintiff, in proportion to their former fixed, defined, and acccepted liabilities.

If, in order to protect his interests in the joint estate, the defendant has been compelled to pay more than he is in the above view legally bound to pay, he may have a right to sue others for a contribution, and to have a decree against those who may not have paid their due according to the former arrangements between themselves; but no decree could pass on the basis of the *incomplete butwara* proceedings of the joint estate.

Muddun Mohun *alone* appealed to the Lower Appellate Court, and succeeded in establishing that he had paid what he had originally to pay by the deed of conditional sale and purchase, *as well as his proportionate share of the difference imposed upon the joint estate by the separation of Mr. Tweedie's share.* The Judge below has made an immaterial mistake by overlooking the propriety of the payment of this additional imposition by all the proprietors of the joint estate, and it is owing to this that the 40 rupees paid by the defendant, Muddun Mohun, have been considered by the Judge to represent in Co.'s rupees the 35 rupees and a fraction mentioned in the defendant's deed. But the fact is that that sum has merely (for the sake of squaring the calculation) been assumed to be in sicca rupees. The 35 rupees and odd annas were, however, Co.'s rupees, and this sum really became 40 rupees, *owing to the addition of* the proportional share of the further sum to be assessed, after the separation of the share of Tweedie into a new estate on a *diminished jumma* in respect to his previously allotted *quota* of *jumma* under his purchase.

Thus, the Judge was quite right in our opinion in holding that, as this defendant had paid all he had to pay under his liability defined under his purchase, he was not liable to pay anything to the plaintiff, even if the latter had paid Government revenue to a larger amount than what he was bound to pay.

We cannot remand this case, as the Lower Appellate Court in this case could only try matters arising out of the appeal of Muddun Mohun (*vide* decision of the late Sudder Court, dated 22nd April 1857, in the case 260 of 1856, reported in pages 649, 650). Under these precedents, it would be illegal for the Lower Appellate Court to try the liabilities of the *other* defendants as to which the special appellant had not appealed. Further, this Court here cannot try the liabilities of the *other* defendants as we cannot come to findings of *facts* in *special appeal;* and, even if a finding of facts by us were not involved, it is clear that this appeal is against the decision of the Lower Appellate Court passed only against the defendant, Muddun Mohun, and the mere fact of the other defendants being respondents in special appeal here will not alter their real position, *i. e.*, as parties in respect to whom there was in fact no appeal.

Under all these circumstances, we dismiss this special appeal with costs.

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The 24th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Money-decree (Procedure by holder of—Against bona fide possessor).

Case No. 2743 of 1865.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th June 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th July 1864.

Shaikh Mowla Buksh (Plaintiff), *Appellant.*

versus

Bhyrab Doss and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Kalee Kishen Sein for Respondents.

A party, who contents himself with a money-decree, must proceed by a regular action to establish his right before he can disturb the possession of a third party, who holds possession under a *bonâ fide* title.

We think that the Judge's view of the law in this case is incorrect.

The Judge states: "It is urged that the "late Sudder Court, in the case of the 22nd "May 1862, ruled that, when a party to whom "property was thus pledged contented him-"self with a decree for money, and did not "pray that his decree should be satisfied "from the pledged property, he must be "held to have waived his lien. This deci-"sion, however, is not that of a Full Bench, "and the High Court *has subsequently* "*ruled otherwise.*"

But the Judge here quotes generally and not specifically the precedents on which he relies as overruling that specifically cited against his view.

We have now to refer him to the Full Bench decision, dated 14th December 1864 (1 Weekly Reporter, p. 315), and request him to follow that decision.

This case must be remanded, in order that it may be re-decided on the principle of the decision above cited, *viz.*, that a party who contents himself with a money-decree must proceed by a regular action for the establishment of his right, before he can disturb the possession of a third party, who holds possession under a *bonâ fide* title.

Remand accordingly.

The 26th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation Sixty years—Suit by Government to establish title to Julkur—Onus probandi (When limitation is pleaded).

Case No. 350 of 1865.

Regular Appeal from a decision passed by Mr. S. DaCosta, Officiating Principal Sudder Ameen of Rungpore, dated the 24th August 1865.

The Collector of Rungpore, on behalf of Government (Plaintiff), *Appellant,*

versus

Prosunno Coomar Tagore (Defendant), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. G. C. Paul and *Baboos Sreenath Doss, Dwarkanath Mitter,* and *Kishen Dyal Roy* for Respondent.

A suit by Government to establish its right and title to a *julkur* is barred by limitation under Section 2, Regulation II., 1805, if brought after the expiration of 60 years after adverse possession against Government.

The *onus* is on a plaintiff to remove the bar of limitation pleaded by a defendant, by showing that he (the plaintiff) had possession within the period prescribed by law.

The previous litigation in this case is fully set forth in the paper book with the record in this case.

The Government, considering itself entitled to the *julkur* of large navigable rivers, recently took possession summarily by its Revenue Officers of the *julkur* of the defendants, Baboo Prosunno Coomar Tagore and others, in the Brahmapootra, Konie, and other rivers, before 1860. The parties thus ejected sued on the 7th July 1860 for recovery of possession, on the ground that they could not legally be summarily ejected from their *julkur*, and that the *julkur* could not pass from their legal possession into the

hands of Government without a decree of Court in favor of Government after a regular suit for the establishment of its right and title. These suits of the present defendants (then plaintiffs) were successful (*vide* decisions of this Court, 23rd September 1863, 9th February 1864, and 27th May 1864). The consequence is that the Government has now brought a regular suit to establish its right and title to the *julkur* in dispute, and to have possession thereof decreed to it. This suit the Principal Sudder Ameen has dismissed. He has held as follows, *viz.*: "That the settlement-papers exhibited by plaintiff, *viz.*, the kubooleut (copy No. 4) and *wasil-bakee* papers (Nos. 1 and 2) show that the *julkur* of the river Brahmapootra *alias* Konie Nuddee is not included in the settlement of Pergunnah Pathadahs and its *kismut*; while the defendant having failed to file any settlement-paper to show the affirmative, it is definitely proved that this *julkur* is not in fact included in the settlement of the said Pergunnah. But I opine that this circumstance will not in the first place tend to dispossess the defendant *when he has had possession for more than sixty years.*" The Principal Sudder Ameen then records: "Now, it is seen that the defendant's numerous documentary and oral evidence clearly and satisfactorily prove the *defendant's possession and enjoyment of the fishery for the past sixty years and more. The plaintiff has no evidence to show the possession of Government for any period. Had Government had possession, the plaintiff* would have been able to produce leases or *kubooleuts* of parties to whom the *ijara* of the *julkur* might have been given from time to time, and would have cited these lessees as witnesses to produce their pottahs and receipts given them on payments of rents."

The Principal Sudder Ameen next states: "The verbal arguments just now advanced by the Government pleader tend to show that the *Government never had possession of the fishery within the past sixty years,* but that the defendant's and his ancestor's long-continued possession during that term would oblige Government to lease the fishery to defendant. All the above I consider fully adequate to establish the defendant's right of occupancy under the above law, and justice and equity, and in disqualification of the plaintiff's claim. *which is at once barred by the Law of Limitation.*"

Lastly, the Principal Sudder Ameen states: "The right of Government to assess the *julkur* in question, and the rate of rent to which Government may be entitled, are irrelevant matters in this suit, and cannot, therefore, be disposed of here; they can only be decided in distinct suits brought under the law, to wit, Regulation II., 1819, Section 30. or Section 28, Act X. of 1859, as the case may be, and under the spirit and meaning of Section 13, Act X. of 1859."

The Government appeals from this decision, urging—

I. That the suit is not barred by the Law of Limitation, as the cause of action only arose on the 6th July 1860, when the defendant first sued Government, after Government had summarily ejected defendant. Further, that the earliest documents evidencing defendant's possession are the quinquennial registers of 1212 and 1227 B.S.

II. That the Principal Sudder Ameen has found as a fact on evidence, which is in no way rebutted, that the *julkur* in suit formed no part of the assets of the Permanent Settlement of plaintiff's estate.

III. That the Principal Sudder Ameen is wrong in referring the Government to a remedy under Regulation II. of 1819, and under other laws, as there may be no remedy under those laws.

After hearing most fully the Counsel for appellant, we are clearly of opinion that the appellant (the Government) is barred by the Law of Limitation contained in Section 2 of Regulation II. of 1805. When Government as plaintiff brought this suit, defendant pleaded that plaintiff was barred by the law cited. That law gives Government, as representing the rights of the Sovereign, a period of sixty years within which to sue for its rights to public revenue, such, for instance, as these are said to be. The law gives no extension of that period of sixty years. It allows no exception so as to fix the period as that when first the attention of Government might be called to its rights. Neither that law nor any other laws provide remedies for the Government or others who sleep over or do not give their attention to their own rights in due time, nor does it fix limitation from the date of a suit by a party considering himself illegally ejected by Government from long previous possession.

It is admitted that Government is not in a position to prove its own possession, before it recently summarily ejected defend-

ants. It is pressed upon us that it is for defendant to prove that he has been in adverse possession for 60 years before he can succeed in his plea of the plaintiff being barred by limitation. We do not concur in this view. When a defendant pleads in bar that plaintiff cannot be heard in a Court under the Law of Limitation, because plaintiff has not been in possession within the period prescribed by law, it is for plaintiff to remove that bar by showing possession within such period as the law prescribes. The Government in this case does not show or attempt to show its possession in this way.

Baboo Kishen Kishore Ghose has, it is true, pressed upon us that the cause of action arose only on the 6th July 1860, when defendants, after their summary ejectment, first sued Government. But we think that if we were to admit such a plea, it would be equivalent to holding that the plea of limitation might always be successfully pleaded by a party committing an act of illegal ejectment, and then pleading that it is only when such illegally ejected party sues for his remedy for the loss of his long previous possession, that the cause of action arises, and that all previous adverse possession of a defendant ought to go for nothing; and we are not prepared to hold this at all.

This suit then, having been brought too late, *viz.*, beyond sixty years after adverse possession against Government by defendants, is barred by the Law of Limitation.

In this view we are not perhaps called upon to go further or to record our opinion upon the plea urged upon us by the Government pleader that no documents before 1212 B. S. showed defendants' possession.

The Government pleader was more than once invited to read the documents of date anterior to 1212 B. S., but he did not do so. We, however, notwithstanding this, and in order not to leave his plea unanswered, have considered those papers, and we think they quite sufficiently indicate the *julkur* in suit (as contended for by defendant in paras. III. and IV. of his cross-appeal) to have been in defendants' possession more than sixty years before their illegal ejectment by Government.

Thus, looking to the rule of law that it is on plaintiff to remove the bar of limitation pleaded by a defendant by showing that such plaintiff has had possession within the period prescribed by law, and holding on the whole evidence that there has been shown no such possession in Government for sixty years before this litigation, as required by Regulation II. of 1805 in cases like this, and considering further that defendant has shown his possession from before the Permanent Settlement, that is, for more than sixty years, till recently illegally ejected by Government, we record our judgment on this appeal, that the conclusion come to by the Principal Sudder Ameen, *viz.*, that plaintiff is barred by limitation, is a correct conclusion.

We do not, however, give our concurrence to any other opinions or views stated in other parts of the Principal Sudder Ameen's judgment, as it is not necessary to consider them under the circumstances above stated.

This appeal of the plaintiff is, therefore, dismissed with costs.

The 26th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale of fraction of share of Estate—Rights of Purchasers—Reservation of favorable rates to proprietors—Jurisdiction (of Civil Court)—Right to possession.

Case No. 2745 of 1865.

Special Appeal from a decision passed by Mr. E. G. Birch, Judge of Shahabad, dated the 15th August 1865, affirming a decision of Moulvy Irradut Ali Khan, Principal Sudder Ameen of that District, dated the 21st February 1865.

Chytun Singh and others (Defendants), *Appellants,*

versus

Kayessur Koonwur (Plaintiff) and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Appellants.

Mr. H. C. Marinden and *Baboos Juggadanund Mookerjee, Kalee Mohun Doss,* and *Bhowanee Churn Dutt* for Respondents.

In the absence of any reservation or restriction, the purchaser of a fraction of a share of an estate acquires by his sale an undoubted right either to cultivate a proportionate share of the lands cultivated by his vendors on the same conditions as to favorable rents as

those under which they as proprietors cultivated it, or to claim his share of the rents of these lands just as he would from any ryot of the estate, but without any other sum as mesne-profits.

A claim to obtain a declaration of title to a share of the proper assessment of such fraction is a claim to a right to possession, and is only cognizable by a Civil Court.

THE special appellants, proprietors of 12 annas of an estate, sold a fraction (2¼ annas) of their property to the special respondent.

Before the sale, these vendors as well as the holders of the 4 annas respectively cultivated themselves certain lands in different parcels, for which, in their mutual accounts, they allowed to each other one rupee per beegah as rent.

This right, the special appellants admit, they enjoyed in virtue of their proprietary right.

By the sale to the special respondent, he acquired an undoubted right, either to cultivate a proportionate share of the lands cultivated by his vendors on the same condition that they cultivated it, or, if it were more convenient for all parties, to claim his share of the rents of these lands just as he would from any other ryot of the estate.

His present action is in reality for the latter right. The defendants contend that he can receive from them only his share of the rents at one rupee per beegah.

This would have been a good defence if the respondent had purchased any share of the estate from the proprietors of the remaining 4 annas as to whom arrangements to that effect had been mutually come to, just as it would be a good answer against the special respondent by the holders of the said 4 annas with regard to those lands which were cultivated by them.

But we are clearly of opinion that the plaintiff is not entitled to claim for himself a separate allotment of lands out of the estate sold to defendants for his own cultivation. If the principle of such an allotment were admitted, the extent to which it might be legitimately carried would be that there must be an entire distribution under the several sales by the different proprietors (and even by subsequent purchasers from them of fractional shares out of their respective portions) of the greatest part of the lands of the estate to these several proprietors at a rate of one rupee per beegah: thus almost obliterating the real and substantial proprietary rights of those who purchased such rights. Nor is any such scheme practicable, as the lands of the estate ordinarily are to be found already leased out, and not open to such treatment. Therefore, when the special appellant sold, he might have inserted a condition in the deed of sale to limit the rights of the purchaser so as to restrict him from receiving for these lands, even from them (his own vendors), no more than the fractional share of the rent of one rupee per beegah. But he did not do so, and yet he asks us to treat the transaction just as if there were such a definite condition. Therefore, as the sale to defendant, respondent, has been made without any such reservation, the fractional shares of the special rights have also passed to the purchaser, and he can legally claim to exercise his right in any one of the two forms mentioned above.

We hold, however, that the plaintiff has no right to receive from his vendor proportionate mesne-profits according to any calculation of what the special appellants may have realized by their cultivation. He is only entitled to his *share of the proper rents* of the lands according to the prevailing rates. The claim of the special respondent, being one which could not be tried by a Revenue Court, was rightly brought in a Civil Court, and the possession he asked in this suit was in fact merely a claim to obtain a declaration of his title to his share of the proper assessment of these lands, and in such form a right of possession.

We accordingly dismiss the special appeal of the appellants with costs, but modify the order of the Lower Appellate Court so far as to limit the claim of the plaintiff to his share of the fair and equitable rents of the lands in dispute, and to declare that he is not entitled to any other sum as *mesne-profits.* The rents due for the period now sued for are to be fixed in execution of decree, and may for the future be demanded in a Revenue Court as in ordinary rents between landlord and tenant.

The 27th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Construction of Deed of Gift—Putra poutradi—Angoja Santan—Widow.

Case No. 3427 of 1865.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 30th August 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated 31st May 1865.

Bugola Moyee (Defendant), *Appellant*,

versus

Bhowanee Churn Paul (Plaintiff), *Respondent*.

Baboos Unnoda Pershad Banerjee and *Bhowanee Churn Dutt* for Appellant.

Baboos Upprokash Chunder Mookerjee and *Hem Chunder Banerjee* for Respondent.

Construction of a deed of gift of a share of a village created in favor of a nephew and his sons and grandsons, the terms used being not only "*putra poutradi*" but "*angoja santan*." HELD that the language of the deed was very special, and limited the gift to issue male of the donee, and did not include his widow as his heir on failure of male issue.

Seton-Karr, J.—IN this case, both the Lower Courts have come to the same conclusion as to the interpretation of a deed of gift of a share in a certain village created by the plaintiff in favor of Gobind Mohun, the sister's son of the donor, plaintiff.

The deed recites that the nephew of the donor had been long living in his family, and that it was imperative on the donor to make some provision for his maintenance. In consequence, the village in question was made over to Gobind Mohun and to his heirs for ever.

Gobind Mohun has lately demised without heirs male, and the object of the present suit is to recover the village in question, which is a talook paying revenue to Government, from the widow.

Both Courts have in effect decided that the gift is void by failure of heirs; that the widow has no title to succeed; and that the village reverts to the plaintiff. The first Court finds in addition that the gift is annulled by failure to observe the conditions prescribed.

It is necessary to scan closely the wording and intent of the deed.

The deed says: "Do you pay the Government revenue, and continue to enjoy the "remainder in the succession of your sons "and grandsons (*putra poutradi krame*). "The only condition imposed on you is this, "that you and the sons born of your body "(*angoja santan*), and their sons and sons' "sons, shall continue to reside in this my own "village. No other person (*patra*) shall enjoy the same. You must never alienate this "village with the desire and object of living "anywhere else."

A further condition is imposed a little below where the donor requires a yearly sum of 6 rupees to be paid to him by the donee for the expenses of the *Pooja*; in default of payment, the sum due was to be realized by legal process.

The question for consideration is, *first*, whether the above gift includes the widow as heir of her husband, the donee, or whether it is open to the donor to resume the village on the death of his nephew without sons, and to deprive the widow of the same.

The pleader for the widow, special appellant, argues that the words "*putra poutradi*" &c., and "*angoja santan*" are not meant to exclude the widow who, under Hindoo Law, would succeed to a life-interest in her husband's estate, and that this construction would prevail in regard to wills, deeds of gift, and other documents wherever similar expressions are used. He also urges that the conditions of the deed have not in reality been violated, and that the widow is competent to fulfil them equally with sons born of the body.

The pleader for the plaintiff, respondent, dwells, on the other hand, on the expressed intention of the donor and on his distinct limitation, over and above the words *putra poutradi*, &c., of the gift to the male issue of the body, which issue has failed.

On the whole, I am of opinion that the Lower Courts have, in this instance, decided correctly. The words "*angoja santan*" ought to be construed literally, and should limit the gift to issue male of the donee. In this view of the case, there is no cause for interference, and no need to enter into questions decided by the first Court, but not by the Judge, as to the observance or non-observance of the stipulations.

The appeal ought to be dismissed with costs.

Macpherson, J.—I concur in thinking that this appeal ought to be dismissed with costs. I rest my judgment entirely on the very special nature of the language used in the deed of gift, which, in the opinion of my learned colleague, as well as of both the Lower Courts, is inconsistent with the idea that the donor intended that the property should ever go to a female. The expressions used are very unusual and exceptional.

The 27th February 1866.

Present :

The Hon'ble J. B. Phear and G. Campbell, *Judges.*

Trustee—Alienations by—Limitation—Title of Purchasers.

Special Appeals from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 20th July 1865, modifying a decision passed by Moulvie Sukhawut Hossein Khan, Principal Sudder Ameen of that District, dated the 31st December 1864.

Case No. 2688 of 1865.

Luteefun and others (Defendants), *Appellants,*

versus

Bego Jan and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Mr. C. Gregory for Respondents

Case No. 2830 of 1865.

Bego Jan and others (Plaintiffs), *Appellants,*

versus

Syud Cherag Ali *alias* Syud Jan and others (Defendants), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Moonshee Ameer Ali Khan Bahadoor, Baboos Kishen Kishore Ghose, Chunder Madhab Ghose, Unnoda Pershad Banerjee, and *Roopnath Banerjee* for Respondents.

A suit brought by *cestui-que* trust to set aside, as fraudulent, certain alienations made by the trustee, was dismissed by the Lower Appellate Court as barred by limitation, merely on the ground that more than 12 years had, at the commencement of the suit, elapsed since the execution of such deeds of alienations. HELD (1) that this was not sufficient, and that the Court should have tried whether the purchasers were cognizant, at the time of their purchase, of a subsisting trust affecting the property; for, if so, they would have taken in subject to the trust, and would stand in the shoes of the original trustee, and would not be *bonâ-fide* purchasers from trustees entitled to the benefit of the Law of Limitation; (2) that, if the trustee had power to make valid grants, the grantees would have a perfectly good title, if they took for valuable consideration without notice of the trust.

THESE are cross-appeals, arising out of the same suit.

The admitted facts of the case are, in the words of the Lower Appellate Court, as follow:—

"On the 9th January 1837, Khajah Mehn-"dee Ali Jan made a Will by which he set "aside one-third of the income of his entire "estate for religious purposes, and left the "remaining two-thirds to his daughter Ah-"mudee Begum, and the children of his son "Moostufa Buksh, in the proportion of two-"thirds to the former, and one-third to the "latter. Bundeh Ali, the husband of Ah-"mudee, was appointed executor, and the "entire estate was made over to him on "trust, with directions to account to Ahmu-"dee Begum."

It seems also that Ahmudee Begum and the immediate heirs of Moostufa are dead; but, before Ahmudee's death, Bundeh Ali granted certain *mokurruree* pottahs of the property, and also sold the reversion. The defendants are the grantees of these pottahs and reversion respectively. The plaintiffs sue as the heirs and present representatives of Ahmudee and of Moostufa's children, and seek to recover the property on the ground that the alienation of it to the defendants was in breach of, and not warranted by, the trust reposed in Bundeh Ali by the will.

On this state of facts, the contest between the parties raised questions for judicial decision, which, we think, may be conveniently exhibited in the following order—

(1). Was the suit barred by the Statute of Limitations against all or any of the defendants?

(2). If not, had Bundeh Ali power to pass the property to the defendants, as they allege he did?

(3). Supposing the transfer to be valid, was the property, up to and at the time of such transfer, subject to a trust in favor of the plaintiffs or their ancestors?

(4). If there was such a trust, did the property become relieved of it in the hands of the defendants by reason of their having purchased for value without notice from a person competent to convey?

(5). Was the trust extinguished at the time of the transfer either expressly or impliedly by the acquiescence therein of Ahmudee or other persons through whom the plaintiffs claim, or has it become in any way extinguished since?

With regard to the *first* question, the Lower Appellate Court has decided that the suit is barred by the Statute of Limitations as against all the defendants except Mussamut Luteefun; and, against this determination, the plaintiffs appealed in the case numbered 2830.

The Judge seems to have arrived at this conclusion merely on the ground that more than 12 years had, at the commencement of

suit, elapsed since the execution of the respective deeds of alienation. We think that, under the circumstances of the case, this is not sufficient. If the defendants, at the time of taking their respective interests, were cognizant of a subsisting trust affecting the property, or if reasonable enquiry would have made them so, then they would have taken the property subject to the trust notwithstanding they paid full value for it, and would in all respects stand in the shoes of the original trustee. They would not be *bonâ fide* purchasers from trustees entitled to the benefit of the Act, but actual trustees within the scope of the Clauses of the Act which affect such persons. The plaintiffs' appeal must, therefore, be upheld.

Further, the Lower Appellate Court, having held that the suit was not barred against Luteefun, proceeded to declare that the conveyances by which she claimed from Bundeh Ali were not good against the plaintiffs, and it is against this decision that Luteefun files the cross-appeal No. 2688. We are of opinion that this appeal must be decreed. If Bundeh Ali had power to make valid grants or conveyances, and we see no reason to suppose that he had not, Luteefun would have a perfectly good title if she took for valuable consideration without notice of the trust. And this point the Judge does not appear to touch.

Both appeals are, therefore, decreed, and the whole case is remanded for re-consideration with special reference to the five principal questions which we have above indicated.

We feel bound to observe with regard to question (2) that the facts of the case appear to us very strong to show that Bundeh Ali, in whose name the property stood, and by whom it was solely managed, was sufficiently an agent of the beneficial owners to make valid pottahs and conveyances in his own name. And with regard to question (3), we are of opinion that the trust created by the will was not confined to the lives of the persons named, but was an absolute gift to them capable of descending to their heirs. And there certainly does not seem to be any evidence of acquiescence, either express or implied, on the part of the persons beneficially entitled in Bundeh Ali's dealings with the property. Consequently, as it appears to us, the cardinal issue which remains between the plaintiff and all the defendants alike is this, namely, did the latter take with knowledge that Bundeh Ali held the property in trust, or were they innocent purchasers for value without notice? It is certainly difficult to imagine that any of the defendants in appeal 2830, so closely connected as they were with the plaintiffs' family, could be unaware of the conditions under which the property came into Bundeh Ali's hands; and at any rate one would think that the slightest enquiry would have led to the production of the will. However, the question of knowledge or no knowledge is entirely a matter of fact for the Lower Appellate Court to determine. The whole case is remanded as before mentioned.

The 28th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Partition—Onus probandi—Accounts.

Case No. 313 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 30th June 1865.

Gooroo Pershad Mookerjee (Defendant), *Appellant,*

versus

Kalee Pershad Mookerjee (Plaintiff), *Respondent.*

Baboos Onoocool Chunder Mookerjee and *Dwarkanath Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Respondent.

Suit laid at Rupees 20,736-3-3-3.

In a suit for partition of joint family property, in which the defendant pleads that a partition has already taken place, the *onus* is on the defendant to prove the alleged partition. Every one who is entitled to a share must account for such portion of the joint estate as may have come into his hands.

THIS is a suit for partition between two Hindoo brothers. The plaintiff instituting his suit on the 16th of May 1864 (1271 B. S.) alleges that he and the defendant became separate in food in 1259 B. S., and have ever since remained so separate; but that no partition or division of the joint property ever took place. The defendant states that the partition of 1259 was general, and that the joint estate was then divided between the brothers, and has ever since been held by them separately. The Lower Court has held that the defendant failed to prove his case, and has given a decree in favour of the plaintiff.

We do not think that we should be justified in reversing this decree so far as it declares that no partition has ever taken place, inasmuch as we agree in the conclusion which has been arrived at, that the defendant, on whom lay the *onus* of proof, has not proved the partition. The judgment of the Lower Court, however, is most slovenly and discreditable to the Judge who wrote it. There is on the record a very large mass of evidence of one kind or other, but it is quite impossible to gather whether the Principal Sudder Ameen ever really took it into his consideration, or whether he in any degree appreciated the strong points in the defendant's case. Yet the defendant had several strong points. In the *first* place, the plaintiff allowed more than eleven years to elapse between the date of the separation in food, and the filing of his plaint, although he says that throughout this period he was kept out of his share by the defendant, and was constantly asking for it, and calling upon him to come to an account. This laches on the plaintiff's part is an important item in favor of the truth of defendant's story that a division of property, as well as a separation in food, took place in 1259. Another important item is the fact admitted by the plaintiff in his written statement, that, after the partition in mess, the defendant made over to him certain bonds for sums due to the brothers jointly; these bonds being made over to him (as he alleges) "by mistake in the shape of maintenance." Then, in addition to the bonds, it is proved that the plaintiff has recovered, by suits brought, either in his own name, or in that of his wife, various other debts due to the joint estate. All these facts go to show that a partition did take place, and they ought to have been taken some notice of by the Lower Court. On the other hand, however, there is much which leads to the conclusion that, though a partition was talked of, and some steps towards it were taken, it never was carried out: and that is, as it appears to us, how the matter really stands. Except in the points which we have indicated, the evidence of a partition is of a general and unsatisfactory nature, and is met by the evidence in favor of the plaintiff. Moreover, it has been already actually decided by a competent Court that the defendant failed to prove the partition in a suit brought against him by the plaintiff in which the defendant pleaded the partition which he now sets up. On the whole, we think that no complete partition is proved to have taken place, although a partition was intended, and probably partly carried out. So far, therefore, as the decree finds that there was no partition, and declares the plaintiff entitled to a half of all that is joint, we confirm the decree appealed against. But it is clear that, in a partition-suit, before one brother can get half of all the joint property in the hands of another, the former must himself account for and come to a partition of all the joint property which has been in *his* hands. In the present case the plaintiff evidently has, or has had, some portion of the joint estate in his hands, and the decree cannot be complete without a distinct finding as to what the plaintiff has to account for. The decree, too, as it stands, disposes in a very summary and unsatisfactory manner of the details of the account against the defendant, and we think that he is entitled to have that account taken fully and accurately. The evidence on the record, however, is insufficient to enable us ourselves to take these accounts or settle conclusively the issues as to the respective liabilities of the plaintiff and defendant to each other in coming to a final partition.

We remand the case to the Lower Court to try whether there is any, and, if any, what property, whether standing in the plaintiff's name or in the name of any other person, for which the plaintiff must account in coming to a partition. The Court will also find distinctly what the property in defendant's hands is, which is subject to partition. In fact, there must be a general account as between the two brothers of all property belonging to the joint estate which has come to the hands of either of them. The plaintiff must account as strictly as the defendant, as to any portion of the joint estate come to his hands. Each is entitled to a one-half share of the whole: and till the account is taken, and the exact liability of each is ascertained, no proper or accurate decree can be made.

The Lower Court will, under Section 354 of Act VIII. of 1859, take these accounts trying all necessary issues which may arise incidental thereto, and for that purpose taking any further evidence which the parties may offer. The Court will then make a distinct and accurate finding on the evidence, and return the finding together with the evidence to this Court.

The case is remanded accordingly. But the proceedings have now reached such a

stage, that the parties might well, in our opinion, either settle these further questions amicably between themselves, or refer them to the decision of arbitrators.

The 28th February 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Arbitration (Time for enforcing award of private).

Case No. 2908 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 7th August 1865, reversing a decision passed by the Moonsiff of that District, dated the 6th September 1864.

Bhyrub Jha (Plaintiff), *Appellant,*

versus

Hunooman Dutt Jha and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Tarucknath Sein for Respondents.

An award of private arbitration is incapable of enforcement, if the application for enforcement be not made within six months from the date of the award.

PLAINTIFF sued under Section 327 for the enforcement of a private arbitration entered into between himself and the defendant without the intervention of the Court.

Defendant pleaded that, as the application was not made within six months from the date of the award, it cannot now be enforced.

The Lower Courts, on the ground pleaded by defendant, dismissed plaintiff's claim.

Plaintiff now appeals specially, urging that the mere fact of the application not having been filed within six months from the date of the award, does not render the award incapable of enforcement, inasmuch as the terms of the law, *viz.*, Section 327 of Act VIII. of 1859, are not imperative.

It is quite true that in one sense they are not imperative: for it is not imperative upon the parties to file the awards of arbitration at all; if, however, they require them to be enforced by the Courts, they must make the application within six months from the date of the award. That has not been done in the present case. The Lower Court's orders are, therefore, quite correct, and we dismiss this special appeal with costs.

The 28th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Reversal of sale of land in execution against third party.

Case No. 2871 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 11th July 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 26th November 1864.

Sreemutty Dossee and others (Plaintiffs), *Appellants,*

versus

Sheebanee Dabia and others (Defendants), *Respondents.*

Baboo Upprokash Chunder Mookerjee for Appellants.

Baboo Nubo Kishen Mookerjee for Respondents.

A suit to set aside a sale of land in execution of a decree against a third party is not barred by limitation under Clause 3, Section 1, Act XIV. of 1859, if brought within a year after the sale actually took place.

THIS suit is substantially one brought in order to set aside a sale which was made

of certain lands in execution of a decree of a Civil Court against a third party. The plaintiff objected (under Section 246 of Act VIII. of 1859) to the sale, claiming the lands as his own. But the Court under Section 247 refused to investigate his claim. Within one year and three days of the Court's refusal, and less than one year after the sale actually took place, the plaintiff brought this suit to establish his rights and get possession. It is true that in his plaint he asks that the order refusing the investigation may be set aside, but clearly his substantial suit is to recover the lands and set aside the sale, so that, under Clause 3, Section 1 of Act XIV. of 1859, he certainly is within time. (*See* the cases of Syud Mahomed Afzul *vs.* Kanhya Lal, 2 Weekly Reporter, p. 263; and Ram Gopal Roy *vs.* Nund Gopal Roy, 4 Weekly Reporter, p. 42.)

The case must be remanded to the Lower Appellate Court for trial on the merits.

The 28th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Remand for the deciding Judge to record his reasons only—Trial of case de novo by his successor.

Case No. 2826 of 1865.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 10th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 4th September 1862.

Bhyrub Sheet and others (Plaintiffs), *Appellants,*

versus

Khettur Mohun Gossain and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Mitter for Appellants.

Baboos Nil Madhub Sein and *Banee Madhub Banerjee* for Respondents.

When a case is remanded to a particular Judge merely for him to record the reasons of his finding, his successor, if the deciding Judge has left the district, acts without jurisdiction when he re-hears the whole appeal *de novo.*

Seton-Karr, J.—After hearing both parties, and examining closely the order of remand, we are quite clear that the Judge has acted without jurisdiction. The case was remanded by the High Court for the Lower Appellate Court to record reasons for its finding, evidently under the impression that it would be re-tried by the same Judge who had tried it on the previous occasion, and had given no reasons at all for the decision of a complicated case. The Court might surely have been informed by one party or the other that the deciding Judge had left the country. And the present Judge, instead of proceeding to decide the case *de novo*, ought to have brought the fact of the departure of his predecessor to the notice of the Court, and have asked for instructions.

As it is, we have only to set aside the order of the Judge which was passed without any jurisdiction, and to declare the defendant, who was special appellant on the last occasion, entitled to apply to the Bench which passed the order of remand on imperfect information, for a review so as to enable the present Judge to re-try the case *de novo.* We observe that the case reported at page 275 of Vol. II. of the Weekly Reporter, 5th of April 1865, is in point as regards the power given by the order of remand.

Both parties may pay their own costs in this special appeal which is decreed as far as the setting aside the order of the Judge is concerned. Costs in the Lower Courts will follow the ultimate result of the case.

Macpherson, J.—Following the precedent referred to, I think the proceedings now appealed against are without jurisdiction, and must be set aside. So far the appeal will be allowed without costs.

The 2nd March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Recovery of possession (under decree of Privy Council)—Right of action—Interest (on mesne profits).

Regular Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Behar, dated the 30th June 1865.

Case No. 323 of 1865.

Joykurun Lal and another (Plaintiffs), *Appellants*,

versus

Ranee Asmudh Kooer and another (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellants.

Messrs. R. V. Doyne, R. E. Twidale, and *C. Gregory* for Respondents.

Case No. 360 of 1865.

Ranee Asmudh Kooer and another (Defendants), *Appellants*,

versus

Joykurun Lal and another (Plaintiffs), *Respondents*.

Messrs. R. V. Doyne, R. E. Twidale, and *C. Gregory* for Appellants.

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Respondents.

The right of action to a person, who is restored to possession under a decree of the Privy Council, does not accrue before the decision of the Privy Council; and he is entitled to interest on mesne-profits from the time of his ejectment up to one year after the decision of the Privy Council, that being held to be a reasonable time to be allowed to him for commencing his suit.

We are of opinion that the right of action did not accrue before the judgment of the Privy Council was pronounced: for, before that time, the plaintiff was out of possession under judgment of a Court of competent jurisdiction, and he could not have sued before that decree was set aside. The case is, therefore, not barred by limitation as to any part of the claim.

It is clear that the case does not fall within Section 11 of Act XXIII. of 1861. The claim in the suit of Rajah Modenarain, the late husband of the defendants, in which he was plaintiff, was brought to recover possession by setting aside a mokurruree pottah. He recovered under a decree of the Sudder Court reversing the decree of the Court of first instance, and he obtained possession under that decree. The decree was reversed by the Privy Council, and the plaintiff was restored to possession in January 1865. The claim of the present plaintiff is to recover mesne-profits and interest from the time when he was rejected to the present time.

It was proved that the lands were let out by the defendants at rents amounting to 6,000 rupees for Munniwarrah Burdee, 3,400 rupees for Jummamah, 2,600 rupees for Erky, and 700 rupees for Chilary. These sums amount together to 12,700 rupees. But from this a deduction of rupees 2,005-5-8 must be made on account of the rent to which the plaintiff would have been liable if the mokurruree pottah had not been set aside.

All that the plaintiff is entitled to is that the defendants, as representatives of their late husband Modenarain, should account for what has been received, or what, but for their improvidence, might have been received during the time that the plaintiff was kept out of possession.

It was shown that the rents actually collected from the lands by the lessees under the defendants exceed the amounts reserved by the leases granted whilst the plaintiff was out of possession. But we do not think that those leases were improvident, having regard to the fact that all risk and trouble of collection were avoided, and that the rents realized did not, for the first two years after the leases were granted, exceed the rents reserved by more than 15 to 16 per cent., of which 10 per cent. for actual collection would not be unreasonable.

We think that the defendants are liable to pay interest on the amounts received from the time of receipt to the present time, except for a period of two years from January 1863 to January 1865.

It was contended that interest was not allowed in an ordinary suit for mesne-profits except from the commencement of the suit, and that the defendants ought not to be in a worse position (the possession being under evidence of the Sudder Court) than they would have been if they had been actually trespassers. But there is this difference. If they had been actual trespassers, the plaintiff might have sued them immediately for damages, and would not in such a suit be allowed interest upon those damages for the period antecedent to the commencement of the suit. But in this case the plaintiff's delay in not commencing his suit before the decree of the Privy Council was pronounced was not attributable to him, as he could not sue until the decree of the Sudder Court was reversed. He, in fact, endeavoured without effect to get mesne-profits allowed under Section 11 of Act XXIII. of 1861; but this Court held that he had no right to do so. Under these circumstances, we do not think that a year's delay was unreasonable.

We think he ought to be allowed a reasonable time for commencing his suit after the decision of the Privy Council was pronounced; but we do not think that he ought to be allowed more than a year for the purpose. The decision of the Privy Council was in January 1862. The plaintiff did not obtain possession until 16th January 1863. The action was not commenced until 31st December 1864.

We, therefore, think that, on account of his delay in suit, he ought not to be allowed interest for the years 1863 and 1864.

The decree will be amended by awarding to the plaintiff rent at the rate of 12,700 rupees a year from 1st Assin 1265 (corresponding with 5th September 1857) to 16th January 1863. The landlord's rent at rupees 2,005-5-8 will be deducted yearly from the yearly sum of 12,700 rupees, which will leave a balance of rupees 10,694-10-4 as the rate per year to be allowed. Upon this sum of rupees 10,694-10-4, there must be interest for each year, commencing from 1st Assin 1266 (corresponding with the 24th September 1858) up to the 1st January 1863, and from 1st January 1865 to the present time. The above sums will be capitalized, and interest upon that amount will be decreed from this date to the date of realization, to be assessed in execution.

The costs of the two appeals to be allowed to the parties in proportion to the amounts decreed and disallowed.

The 5th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Government Revenue (Recovery of—by Mortgagee in possession).

Case No. 343 of 1865.

Regular Appeal from a decision passed by Moulvie Syud Iradut Ali Khan Bahadoor, Principal Sudder Ameen of Shahabad, dated the 30th August 1865.

Badaum Koowur (Defendant), *Appellant,*

versus

Lalla Seetul Pershad (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Unnoda Pershad Banerjee* and *Kedarnath Chatterjee* for Appellant.

Mr. R. V. Doyne and *Baboo Dwarkanath Mitter* for Respondent.

Suit for Government revenue paid by mortgagee in possession of property mortgaged for a debt secured by an instalment-bond executed in his favor by the mortgagor through a mookhtear. Although the plaintiff could not prove the execution by the defendant of the power of attorney in the name of the person alleged to have signed the bond for the defendant, yet, as the plaintiff had paid the arrears of revenue due on the mortgaged property in the *bonâ fide* belief that he had a rightful interest in it, and would thereby save the property from sale, and be entitled to recover the money so paid, such payment was held to be not officious, and the suit was decreed.

We see no reason to disagree with the Lower Court, as far as it discredited the evidence produced by the appellant to establish that she herself had paid the Government revenue claimed by the plaintiff. The fact of the receipts for this revenue not being with the appellant further shows that she did not pay it, and her attempt to explain their non-production by charging fraud against the mookhtear who paid the revenue in the Collectorate is of no avail, as the plea is not proved.

The mookhtear is admitted to be the servant of the Maharajah of Domraon, whose treasurer the plaintiff is, and there is no proof of the mookhtear's having ever been engaged in the service of the appellant.

Even if the appellant had succeeded in her plea, still the fact of the receipts for so many years being with the mookhtear would require very satisfactory explanation, and it is not really at all so explained.

The appellant has suggested that the money in dispute, if not paid by her, must be that of the Maharajah of Domraon, and not of the plaintiff. The appellant urges that the original transaction of the instalment-bond (for payment of which bond this property is said to have been mortgaged, and of which the revenue paid is now in dispute), has already been pronounced in the former case by the Appellate Court to be merely a paper transaction; that, even if the transaction be assumed to have any substance, it is incredible that the plaintiff would advance (1,80,000) one lakh and eighty thousand rupees in hard cash to the Maharajah of Domraon, and receive in return an instalment-bond from the appellant, stipulating that this money was to be re-paid to him by instalments within forty years, *without interest;* and that there is nothing to show that the plaintiff had paid the money, or had any right to suppose, when he paid in to the Collectorate (if he paid at all), that he had a *bonâ fide* interest in protecting the estate of the appellant by such payment, so as to justify a claim under Act XI. of 1859.

Now, we have no occasion to go beyond the issue adopted below by the appellant.

She pleaded that *she had paid*, and that the plaintiff *had not*. The denial of the payment by the plaintiff was intended by appellant to support the payment alleged by appellant, but was never intended to signify that, if she failed to prove that she paid the money, then, notwithstanding such failure, the plaintiff might be shewn, not to be the person who had paid, but that another and a totally different person was the owner of, and the party who paid, the money.

If this had been distinctly pleaded, the plaintiff would, on the other side, have been in a position to offer evidence on the plea, but we cannot now let him be taken by surprise by proceeding at this stage to try any such issue here, which is one entirely new and not fixed below, but really taken in appeal for the very first time.

Further, we hold that the fact of the instalment-bond being in the name of the plaintiff, together with the additional fact that the Maharajah of Domraon has in the former case already *denied on oath* that he is any way interested in the money of the bond, show that, even if we assume that there is some reality in the present suggestions of the appellant, we cannot (whatever may in fact be the arrangements in that view of the case between the plaintiff and the Maharajah) try the new issue. To do so would not only complicate the old case, but also raise a new case altogether. The appellant, moreover, never before complained of any omission of the Courts to direct the trial of such an issue, and we do not consider there is any thing to justify a remand to try a case altogether different from what appellant set forth below.

If the appellant has not paid the revenue, she is clearly liable for money paid on her account, though the money paid may be either wholly or partially that of a person not before us, but who is not likely to claim or to obtain a decree for the money from the plaintiff after its reaching the plaintiff through a Court of Justice. For the purposes of this suit, we have no occasion to examine into the further details of the transactions connected with the property of which the revenue was paid by the plaintiff. These in fact extend from the time of the decree being obtained by the plaintiff against the appellant and others who then jointly owned the property; they reach over the subsequent sale in execution, the purchase by the Maharajah of Domraon, and the subsequent gift to the appellant by the said Maharajah of the entire property so purchased, and so up to the alleged loan to the appellant by the plaintiff of the consideration-money of the said instalment-bond. These facts do not really affect the decision of the present case as on the pleadings and issues on which the parties went to trial. It is immaterial whether, in return for the bond, money was received by the appellant to pay the Maharajah the consideration for the conveyance of the property into the hands of the appellant who is a relation of the Maharajah.

It may or it may not be the case that for all these transactions no cash passed beyond the deposit in Court and the withdrawal from the Court through the plaintiff of the purchase-money paid by the Maharajah of Domraon. It may also be that substantial rights were passed to the appellant by a deed of gift, and that some rights to recover money far exceeding the original amount of his decree was reserved to the plaintiff by the instalment-bond, either wholly for himself, or partly or wholly in trust for the Maharajah. These are not points for trial or decision on this record in appeal.

It is, however, necessary to note that the appellant, who denied the execution of the instalment-bond in the former suit in which, for non-payment of one or two instalments, the plaintiff in the present case had sued for the whole debt (as it was stipulated in the

deed that he might on such default), now distinctly admits that she holds the property from the Maharajah, and that in the former case the only deed of gift filed by the plaintiff was denied by the appellant without her producing any deed herself. By this admission, she must be supposed to admit all the previous transactions up to the purchase of the property by the Maharajah of Domraon in execution of decree, as he could not have conveyed to her without acquiring the property herself.

If the appellant could have fairly pleaded complete ignorance of all previous transactions, and that the property now, as well as before the passing of a decree against her, was conveyed without her knowledge, that all these transactions were a series of frauds to cheat her of the property, the dismissal of the claim of the plaintiff under the instalment-bond in the former case might have been some ground for refusing the present claim of the plaintiff. As long, however, as the decision passed here in the former case is not set aside in appeal by Her Majesty's Privy Council before which Court it is now pending, we must deem that decision as a correct one.

But, notwithstanding the failure of the plaintiff to prove the execution by the appellant of the power of attorney in the name of the person who is alleged to have signed the bond for her, we cannot hold that the plaintiff had not sufficient reasonable grounds to believe *bonâ fide* that, when the property mortgaged for the debt secured by the instalment-bond fell in arrears, he would, by paying the money in dispute, not only legally (under Act XI. of 1859) protect the property from sale, but would also be entitled to recover this money from the appellant on the ground of the interest which he supposed *bonâ fide* he had in that property. The payment, then, was not in our view merely an officious one. Indeed, a large portion of the money now claimed was paid after plaintiff had sued, and after he had obtained a decree upon the instalment-bond. At the same time, no desire to protect the property from sale would justify the plaintiff in claiming any money not originally payable by the appellant. But, as the money sued for by plaintiff was money which defendant was legally bound to pay to the Government as revenue of Government, and she did not pay, she must re-pay the amount to plaintiff.

We accordingly see no reason to interfere with the decision of the Court below, and dismiss this appeal with costs.

The 5th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Splitting of claim—Suit for possession and reversal of Act IV. Award—Suit for damages (on account of misappropriated materials of house).

Cases Nos. 3045 and 3135 of 1865.

Special Appeals from a decision passed by Baboo Koonj Lal Banerjee, Officiating Additional Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th July 1865, affirming a decision passed by Baboo Nurottum Mullick, Sudder Ameen of that District, dated the 15th March 1865.

Kaleekant Roy Chowdhry and others (Defendants), *Appellants,*

versus

Huro Mohinee Chowdhrain and others (Plaintiffs), *Respondents.*

Baboos Oopendur Chunder Bose and *Kalee Mohun Doss* for Appellants.

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Respondents.

The subject-matters of a suit for possession of land and reversal of an Act IV. award, and of a suit for damages on account of the materials of a house subsequently misappropriated, are distinct both as to time and cause of action. The latter matter need not necessarily be included in a suit for the former.

THE pleaders for both parties admit that one and the same decision by this Court will govern both these special appeals.

Plaintiff sued to recover 800 rupees, the value and cost of erection of a house of plaintiffs, alleged to have been illegally pulled down by Kaleekant Roy and Madhub and others, defendants, and the materials of which they had carried away. The allegation of plaintiff was that, while there was a suit pending for possession of the land for which plaintiff eventually got a decree, the defendants illegally pulled down the house, notwithstanding an intermediate injunction by the Court.

Kaleekant Roy, defendant, pleaded that the materials of the house were *bonâ fide*

sold to a Rajmistree by Bromo Moyee defendant; that one of the defendants, Rajkisto, purchased some of the materials from this Rajmistree, but returned them. Madhub defendant pleaded the same—and in bar, limitation and splitting of claim. Bromo Moyee defendant admitted the misappropriation of the materials of the building.

The first Court held that limitation did not bar the suit, and that there was no improper splitting of claim, as the act which formed the subject of this suit was entirely subsequent to, and distinct from, that suit; and, in fact, the result of disobedience of an injunction of the Court issued after the first suit had been instituted. On the merits, the first Court, referring to the statements of the two peons who were deputed by the Court to the spot with reference to the execution of its injunction, but proceeding distinctly upon the independent evidence of plaintiff's witness at a local enquiry, found as a fact that the materials of the house had been made away with by defendants Madhub and Kalee Kant Roy. Adverting to a plea by defendants that the plaintiff's witnesses had deposed previously in a manner contrary to their depositions before the first Court, that Court observes that the defendant did not produce the alleged contradictory depositions so as to establish this plea. The first Court also refers to the fact that the Rajmistree indicated by Kalee Kant as the purchaser of the materials from Bromo Moyee denied any such purchase, and it further holds this plea of defendant to be unproved. Madhub's plea the first Court also found not established. Holding these views, the first Court gave a decree to plaintiff against Kalee Kant and Madhub for Rupees 662-8 as the real value and cost of the house and materials.

The above named defendant separately appealed to the Principal Sudder Ameen's Court. The Principal Sudder Ameen has held that limitation does not bar the suit, that defendants Madhub and Kalee Kant did misappropriate the materials, that Kalee Kant and one Pran Kisto made a room of some of them, and that Bromo Moyee's statement of her sale is a collusive and false statement; further, that the plaintiff's evidence and the local enquiry establish plaintiff's case.

The defendants Kalee Kant and Madhub, dissatisfied with this decision, appeal specially. The grounds of their appeal have been taken down verbatim as the pleaders stated them before us.

I. That the plaintiff's present suit will not lie, as she abandoned the present claim for damages in the previous suit.

On this plea, we would remark that it was *after* the first suit was instituted, *and subsequent to an injunction*, that the materials of the house were misappropriated, so that the subject-matter of each suit was perfectly distinct as to time and cause of action. But even had it been otherwise, we think the previous suit, which was for possession of land and reversal of an Act IV. award, need not imperatively have included such a claim as the present. Section 10, Act VIII. of 1859, allows even *wasilat* of land to be matter of separate action. Under this analogy, and on the facts of this case, we think that damages on account of the misappropriated materials of a house need not be necessarily asked for in a suit for possession under title, and in reversal of an Act IV. award.

II. That the Lower Courts have admitted a peon's return as legal evidence without his deposition.

On this plea we observe that it is quite patent on the record (as we have above set forth) that the return was not the main evidence on which the finding of fact was come to in the First Court, and upheld by the Lower Appellate Court.

III. That it was not for defendant to produce the previous depositions of the plaintiff's contradictory statements of the witnesses as they were on the records.

We think this plea quite futile. If defendants wanted the depositions referred to or read, it was for them to cause the reference and perusal, and the neglect of their duty in support of their plea cannot now be urged against respondent: nor can it thus be properly now said that the Court disregarded their evidence. It is for the parties to prove their cases themselves, not for the Courts to do it for them.

IV. That the Courts below were wrong in holding that defendants admitted any misappropriation.

We have only to say that, if the Courts were wrong, they clearly enough found on quite sufficient *independent evidence*, beyond the admissions, that the defendants were guilty of the misappropriation charged.

V. That the Lower Courts wrongly looked at the decision in the previous suit as evidence when the defendants were not parties to it.

We are of opinion that this is not so, and that the Courts only referred to the previous

decisions so far as was requisite *in consequence* of defendants' own pleadings.

VI. That the Lower Court had no evidence on which to base its decision as to defendant's Bromo Moyee's collusion with the other defendants.

We think on this plea that both Courts were fully justified in recording their remarks on those probabilities which the situation of the parties and the surrounding circumstances led them to deduce.

VII. That some documents and evidence on defendants' part were not considered.

On this, we would remark that the law requires distinct pleas in a memorandum of special or regular appeal. The terms "some documents" are not distinct, nor do we see that plaintiff's petitions of 27th April 1862 or 5th May 1862 were so disregarded by the Courts below as to affect the decision. The finding of fact rested on the whole independent evidence in the case.

Under all these circumstances, we consider all the pleas in special appeal untenable, and indeed, frivolous. The conduct of defendants to the plaintiff, and the contempt of Court by defendants, and their conduct in all the Courts, have been anything but creditable, and we can only express our surprise that they should have still further extended litigation of this character to this Court.

We dismiss these special appeals with all costs on defendants.

The 6th March 1866.

Present :

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Arbitration—Jurisdiction.

Case No. 3144 of 1865.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 29th June 1865, affirming a decision passed by the Moonsiff of that District, dated the 30th November 1864.

Shitanath Biswas and others (Plaintiffs), *Appellants,*

versus

Kishen Mohun Mookerjee and others (Plaintiffs and Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Huree Narain Roy for Respondents.

Whilst a suit was pending before arbitrators, the appellant, on application, was made a co-plaintiff, and as he made no objection to the arbitration, but suffered the arbitrators to give in their award, which affected him equally with the other co-plaintiffs, he was considered as having agreed to the arbitration *ab initio*, and therefore bound by it.

HELD also that the first Court acted illegally in deciding the case on the merits after the arbitration, and that the Lower Appellate Court was right in deciding the appeal on the terms of the award instead of on the merits.

WE see no reason to interfere with the Lower Appellate Court's order in this case. It appears that the suit was, with the consent of all the then parties to it, referred to arbitration. Whilst it was pending before the arbitrators, the special appellant petitioned the Court to be made a co-plaintiff, and he was made a party accordingly. The suit shortly afterwards was decided by the arbitrators adversely to the plaintiffs.

The special appellant now contends that the Judge ought to have tried the case as the Moonsiff did on the merits, and had no right to bind him (special appellant) by an award to which he was no party.

On this, we observe that, although special appellant was no party to the suit when it was referred to arbitrators, yet, when he was made a co-plaintiff, he took that position in the case as it then stood, before the arbitrators that is; and as he made no objection to the arbitration, but suffered the arbitrators to give in their award which affected him equally with the other co-plaintiffs, he must be considered as having agreed to the arbitration *ab initio*, and to be, therefore, bound by it.

With regard to the other objection, we think that the Moonsiff acted illegally in deciding the case on the merits after an arbitration award, which took the case out of his jurisdiction, had been come to, and that the Judge was right under Section 324 of Act VIII. of 1859 in deciding the appeal on the terms of the award, and that he had no power to go into the appeal on the merits.

We, therefore, dismiss the special appeal with costs.

The 6th March 1866.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Conveyance by Hindoo Widow—Suit by Reversioner.

Case No. 2955 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 17th August 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 15th September 1864.

Hurish Chunder Sein Lushker, Guardian of (Plaintiff), *Appellant,*

Okhoy Chunder Sein and another, Minors,

versus

Bromo Moyee Dossia and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Kalee Mohun Doss and *Luleet Chunder Sein* for Respondents.

A reversioner may sue to have a conveyance by a Hindoo widow declared void as against him, but he cannot sue simply for ejectment and possession during the lifetime of the widow.

In this case, the plaintiffs sued for possession, on the ground that they were reversioners entitled to the property on the death of the two ladies mentioned, and that these ladies had alienated the property *ultrâ vires.* It is admitted that both ladies are still alive, and a Full Bench decision of this Court has declared that under such circumstances the reversioners are not entitled to possession. Following this decision, the first Court has rejected the prayer for possession, but has, nevertheless, gone on to decide that the conveyances by the ladies were invalid. On appeal and cross-appeal by both parties respectively, the Lower Appellate Court has decided that the suit cannot be entertained during the lives of the ladies, and on that short ground dismissed the suit. We think he is quite right. Had the plaint in the first instance sought the alternative relief of having the conveyances declared void as against the reversioners, probably it would have presented some merits which the Court would have been bound to enquire into. It was, however, simply a suit for ejectment, and, on the face of the plaint, it clearly did not lie.

We dismiss the appeal with costs.

The 6th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Hindoo Law of Inheritance—Brother's Son's Daughters.

Case No. 407 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dinagepore, dated the 20th September 1865.

Radha Pearee Dossee and another (Plaintiffs), *Appellants,*

versus

Doorga Monee Dossia and others (Defendants), *Respondents.*

Baboos Juggadanund Mookerjee and *Kalee Kishen Sein* for Appellants.

Baboos Banee Madhub Banerjee and *Goopeenath Mookerjee* for Respondents.

Suit laid at Rupees 24,800.

A brother's son's daughters are not heirs according to Hindoo Law.

This suit is brought by Radha Pearee Dossee and Motee Monee Dossia, plaintiffs (appellants), for declaration of their reversionary title to, and possession of, real and personal estate, against Binode Monee Dossia, widow of one Hookoom Chand Suttyer, on the ground that Binode Monee, being in possession, is wasting the estate. The plaintiffs are daughters of the son of Oodoy Churn Suttyer, the bother of Hookoom Chand.

The defendant's deceased husband's brother's son's daughters are not heirs according to Hindoo Law. The plaintiffs have, therefore, no right of action; and this suit, as regards Binode Monee, must be dismissed.

It appears to us that the action, as far as Doorga Monee is concerned, is merely brought collusively.

The appeal is, therefore, dismissed with costs and interest.

The 7th March 1866.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Mahomedan Law—Legitimacy.

Case No. 265 of 1865.

Regular Appeal from a decision passed by Baboo Punchanun Banerjee, Principal Sudder Ameen of Hooghly, dated the 10th July 1865.

Oomda Beebee (Defendant), *Appellant*,

versus

Syed Shah Jonab Ali (Plaintiff), *Respondent*.

Moulvie Murhamut Hossein and *Baboos Dwarkanath Miller* and *Sreenath Doss* for Appellant.

Baboos Kishen Kishore Ghose and *Hem Chunder Banerjee* for Respondent.

According to Mahomedan Law, the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so.

Peacock, C. J.—This was a suit brought for confirmation of possession of a certain share in certain lands by reversing an order under Act XIX. of 1841 of the Judge of the District of Beerbhoom, bearing date 18th March 1864. The order of the Judge under Act XIX. was that the defendant had proved by documents that she was the daughter of Banda Ali. The defendant in her written statement says that "the fact "of my being the daughter of Shaha Banda "Ali (since deceased) will be proved by "the *heba-bel-awez-namah* executed by my "father, and other documents."

We are told by the pleaders for the defendant that one of the issues raised was whether the defendant was or was not the daughter of Banda Ali. The Principal Sudder Ameen, in delivering his judgment, says that one of the points for determination is, "was the defendant, a daughter of Shaha "Banda Ali, born of his loins in the womb "of a wife married to him lawfully accord-"ing to the *Shurra?*" That was a different issue from the one which we are told was laid down. But the record before us does not enable us to say what was really the issue, because the paper containing the issues that were raised has not been sent to us, and has probably been placed in a separate *Nuttee*, consisting of papers which are not usually sent up to this Court. But it certainly ought to have been sent, as it is a most important document for the Court to have before it. If the issue was such as the Principal Sudder Ameen in his judgment has stated it to be, and seems to have understood it, and did not raise the simple issue, whether the defendant was the daughter according to Mahomedan Law, it is quite clear that he laid down a wrong issue. Having regard to the defendant's written statement, the question was whether she was or was not the daughter of Banda Ali according to the Mahomedan Law. If, on the other hand, the issue was, as it was stated by the defendant's pleaders to be, then it appears to us that the Principal Sudder Ameen tried the wrong issue. Sir William Macnaghten, in his Principles of Mahomedan Law, Chapter VII., Section 33, page 61, lays down the law in the following words: "If a man acknowledge another to be his "son, and there be nothing which obviously "renders it impossible that such relation "should exist between them, the parentage "will be established." I apprehend the same rule is applicable to the case of a daughter. The same rule is also laid down substantially, though in different words, by Mr. Baillie, in his Digest of Mahomedan Law, page 405. The acknowledgment of the father renders the son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to have been so.

Now, the Principal Sudder Ameen in this case enters into the question, not as to whether it was possible or impossible, but whether it was probable, that this gentleman, Banda Ali, had married a *Domnee* or not. That was not a matter to be enquired into under the real issue, because, if Banda Ali did acknowledge that the defendant was his daughter, then, according to the Mahomedan Law, she became his daughter, and one of his heirs, unless it was impossible for her to be so. But when we come to enquire into what was the evidence of the acknowledgment, we find that the defendant relied on a *heba-bel-awez* and other documents, but no evidence was given that the acknowledgment was Banda Ali's. On the 6th April, after the plaintiff's witnesses had been all examined, the plaintiff filed two documents, one of which was a *futwa*, and another a certified copy of a petition assenting to a mutation of names, and in that document Banda Ali calls the defendant his daughter. That document was ordered to

be filed without any particular notice having been taken of its having been filed after the proper time; and, as it was filed pending the examination of witnesses, the parties may have believed that it was taken to be a proved document. Being a certified copy, it might be evidence that the original existed in the Collector's Office. But the existence of such original would be no evidence that Banda Ali made the admission contained in it, because such an original might be filed in the Office of the Collector, and yet the document might not have been signed by Banda Ali. Therefore, it was necessary to prove that Banda Ali signed the original petition, before any acknowledgment contained in it could be evidence. The Principal Sudder Ameen, by accepting the document, and allowing it to be filed in the record in that particular stage of the cause, may have misled the parties into believing that it was admitted without further proof. If the documents filed were not evidence, the Principal Sudder Ameen ought not to have alluded to them at all. But in his judgment he refers to the arguments of the vakeels on those documents, and then he gives his own reason why Banda Ali styled the defendant as his daughter, thereby assuming that Banda Ali had acknowledged the defendant to be his daughter.

Under these circumstances, we think that the Principal Sudder Ameen has not tried the correct issue, namely, whether Banda Ali did acknowledge the defendant to be his daughter in such a manner as would render her his heir, or one of his heirs, under the Mahomedan Law. We should not send this case back to the Principal Sudder Ameen to be tried, if we had evidence sufficient to enable us to try the issue. But, as I have already observed, the documents which have been put in as proving the acknowledgment of Banda Ali have not been proved. Considering the way in which the documents have been filed in the record, we think that the parties should have an opportunity of having the proper issue tried, and of calling further evidence in support of it. Therefore, under Section 354 of Act VIII. of 1859, we remand the case to the Principal Sudder Ameen for the purpose of trying whether the defendant was the daughter of Banda Ali according to Mahomedan Law. If he find that there was an acknowledgment by Banda Ali that this lady was his daughter, and that it was impossible for her to be his daughter, he ought to find that she was his daughter.

The case will be kept on our file until the Principal Sudder Ameen returns his finding upon that issue. As the case is going back to the Principal Sudder Ameen, the record must be sent back to him to try all the issues. The Principal Sudder Ameen will try the issue now directed, instead of the first issue mentioned in his judgment, and also the remaining issues, and return the record to us with his finding.

The costs will await our final decision.

L. S. Jackson, J.—I think the plaintiff is entitled to the opinion of both Courts on all issues involving questions of law and fact. But I hope it will be understood that we by no means sanction the position or the principle that, because a plaintiff or defendant has omitted to set up by the requisite proof a particular document in the Court below, he should be allowed an opportunity of doing so in the Appellate Court. I think it proper in this case, only under the peculiar circumstances of it, to make an order of that kind.

The 7th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Appeal (by representative of deceased Plaintiff).

Case No. 406 of 1865.

Regular Appeal from a decision passed by Mr. R. J. Richardson, Judge of Behar, dated the 16th September 1865.

Juggoo Lal (Plaintiff), *Appellant,*

versus

Lalla Bhikun Lal and others (Defendants), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Mr. R. T. Allan and *Baboos Nil Madhub Sein, Khetturnath Bose,* and *Kishen Lucca Mookerjee* for Respondents.

An appeal by the alleged representative of a deceased plaintiff ought not to be admitted without an order of Court allowing the representative's name to be entered in the Register of Suits.

In this case Mussamut Laloo Koonwur, who was the sole plaintiff, having died apparently after the date of the decree against her,

one Juggoo Lal, describing himself as her daughter's son, presented his petition of appeal to this Court, without having obtained any leave to do so under Section 102 of Act VIII. of 1859. It is clear that this was an irregular proceeding, and that the appeal should not have been received by the Registrar until after the Court had passed an order that Juggoo's name should be entered in the Register of Suits.

But as the respondent did not apply to have the appeal taken off the file on that ground, but merely took the objection at the hearing, and that the appellant may possibly have been injuriously affected by the delay in taking the objection, we direct that the case stand over for two months, to enable the appellant to procure a certificate of his heirship.

He must pay all costs of the respondents upon the appeal down to the present time.

Should he fail to procure the certificate within two months, the case will be struck out with costs.

The 7th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Defamation—Suit for Damages—Charge of Abetment of Riot and Murder.

Case No. 340 of 1865.

Regular Appeal from a decision passed by Moulvie Syud Imdad Ali, Principal Sudder Ameen of Tirhoot, dated the 24th June 1865.

Mugnee Ram Chowdhry and others (Defendants), *Appellants,*

versus

Gonesh Dutt Singh (Plaintiff), *Respondent.*

Baboos Kali Prosunno Dutt, Unnodapershad Banerjee, and *Dwarkanath Mitter* for Appellants.

Baboo Kalee Kishen Sein and *Moonshee Ameer Ali* for Respondent.

A charge of abetment of riot and murder, if groundless and malicious, may render the parties making it liable to a criminal prosecution for perjury. But, if dismissed for want of proof, and under circumstances such as those in this case, the High Court would not affirm the decree of the Court below for damages.

THE brother of the appellant Mugnee Ram being killed in a riot, and the said Mugnee and three others of the remaining four appellants being wounded, at their request Bhugwan, the fifth appellant, went to the police to lodge an information. On the arrival of the police, the first named four appellants gave depositions on oath, stating that the plaintiff and his son were personally present in the affray, and ordered others to beat (*maro*) these appellants. This statement was repeated before the Magistrate, who, however, committed only some servants of the plaintiff to the Sessions, and discharged, among others, the plaintiff and his son, as the record states, "for want of proof." Only one out of the few persons committed was punished by the Sessions Judge. Mugnee Ram and the others were entered, first by the police, and then by the Magistrate, as informants and prosecutors, but were subsequently made witnesses by the Magistrate when the case was committed to the Sessions.

Meanwhile, on Mugnee Ram's asking for the trial of the plaintiff for his participation in the affray, the Sessions Judge refused to interfere. The matter was further taken up to the High Court on the Criminal Side, which Court called for a report from the Sessions Judge, on receipt of which it stated that he did not find it proper to interfere as to the Magistrate's exercise of his discretion.

The plaintiff, however, was fined by the Magistrate 500 rupees for not having given the information of the affray, of which the Magistrate thought he must have known, it having occurred close to his house and for his farmed land.

The plaintiff now sues for damages to the extent of 2,00,000 rupees (two lacs), saying that he does not ask for more, because the defendants would not be able to pay as much as he, with reference to his rank, is entitled to ask for the disgrace to which he was exposed by this false prosecution which had put his life and liberty in danger, and for his detention for three days under the surveillance of the police.

The plaintiff had sued some others besides the five appellants, but the Lower Court found that plaintiff had no claim against them. As against these five, however, the Court was satisfied that there was a previous quarrel between the plaintiff and Mugnee Ram, with whom the other four appellants were in some way or other connected; but, relying upon the orders of the Magistrate as conclusive proof of plaintiff's innocence, gave him a decree for 20,000 rupees, stating that it was not proper to award any higher sum

against the defendants. Against this decision the appellants appeal.

We do not find that the Principal Sudder Ameen had any positive evidence on which he fixed 20,000 rupees as a proper sum. This point, however, is immaterial. On the face of the decision of the Principal Sudder Ameen, we see no reason to hold Bhugwan any way liable for damages. He had not said anything of his own knowledge, but simply went to inform the Police at the request of the other four wounded appellants, and might have properly done this even if he had not been asked by them.

We allow that a party can sue for damages on the ground of a malicious and groundless charge of being an aider and abettor in a riot and murder; but we have strong doubts whether, in such a case as this, the remaining appellants can properly be called prosecutors. They were mere informants to the Police, and, being wounded, were at first examined as informants, but afterwards were made witnesses by a competent authority.

The Police could not allow these appellants to compromise, nor could the Police avoid investigating the case, even if these appellants had refused to be examined. Witnesses giving evidence judicially cannot be sued in a Civil Court for damages, though they certainly are liable to be punished in a Criminal Court for any false and malicious statement that they may make prejudicial to the character or life or liberty of any person.

Now, even if these four appellants, being wounded persons, are to be considered to have been prosecutors, yet, considering the case in all its bearings, we think the plaintiff has no right to recover any damages here.

We find on the record of the case that the plaintiff has given no other proof of his innocence, and of the falsehood of the statements of these four appellants, except a copy of the order of the Magistrate, by which that Officer released the plaintiff for "want of proof." That proceeding and order mentioned no specific reasons or any separate facts showing its opinion of plaintiff's innocence. From the very nature of the offence, this verdict of "not proven" by the Magistrate would not protect the plaintiff from being again put upon his trial for this crime upon fresh and sufficient evidence.

If a charge of perjury were brought against these appellants, the Court trying the case would not be bound by any finding of the Magistrate that these persons had perjured. That Officer had discretion to believe or disbelieve these persons when deposing to the presence of the plaintiff, but had no authority finally to decide for all purposes that what these persons stated on this head was not true.

Neither the Magistrate nor the Sessions Judge who tried the case expressed any clear opinion definitely regarding the falsehood of the assertions of the appellants. It is one thing to discharge a person on the ground of "*want of proof*," and another to record that the statement of witnesses speaking of the participation of that prisoner in an offence are undoubtedly and clearly and deliberately false. This last was nowhere recorded in this case.

The Sessions Judge had power to commit these appellants for perjury, and he did not. One of the witnesses, deposing to the presence of the plaintiff, was by the Magistrate put on his trial for perjury, but was acquitted on trial by the Sessions Judge.

It is clear also that the Civil Courts are not bound by the opinion of the Magistrate, which is the point relied upon by the plaintiff. Even if it be assumed that a Civil Court can consider this order of the Magistrate to be quite sufficient to allow the plaintiff to start his case, it is evident that the appellants have a right to plead that their statements were nevertheless correct, and to depose to that effect, and to produce further testimony in support of their assertion, all which they have done. The plaintiff has not produced any proof, however, to rebut this evidence. Now, even if we be inclined to hold that the plaintiff and his son were not present as deposed to by these appellants, we are quite satisfied that the quarrel arose out of a claim to rents made on behalf of the plaintiff regarding certain lands alleged to be purchased by Mugnee Ram and others, which they asserted were lakheraj, and that the lease of the village (in which these lands were situated) to plaintiff's servant was a nominal transaction by the plaintiff in which he kept himself on the back ground. We are not in a position to say that it was not the plaintiff who caused certain persons to go to the place of the riot, and that there, by their acts, the affray took place. Thus plaintiff really may have been more or less responsible for those acts which led to the murder of the brother of Mugnee and the wounding of several others. We admit that plaintiff had

a remedy against these appellants by prosecuting them for perjury, on the ground that they had, from motives of enmity and malice, stated that he and his son were present when they were not present at all, but plaintiff did not do this.

Under all these circumstances, we think a decree for any damages to plaintiff is not proper, and we accordingly reverse the decision of the Lower Court, and dismiss with costs the plaintiff's case, and decree this appeal with all costs.

The 7th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Limitation (Regulation II., 1805)—Suit by Government against Ghatwals—Onus probandi.

Case No. 2547 of 1865.

Special Appeal from a decision passed by Major J. S. Davies, Judicial Commissioner of Chota Nagpore, dated the 21st June 1865, reversing a decision passed by Lt. R. C. Money, Deputy Commissioner of that District, dated the 13th September 1864.

Bromanund Gossain and others (Defendants), *Appellants,*

versus

The Government (Plaintiff), *Respondent.*

Baboos Tarucknath Dutt and *Upprokash Chunder Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Respondents.

Under Regulation II., 1805, 60 years is fixed as the absolute limit beyond which neither fraud nor any other special allegation will give a cause of action.

In a suit by Government against ghatwals, the defendants were found to have been in possession "for a very long time;" and although they had failed to prove possession in excess of 60 years, the *onus* was held to lie on the Government to prove possession within 60 years.

THIS case is a boundary-dispute between the Government as the zemindar, and the ghatwals as occupiers of the ghatwalee mehal of Jhoonjka belonging to Government, and defendants as owners of the debuttur mehal of Bhalookharreah, and a *reyk* of land situated within the boundaries of mehal Jhoonjka belonging to the defendants. The lands were awarded to the defendants by an Act IV. award in 1847. The present suit was not brought till 1861, and would, in the case of a private plaintiff, be out of time; but this suit being a suit by Government, limitation is regulated by Regulation II. of 1805. By the provisions of that Regulation (Section 2, Clause second), it is provided that "all claims on the part of Government, whether for the assessment of land "held exempt from the public revenue, or "for the recovery of arrears of the public "assessment, or for any other public right "whatever (the judicial cognizance of which "may not have been otherwise limited by "some special rule or provision in force), "shall be heard, tried, and determined in "the several Courts of civil justice to which "cognizance thereof may properly belong, "under the general Regulations which may "have been or may be hereafter enacted, "if the same be regularly and duly preferred at any time within the period of six "years from and after the origin of the "cause of action."

There is no provision which, in the case of fraud, or other unjust and dishonest means of acquisition, extends the period of sixty years. The provision in Section 3rd of the same Regulation, in respect of property acquired by fraud, is only a provision extending the ordinary twelve years' limitation; and by Clause 3rd of the same Section, sixty years is fixed as the absolute limit beyond which neither fraud nor any other special allegation will give a cause of action.

It appears, then, in the present suit that whatever be the origin of defendants' holding, if it had been held for a period beyond sixty years, it will be protected by limitation.

The Lower Appellate Court found defendants to have been in possession for a "very long time,"—an expression which very much tallies with the terms of the Act IV. award, which declares that the defendants had been in possession more than thirty years previous to that case. The Lower Appellate Court goes on to find, on a comparison of boundaries, as a matter of title, that the greater part of the disputed land really and properly belonged to plaintiff's mehal. The judgment proceeds to say that, as defendants have not proved their possession for sixty years and upwards, plaintiff's suit must be decreed.

The defendants, special appellants, appeal on the ground that, in respect of the point of limitation, the *onus* was wrongly thrown upon them; that, under the circumstances, it is not sufficient that they have failed to prove possession in excess of sixty

years, but that it was necessary for the plaintiff to prove possession within sixty years.

Under all the circumstances of the case, seeing that the very long possession of the defendants is found as a fact, we think the defendants' contention correct, and that, to enable the Court to give a decree to plaintiffs, it is necessary to find that plaintiff's allegation of having been in possession, either directly or through subordinate ghatwals within the last sixty years, has been proved. We, therefore, remand the case to the Lower Appellate Court for a distinct finding upon this point.

Remanded accordingly.

The 8th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Income Tax.

Case No. 349 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore in Dacca, dated the 15th August 1865.

The Collector of Furreedpore (Defendant), *Appellant,*

versus

Gooroo Dass Roy (Plaintiff), *Respondent.*

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Mohendro Lal Shome* for Respondent.

Suit laid at Rupees 5,119-3.

A suit for refund of Income Tax paid twice over in two different districts is barred by limitation if brought after three months from the accrual of the cause of action, whether the Collectors acted legally or illegally in collecting the tax.

Seton-Karr, J.—THIS is a somewhat novel case, in which the plaintiff has sued the Collectors of Jessore and Furreedpore to recover Rupees 5,119-3 as money paid twice over, on account of the assessment of the Income Tax for the years 1860, 1861, 1862, 1863, and part of 1864.

Both the Collectors sued filed written statements. The plaintiff's case was that almost the whole of his estates were situated in Jessore, and that he had paid at that treasury the whole amount of his Income Tax leviable on all his estates and other property, which he had again been compelled to pay at Furreedpore for his estates of Roopapat, Binodepore, and Pokhtanee, situated within that district.

The Collector of Furreedpore pleaded limitation under Section 245 of Act XXXII. of 1860 (the Income Tax Act), and he may also be held to have pleaded, amongst other things, that the Court could not at all entertain the claim to set aside the assessment.

The Collector of Jessore stated that the plaintiff had not filed his returns at Furreedpore as he ought to have done, and he then seemed to rest his defence on the written statement of the Collector of Furreedpore.

The Principal Sudder Ameen, in a not very clear judgment, has overruled the plea of limitation raised on behalf of Government, and has ruled that the plaintiff is entitled to recover for the Income Tax assessment levied by Government at Furreedpore. I may observe that I am wholly unable to perceive the force of the Principal Sudder Ameen's remarks that the several Sections of the law cited in defence of Government are "mere verbiage," or in no way bear on the mooted point.

In appeal on the part of Government, two points have been raised under the Act, *first*, that the Civil Court has no jurisdiction at all under Section 244 of the Act; and, *secondly*, that, under Section 245, the plaintiff is barred by limitation.

I think it is only necessary to decide this appeal under Section 245 of the Act, and in this view the plaintiff is barred. The Section says that "no suit, action, or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act without giving to such person a month's previous notice of the intended action and of the cause thereof, *nor after the expiration of three months from the accrual of the cause of action,* or other proceeding."

Under this Section, the plaintiff is clearly out of time. The suit for the years previous to 1864 is on the very face of it untenable, and, as for the year 1864, the last payment was in February, and the suit was not brought until the 9th of August, which is more than three months after the cause of action.

I cannot endorse Mr. Allan's argument that the law is applicable only where the conduct of the official has been legal, and that the Collector must be held to have acted, not under the Act, but altogether without and beyond the Act, inasmuch as he acted

illegally in collecting at Furreedpore what had been already paid for at Jessore, and that illegal acts are tantamount to acts done without any law at all, and are consequently not liable to the rule of limitation especially laid down for injured tax-payers. The tax was levied under color and by aid of the Income Tax Act, and the meaning of the redress open to individuals under the Act is that it should lie for acts done illegally, or against the intent, or beyond the provisions of the law, but still under color of the same. It could never be intended that redress might be sought for under the law only where the acts done were legal. It would be an absurdity for an enactment to tell people that they might have redress for acts done legally under a Statute, while, at the same time, the whole object of the Statute was to raise a tax by the Revenue Officers, and not to allow the liability to the taxation to be questioned in the Civil Courts. The law contemplated that there should be a means of redress against acts illegally or wantonly done, but in pursuance of the objects of the law: provided such redress were sought for within three months of the cause of action. The argument of Mr. Allan, if accepted, would leave some men without any law at all in respect to acts done illegally in the collection of the Income Tax, while it would hold out to others a fallacious and delusive hope of redress against acts done legally and in furtherance of the collection.

The refusal of the Collector to refund the amount levied at Furreedpore is not the plaintiff's cause of action. The time must run from the date of each alleged payment in excess, or of payment of what had been already paid for elsewhere. Neither can the notice given by the plaintiff on the 27th of May 1864 be regarded as constituting a cause of action for all the back years and the previous payments.

We ought not, as Mr. Allan wishes us to do, to give a decree against the Collector of Jessore, on the ground that he seems to admit that the tax has been levied at both districts.

The law, when resorted to, must be construed for Government as for any other suitor, and it is beyond question that the suit is out of time, and should never have proceeded to trial on the merits. Without such a trial, no decree can be given against any Official whether at Jessore or at Furreedpore.

If, however, the plaintiff has really been called on to pay twice over for any portion of his estates, as is admitted by the Government pleader, the proper course would be for him to apply for a refund to the Board of Revenue or the Local Government. His plaint does not state that his application has been carried beyond the Collector and Commissioner of the Division.

As the law is clear in favor of the appellant, the appeal is decreed, and the suit is dismissed with all costs in both Courts.

Macpherson, J.—I agree in thinking that we ought to decide in favor of the appellant, and that the plaintiff's suit ought to be dismissed, not having been instituted within three months of the accrual of the cause of action, as provided by Section 245 of the Income Tax Act. The Collectors in levying the tax were acting in their official capacity; and whether they acted legally or illegally in the course which they adopted, it is beyond doubt that they are protected by Section 245, and that no suit will lie against them unless instituted within three months after the accrual of the cause of action.

The mode in which this suit has been conducted on behalf of Government is worthy of notice. The plaintiff, alleging that he had been made to pay Income Tax twice over, once in Jessore, and again in Furreedpore, sued the Collectors of both those districts to recover the amount paid in excess of that for which he was legally liable. The Government was substantially the sole defendant in the suit. We should have expected that, in such a case, the two Collectors would have combined in their defence, and would, in their written statements, have taken distinctly such grounds of defence as the Government chose to rely upon. Instead of this, the two Collectors file separate statements, each apparently defending the assessment he has himself made, and each saying that, if the other has levied more than he ought, the plaintiff can recover it from him. The Furreedpore Collector says: "If it be true that the tax "on the plaintiff's income at Furreedpore has "been again taxed at Jessore, it is open "to him to adopt measures for the remedy "thereof at Jessore." The Jessore Collector's written statement is as follows:—

"Plaintiff sues on the allegation that he "has been twice assessed, and the amounts "of such assessment have been recovered "from him; he prays for a refund. As he "(plaintiff) did not fill his return of income

"in the Furreedpore Collectorate, he was "there assessed for income on the proper-"ties situate in that district. There is no "law which leaves him the alternative of "appealing against such taxation, or of "setting it aside by a Civil suit. Plaintiff "has not specially stated on what portion of "his income, and on what particular proper-"ty, he has been twice assessed at Jessore. "If plaintiff succeeds in proving the above, "Government can have no objection to re-"funding him such amount from the tax "which he has been charged with at Jessore. "The answer to the rest of the allegations "made in this suit is given in the defence "filed by the Collector of Furreedpore."

The written statement of the Collector of Furreedpore explains the circumstances under which the tax was levied in that district, and raises the question of the three months' limitation under Section 245 of the Income Tax Act. It will be observed that, from the statement of the Jessore Collector, it is quite impossible to gather whether that officer meant to admit or to deny that the assessment in Jessore was wrong: and nothing can be more indefinite or meaningless than the statement that, if the plaintiff proves his case, the Government "can have no objection" to refund. One of the issues fixed and tried by the Lower Court was as to which of the Collectors ought to refund. The Court gives judgment at some length on this part of the case, and finally decides against the Collector of Furreedpore. The Court remarks: "I see from the records "before me that each of the Collectors has "been endeavouring to justify himself for "nearly five years, during which time the "plaintiff was knocked about in their Kut-"cherries like a shuttlecock without re-"dress."

Further, although neither in the written statements, nor orally before the Lower Court, was it ever objected that the one month's notice of suit required by Section 245 had not been given, that objection was taken for the first time, and pressed upon us, in appeal. This is an objection which, if not taken in the first instance, ought not to have been taken at all in a suit such as this.

It is exceedingly difficult to induce suitors in general to comply fully with the requirements of the Code of Civil Procedure, and to file distinct and straightforward written statements. But it might have been expected that a case in which the Government alone was the defendant would have been found an exception to the general rule. Nothing can be more essential to the credit of the Government than that, when suits are brought against it, the line of defence to be followed should be carefully considered in the first instance, and, after being deliberately adopted, should be laid before the Courts, as the law requires, distinctly, and in a business-like manner, and at the right time.

The remark of the Principal Sudder Ameen, that the provision of Section 245 of the Income Tax Act, which makes it necessary that a suit, if brought at all, should be brought within three months from the accrual of the cause of action, is "mere verbiage," is to me simply unintelligible.

The decree of the Lower Court must be reversed, and the plaintiff's suit must be dismissed. As the suit is dismissed on the ground of limitation, and as this plea was urged in the Lower Court as well as before us, I think (although I have some hesitation in coming to this conclusion) that the costs must follow the result, and be paid by the plaintiff.

The 8th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Alluvial Land—Regulation XI., 1825.

Case No. 2139 of 1865.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Dacca, dated the 8th May 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd May 1863.

Shib Chunder Ghuttuck and others (Plaintiffs), *Appellants,*

versus

The Collector of Tipperah and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Kalee Mohun Doss* for Appellants.

Baboos Chunder Madhub Ghose and *Kalee Prosunno Dutt* for Respondents.

Under Regulation XI., 1825, *chur* land belongs to the proprietor of the estate to which it accretes, provided it is not separated from it by an unfordable stream.

The facts governing the application of this principle to a *chur* on the west may be quite different from those having reference to a *chur* on the east, *e. g.*, there may

be a completely intersecting unfordable stream to the west *chur*, and a partial unfordable *khal* to the eastern *chur*.

THIS was a case in which plaintiff claimed some *chur* land as accretion to his farmed lands of Jowar Nurea, abutting on Kismuts Nurea and Kedarpore, and originally a khas mehal of Government. Government supported plaintiff's claim.

Defendants alleged that the lands in suit were part of their *Aslee* lands which had diluviated and re-formed on the other side the nudee; and that plaintiff was already in possession of the whole of the *chur* lands which constituted his farm from Government. It was added that plaintiff never had possession of the lands he claimed.

The first Court found that plaintiff was entitled to the land in suit, and was not barred by limitation.

The defendants appealed against the above decision of the first Court on both points.

The Judge has, on that appeal, held that the evidence adduced by plaintiff showed that plaintiff had originally a re-formed *chur*, and still had it; but that plaintiff had no right to it in any enlarged or extended shape as he now claimed. The Judge then proceeds to remark that a decision of this Court, dated 10th December 1862, shows that a portion of this *chur* to the *west* had already been decreed to other parties; and he adds that it is not shown that Kedarpore was ever part of plaintiff's leased mehal. The Judge then refers to a map of the Collector (Mr. Abercrombie) showing that plaintiff holds the *chur* originally settled with him; and that a *khal* "running nearly across the *chur* on its eastern side" "represents the real and natural boundary beyond which plaintiff cannot claim." "The fact seems to be" (adds the Judge) "that the *chur* shown in Sulaumtoollah's map having extended *eastward* opposite to Kedarpore and Barma, plaintiff has thought fit to claim that extension." "And that *plaintiff has no rights to the east of the khal running across the chur*, and he has not proved that he ever had possession of it at all." The Judge concludes by remarking that a decision of 1846 was more than 12 years before this suit, and gives no boundaries, and says: "The decision of 1847 was a summary one in which defendant admitted the claim, and I can attach but little weight to it."

The Judge, holding, then, that plaintiff cannot have title to any lands beyond the *khal*, and that plaintiff never had possession, dismissed the suit, remarking also that the plaint claimed the lands as of Nurea, not of Nurea and *Kedarpore*, and that the Principal Sudder Ameen should have confined plaintiff to his plaint.

Plaintiff appeals specially, urging—

1st.—That Joar Nurea comprises Kismuts Nurea and Kedarpore.

2nd.—That the admission of defendant in the decision of 1847 is binding on defendant.

3rd.—That by Regulation XI. of 1825, the special appellant is entitled to the land as an accretion contiguous to his farmed lands, the *khal* neither entirely separating the lands, nor being unfordable.

4th.—That the Judge in this case was sitting in review on certain points only, and should not have gone into other matters already decided.

Judgment.—With reference to the first three pleas, we are clearly of opinion that this case must be remanded. The principle on which this case has been decided by the Judge is entirely opposed to the governing rules of Regulation XI. of 1825. Under that law, the plaintiff's *title* to the lands in suit will be made out as preferential to defendant's, if plaintiff can prove that the new accretion is one that has joined on to, and is contiguous to, his farmed property, and, that it is not divested from it by any unfordable stream. Now, the Judge does not find whether the *khal* is fordable or not; and, moreover, it is clear, both from the map on which the Judge relies, and from what the Judge himself states, that the *khal* by no means intersects and separates the whole of the plaintiff's original formed land from the alleged accreted *chur*. Moreover, the Judge has considered that, because plaintiff has not had a *chur* claimed by him on the western side awarded to him, therefore his claim to one on the eastern side may be inferred to be bad. But, having in view the principles of Regulation XI. of 1825, and the facts to be ascertained in order properly to apply those principles, it may well be that the facts governing the application of those principles to the *chur* on the west may be utterly distinct and separate from those having reference to the *chur* on the east, *e. g.*, there may be a completely intersecting unfordable stream to the *west chur*, while there may be a partial unfordable *khal* to the *eastern chur*. We have further to remark that we can see no sufficient ground for the Judge's rejection of the decision of 1847 with the admission of plaintiff's claim by the defendant on the recorded reason that it was a *summary* decision. The Judge

does not say that there was no such admission. It will also be a matter for consideration whether Joar Nurea is plaintiff's property. If so, whether it does or does not comprise in itself Kedarpore. Nor do we see why a decision of 1846 is of less value as *evidence* by being of date twelve years before suit.

All these things having been duly considered, a clear judgment may then be given on plaintiff's title with reference to the provisions of Regulation XI. of 1825.

If, with reference to these remarks, proof of title is not given by plaintiff, plaintiff's suit must be dismissed.

If plaintiff, however, does prove his title, it will then be for the Judge to declare whether, notwithstanding proof of title, plaintiff is barred by any, and what, Law of Limitation.

This case is accordingly remanded for re-trial and decision with reference to these remarks.

The 8th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Hindoo Widow (Right of childless—to alienate moveable property)—Government Promissory Notes not immoveable property.

Cases Nos. 319, 354, and 355 of 1865.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 19th August 1865.

Doorga Dayee and others (Defendants), *Appellants,*

versus

Pooran Dayee and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee, Anund Chunder Ghosal, and *Sham Lal Mitter* for Appellants.

Moonshee Ameer Ali Khan Bahadoor, Mr. C. Gregory, and *Baboo Kalee Kishen Dutt* for Respondents.

A childless Hindoo widow and nearest heir of her deceased husband has, under the Mitakshara Law, an absolute right over all the moveable property left by him, and can alienate it to whomsoever she pleases.

A Government promissory note is not a "corody," or consequently immoveable.

THIS was a suit for declaration of the plaintiff's reversionary right (as guardian of her minor son Manick Chand, the next heir) to the property, real and personal, of one Ram Kishen Doss, and to recover possession of the same, on the ground that the principal defendant, Musst. Doorga Dayee, the widow of the said Ram Kishen, was wasting the property to the detriment of the reversioner.

The claim extended to the recovery of possession of the real property consisting of 3 annas share in Talook Amoneah not alienated, and to reverse certain sales of Government promissory notes made by the widow to third parties, the defendant No. 2, Brijo Ruttun Doss, and Ojoodya Dayee, defendant No. 4, and also to annul a deed of sale in respect of two houses which was alleged to have been collusively made by Musst. Doorga Dayee to her mother, the said Ojoodya Dayee (defendant No. 4).

The defence on the part of Musst. Doorga Dayee was that she was, by Hindoo Law, the sole heiress of her deceased husband, and competent to alienate the property if she were so minded.

Ojoodya Dayee pleaded that she had purchased the two houses from the representative of the original owner and mortgagor, Mohunt Dowlut Geer, who had, from the purchase-money, paid off the mortgage held by Ram Kishen Doss; that the houses no longer, therefore, belonged to Ram Kishen's estate; and that the plaintiff had no claim upon them.

Brijo Ruttun alleged that he had purchased the Government promissory notes in the ordinary course of his business as a banker from the registered owners in good faith for value—Nos. 1136, 1334, and 16867, worth 30,000 rupees, from Ojoodya Dayee, and the other seven notes, worth 20,000 rupees, from Doorga Dayee.

The Principal Sudder Ameen held that Musst. Doorga Dayee had no right under the provisions of Hindoo Law to sell the Government Promissory Notes, and that the sale of the houses to Musst. Ojoodya was fictitious. He considered that the widow had been guilty of waste, and ordered that the plaintiff, on behalf of the reversioner, her son Manick Chand, should get possession of all the property in suit, including the personal belongings of the widow, such as ornaments, shawls, &c. With regard to the promissory notes, he made the defendant No. 1 first liable, adding that, if the money (50,000 rupees) were not recoverable from her, the vendee, Brijo Ruttun, should refund the value. He made all three defendants liable for costs proportionately to their interest in

the suit. And, with regard to the widow, he charged the plaintiff with her maintenance, leaving the amount apparently to the latter's discretion.

Against this decision all three defendants appeal, Musst. Doorga Dayee in No. 354, her mother Ojoodya Dayee in No. 355, and the Banker, Brijo Ruttun, in No. 319. Their grounds of appeal are mere recapitulations of their original defences to the suit.

And, *first*, as to the objection of the widow Doorga Dayee, which, so far as the present case is concerned, may be restricted to her power of selling the Government promissory notes to her mother and to Brijo Ruttun.

She contends that, in her position as a childless Hindoo widow, and nearest heir of her deceased husband Ram Kishen, she had an absolute right over all the personalty left by him, and might alienate it to whomsoever she chose.

In support of this contention, we have been referred in the first place to Colebrooke's Mitakshara, page 365, Section 10, para. 2. Woman's property is there defined to be, amongst other things, "property which she may have acquired by *inheritance*, purchase, partition, increase, or finding." The passage has been the subject of frequent interpretation, and various authorities have been cited to show that, as regards moveables at least, property inherited as this was becomes the absolute right of the widow.

In Strange's Hindoo Law, Vol. I., page 246, we find the following passage in connection with the page 2, Section 11, para. 2 of the Mitakshara—"With respect, "not only to what she may have inherited "from her husband, but to its accumulated "savings also, her (the widow's) duty is to "regard herself as little more than a trustee "for the next heirs." But the learned Commentator goes on to say—"The restriction, "however, in the extent stated seems to "concern land only;" and again—"With "regard to moveables (slaves excepted, that "are considered as land), she has a greater "latitude," and her "*streedhun* being peculiarly hers, whatever falls under this "description would seem to be not only "hers, without reserve, for present use, but "to be at her independent and uncontrollable disposal." And again, in page 248—"According to the Mitakshara and its followers, property which may have been "acquired by inheritance is transmissible to "her own heirs classing with this school as "part of her *streedhun*."

In the *Vivada Chintamonee*, pages 261-262, there occur the following words—"*Katyayana* says as to the first of these, *viz*, that, on the death of the husband, his property devolves on his wife, and becomes her own in default of other heirs, 'Let a woman, on the death of her husband, enjoy her husband's property at her discretion.'

"This refers to property other than immoveables."

Following this view of Hindoo Law, we have a judgment of the Calcutta Supreme Court in the case of Kashinath Bysack (Morley's Digest, Vol. II., page 198), in which it is laid down that, with regard to property which becomes the widow's for want of other preferable successor, the law declares that she may place or dispose of effects other than immoveables as she pleases.

This case comes from Tirhoot, one of the districts forming the ancient province of Mithila; but the law is admittedly the same in this particular both for Mithila and for the provinces governed by the Mitakshara.

Following this view of Hindoo Law, come two decisions of the Madras Sudder Dewanny Adawlut (reported in Morley's Digest, New Series, Volume I., page 180). In the *first*, the widow is declared, under the Mitakshara Law, to have the power to dispose of moveable property left by her husband, although she could not alienate the real estate without the consent of the next heirs. In the other (Gopala Patter and another *versus* Narayana Patter, 28th September 1850), reported in the same Volume and page, the same view is set forth still more emphatically; the widow is declared "to have absolute authority over the personal or moveable property inherited by her from her husband to consume or dispose of it at her pleasure."

In Bombay, where the Mitakshara system of law prevails, we find the High Court coming to precisely the same conclusion. In the case of Becha Bagwan (Bombay High Court Reports, Volume I., Part 1, page 56) it was held that "a Hindoo widow's right "to alienate moveable property inherited "from her husband, without the consent of "his heirs, is absolute."

And again, in the case of Pran Jeebun Doss (reported in page 130, Volume I., Part 2, Bombay High Court Reports), the Bombay High Court held "that a widow was entitled to the moveable property left by her husband absolutely."

The same principle is indirectly laid down in a decision of this Court of the 23rd June

1865, *viz.*, that the widow has an absolute dominion over personal property.

It is contended by the respondent's vakeel that all these decisions and opinions are based on the single * paragraph of the Mitakshara above quoted; that the meaning of that paragraph is in itself dubious, and that there are other authorities which would prove the intention of the law to be different.

* Para. 2, Section 11, Chapter II., Colebrooke's Mitakshara.

These authorities, as the pleader admits, are "locked up in Sanscrit," but he wished the Court to have them translated by competent persons, and explained by Pundits learned in Hindoo Law. We, however, decline to adopt this course, and are content to decide this case on expositions of law that have received the authoritative sanctions of the highest Courts in India, and which are, therefore, binding upon us.

To sum up—In support of the appellant Doorga Dayee's case, we have a *dictum* of Hindoo Law from the book most valued by Hindoos, explained by the authority of successive Commentators, and this explanation supported by the concurrent opinions of the highest Courts of law, both in Madras and Bombay; whilst the respondent has not been able to quote a single precedent of any Court, in which a contrary opinion has been held. And we have, therefore, no hesitation in following what appears to us to be a just and reasonable interpretation of the 2nd Para. of Section 11 of the Mitakshara.

There is no question in the present case of the appellant's having inherited the property from her husband, and explaining the term "inheritance" in the sense given to it above; we declare that, so far as regards the Government promissory notes, the appellant Doorga Dayee had by law an absolute right to dispose of them to whom she pleased.

But it is further contended by the respondent's vakeel that, even if it be admitted that the appellant had a right to alienate moveable property, these Government promissory notes ought not to be considered in that light, but rather as real estate.

In support of this argument, we are referred to a passage in "Macnaghten's Hindoo Law," † in which it is stated that Hindoo Law "classes amongst things immoveable property which is of an opposite nature such as "slaves and corodies or assignments on land." And a Government promissory note is said to be of the nature of a "corody" in the terms of the *Dyabhaga*. The definition of a corody there given (Colebrooke's Dyabhaga, Chapter II., Para. 13, page 26) is "something fixed by a promise in this form, 'I will give that in every month of Kartick;'" and it is urged that, as a Government promissory note covenants that interest shall be paid on it at certain specified times, it is a "corody," and, therefore, real property.

† Macnaghten's Hindoo and Mahomedan Law, 2nd Edition, page 1.

There can be no doubt, we think, that the word "corody" is used solely with reference to land. Macnaghten calls it an "assignment on land;" and the passage in the *Dyabhaga* manifestly refers to land—it runs thus: "The ownership of father and son is "the same in land that was acquired by the "father, or in a corody, or in chattels," and from the explanation given in the succeeding Para. 14 of the word "chattels," it is clear that the intervening term "corody" refers equally with chattels (which are explained to mean slaves) to land, and to assignments upon it, so that, as a promissory note does not refer to land, it cannot be held to be a corody, or, as a consequence, immoveable property.

For these reasons, we reverse the decision of the Principal Sudder Ameen, so far as it relates to the cancelment of the sale of the promissory notes.

This decision will also dispose of the appeal of Brijo Ruttun, the banker, No. 319.

With regard to appeal No. 355, preferred by Musst. Ojoodhya Dayee, we agree with the Principal Sudder Ameen in thinking the sale to her by Kurungeer altogether fictitious and fraudulent. The only evidence in support of it is that of two witnesses, whose depositions are discrepant and irreconcilable. The bill of sale is not attested, and the whole transaction is manifestly collusive.

Our order on these appeals will, therefore, be to declare that the sale of the promissory notes was legal, and that Brijo Ruttun has the right to retain them, and that the two houses still remain part of the deceased Ram Kishen's estate under the mortgage; and further that the widow will retain possession of the jewels, shawls, &c., which are manifestly of the nature of *streedhun*, and which, indeed, are, to all intents and purposes, admitted by the plaintiff to be defendant's personal property, but which the Principal

Sudder Ameen has ordered to be given up along with the other effects.

The question remains as to the future management of the property. Although we hold that the widow Musst. Doorga Dayee was, according to Mitakshara Law, empowered to dispose of all the personalty, there can be no doubt, after going through this record, that she is a reckless, extravagant woman, and has committed, so far as intention went, waste of the estate by procuring the fraudulent transfer of the two houses to her mother. But to take from her the management, and place it in the hands of a still younger woman, a "*purda-nusheen*" who, from education and habit, would be equally incompetent to look after her own and her son's interests, and would be liable to the same pernicious influences as Musst. Doorga Dayee, would be to perpetuate the evil; and the only course open to us, with a due regard to the interests of the reversioner, is to direct the Principal Sudder Ameen to appoint a competent and respectable person as receiver, to manage the estate, and collect the rents, and to pay them over monthly or quarterly, as may be found most convenient, under the sanction of the Court, to Musst. Doorga Dayee, who, so long as she lives, is entitled to whatever surplus there may be, after providing for the costs of management at ten per cent. on the collections.

The costs will be assessed proportionately.

The 9th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction (Want of)—Decision on merits.

Case No. 3070 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 12th July 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 12th August 1864.

Raj Kishoree Dossee (Plaintiff), *Appellant,*

versus

The Collector of Furreedpore and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Oopendur Chunder Bose* for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

A Court, when it finds that it has not jurisdiction to entertain a suit, should not proceed to determine the case on the merits.

THE special appellant complains with justice that, as the Lower Appellate Court held that it had no jurisdiction to entertain the suit, the Court acted wrongly in proceeding to express its opinion on the merits.

The Court, having found that there was no jurisdiction, ought not to have gone on to decide the case on the merits. The Lower Court's judgment, so far as it finds that there is no jurisdiction, will stand: the rest is extra-judicial, and must be struck out.

The appellant is entitled to the costs of this appeal.

The 9th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Joint Hindoo Family—Presumption of Joint property.

Case No. 2797 of 1865.

Special Appeal from a decision passed by Mr. G. Bright, Officiating Judge of East Burdwan, dated the 19th June 1865, reversing a decision passed by Mr. S. Wright, Sudder Ameen of that District, dated the 22nd July 1864.

Dhurm Chand Shatea and others (Defendants), *Appellants,*

versus

Raj Mohishee Debee (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Banee Madhub Banerjee* for Appellants.

Baboos Gopeenath Mookerjee and *Umbica Churn Banerjee* for Respondent.

Where brothers are found to be living together as a joint Hindoo family, they must be presumed to be joint in property, until the contrary is proved. This presumption would to a certain extent be rebutted by a clear admission or clear proof of the non-existence of ancestral property.

It appears that the Lower Appellate Court has adopted the principle of the High Court decisions reported in page 107 of Sutherland's Weekly Reporter, Civil Rulings, Volume I., page 283, Volume II., and page 31, Volume III., and we agree with the ruling of law as laid down by these decisions.

Upon the evidence produced by the special appellant, defendant, with a view to rebut the presumption arising in favor of the plaintiff, the Court of first instance decided that the property was the debtor's, but the Lower Appellate Court holds that this evidence is of no avail.

The defendant, special appellant, however, argues that in this case the Lower Appellate Court has wrongly assumed the existence of ancestral property, which is admitted on both sides not to have existed, and that the proof of the fact of all the three brothers living together is not altogether satisfactory, as it does not appear whether the admission by one brother of his living with another (not with the father-in-law of the plaintiff) was made before or after the decree in favor of the decree-holder defendant against the first two brothers, and whether it was a *bonâ fide* admission or merely one made in fraud of creditors. We think it necessary for the proper application of the principles laid down in the precedents cited above that the brothers must be either admitted or proved to be living as members of a family in a joint house and in commensality. We do not read the precedents to rule that brothers must always be living together, but that, if they are found to be living together as a family, they must be presumed to be joint in property, until the contrary is proved. It is also to be noticed that the clear admission or clear proof of the non-existence of ancestral property must also be taken as a fact, rebutting to a certain extent the above presumtion of joint property.

As these points are not so clear as they be, we remand the case for a clear finding—

1. Whether the brothers lived together as a joint Hindoo family.

2. Whether there was any ancestral property, or none. Evidence should be called for from both parties upon this, and the decision given according to the weight of evidence.

The 10th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Ancestral property—Estoppel.

Case No. 237 of 1865.

Regular Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 17th May 1865.

Chundeemun Bohoo and others (Defendants), *Appellants,*

versus

Thakoor Ras Beharee and others (Plaintiffs), *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboos Mohesh Chunder Chowdhry and *Unnoda Pershad Banerjee* for Respondents.

Persons claiming under *A* and *B* are bound by *A* and *B's* act in admitting *C* as entitled, equally with themselves, to ancestral property.

This action was brought by the plaintiff as the purchaser in an auction-sale for possession of property purchased by him. Plaintiff was opposed by the appellants with regard to one portion of the claim, and by others with regard to another portion. The Court below gave a decree to the plaintiff for both portions. Against this decision, certain of the defendants alone appealed, and it is only that part of the case which we have to try.

The appellants before us are defendants, Nos. 6 and 7, Chundeemun Bohoo and Chundrantee Bohoo, wives of Brindabun Doss and Brijo Doss. The action was for debt. The debt was originally sued for as that of Brojo Bhoobun, the grandfather of the husbands of the appellants. The parties sued were two grandsons, who pleaded that Golab Beebee, the widow of their deceased brother Pursotum Doss, should have been jointly sued, as she was also interested with them in the half portion of the ancestral estate inherited by their father from their grandfather, the original debtor. She was accordingly made a defendant, and ultimately a decree was given *against all the three defendants jointly and severally.*

For some reason, however, which does not clearly appear, the two-thirds of the share of the ancestral property, *viz.*, 5 annas and 4 pie, the share of the two husbands of the appellants, were not available to the decree-holder. On this, he caused the remaining one-third, *viz.*, 2 annas 8 pie, to be sold as the share of Golab Beebee, defendant.

The two appellants opposed the claim of the plaintiff, on the ground that the widow of Pursotum had no legal right in the property; that the share of her husband after his death, according to the Mitakshara, devolved on the surviving two brothers as members of a joint undivided family under that law; that the husbands of the appellants, after this succession, and long before the decree, had sold their rights in the entire half portion of the property to the appellants, their wives; and that the decree, being for the debts of Brojo Bhoobun, could not be executed against any portion of the property inherited by his three grandsons through their father Huree Doss, the son of Brojo Bhoobun.

The Lower Court considered that the appellants did not succeed in proving any *bonâ fide* purchase for themselves; that accordingly they had no better right than their husbands; that, the latter having in the case against them admitted that Golab Beebee held a one-third share with them, they or those who are now in their places could not raise an issue denying her rights.

No attempt is made before us to prove that the alleged sale to the appellants was *bonâ fide.* In the face of the facts recorded in the decision of the Lower Court, it would have been difficult to do so. The plea that no property was inherited by the grandsons of the debtor through their father was not taken in the memorandum of appeal, but the pleader of the appellants takes it before us verbally. It is, however, of no avail; for, even if there were any substance in the objection, the husbands of the appellants should have taken it in the case brought against them by the creditor. After the decree has been passed against them personally as heirs of the original debtor, they cannot be permitted to raise any entirely new plea which affects the validity and propriety of the said decree.

If the appellants could in this case prove that they purchased *bonâ fide* from their husbands (whose grandfather was indebted to the present decree-holder) *before* they or their father inherited through the said original debtor, then they (the appellants) might have been allowed to open any question regarding the legal rights of Golab Beebee as widow of Pursotum Doss, and to prove whether he was living joint with, or separate from, his other brothers.

There are as facts in this case, *firstly*, that the two-thirds share of the two husbands of the appellants does not appear to be in the possession of the appellants, or even of their husbands; *next*, that at best it was not at the time of the sale of the share now in dispute available to the decree-holder for sale (possibly being attached by some other decree-holder against the two husbands under a decree of the late Supreme Court). Finding, then, that the two husbands of the appellants had caused Golab Beebee to be associated with them as one of the heirs of the original debtor and interested in property inherited from him, and that, when the decree-holder caused the property now in dispute to be put up for sale in execution of his decree obtained against the said Beebee and her two brothers-in-law, he was understood by all to put up to sale such of the ancestral property of his debtor as was then available to him, and not restricted to any particular rights of Golab Beebee as the widow of her husband, deceased, we come to the conclusion that the property was called the one-third share of Golab Beebee *only in a technical and descriptive sense.* Even if the widow had no right, the property belonged to the other two debtors, and was sold in execution of a decree in which these brothers were, in the eye of the law, the debtors by representing the original debtor. As the case now stands, the appellants, as representatives of their husbands, have all those liabilities arising with reference to their husband's proceedings in the

former case, as well as with reference to the decree passed in that suit; and they, therefore, cannot now be allowed to oppose the present claim of the auction-purchaser by pleading any right adverse to the *status* voluntarily given by their husbands to Golab Beebee as representing the one-third rights of her husband, deceased, though he might have been living jointly with his other two brothers.

We accordingly see no reason to interfere, and dismiss the appeal with costs.

The 12th March 1866.

Present:

The Hon'ble G. Loch and F. A. Glover,
Judges.

Section 374, Act VIII. of 1859—Admission of grounds not mentioned in petition of Special Appeal—Transfer of non-transferable Tenure—Right of Zemindar to possession.

Case No. 2043 of 1865.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 27th March 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 14th December 1860.

Joy Kishen Mookerjee (Defendant),
Appellant,

versus

Raj Kishen Mookerjee (Plaintiff),
Respondent.

Mr. G. C. Paul and *Baboos Dwarkanath Mitter* and *Pearee Mohun Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Respondent.

Section 374, Act VIII. of 1859, leaves it in the discretion of the Court to admit any new ground of appeal arising out of the proceedings, though it may have been omitted in the petition of special appeal.

The transfer of a tenure not transferable by the custom of the country gives the zemindar no right to take actual possession so long as the rent is paid by the recorded tenant or his heirs, and not by a stranger.

THIS case was remanded for the Judge to ascertain whether the tenures in dispute were by local custom transferable tenures. They were found by the Judge to be *khodkasht* tenures, and, after making a local enquiry, and taking the evidence of witnesses, and examining documentary evidence, the Judge has come to the conclusion that, in that part of the country, these tenures are not transferable without the consent of the zemindar.

Two objections have been raised to the judgment of the Court below, awarding actual possession to the zemindar plaintiff: *1st*, that, even accepting the finding of the Judge that the *khodkasht* tenure is not transferable, yet the fact of such transfer having been made does not entitle the zemindar to enter into actual possession, and eject the tenant; *2ndly*, that the Judge is in error as to what constitutes a custom.

It was objected by the special respondent that the *first* ground now taken could not be admitted at this stage of the proceedings, as it was not taken in the petition of appeal; and the pleader for the respondent went so far as to say that in his opinion the Court has no power to allow of its now being discussed and determined. The words of the law are distinct, and do not, we think, in any way restrict the power of the Court to admit for argument any legal point arising out of the proceedings of the Court below. Section 374 of Act VIII. of 1859 declares that the appellant shall not, *without the leave of the Court*, be heard in support of any other ground of objection than those entered in his petition of appeal; but the determination of the Court may be upon *any* ground on which a special appeal would lie. These words at the close of the Section clearly leave it open to the Court to admit of any new ground of appeal arising out of the proceedings, though it may have been omitted in the petition of appeal.

We now proceed to consider the *first* ground which is admitted for argument by the Court. It is contended for the appellant that the transfer of a tenure not transferable by the custom of the country, though not binding on the zemindar, and in any way prejudicing his rights, does not cause a forfeiture of the tenant's rights, nor entitle the zemindar to evict such tenant or any one holding under him, and to take actual possession of the land himself; that, though the zemindar cannot be forced to receive rent from the transferee, nor is bound to acknowledge him in any way, yet, so long as the recorded ryot and his heirs continue to pay rent, the zemindar cannot take actual possession; and that it is only upon the death of the ryot without issue, or on his failure to pay rent, that the tenure lapses to the zemindar, and he can enter into actual possession. On the other side, it is urged that the defendant is a wrong-doer; that he has no title, and is not in a position

to raise the objection; that, as the original tenant was no longer in actual possession, the zemindar was entitled to take possession.

Where a tenant, who holds a tenure not transferable without the consent of the zemindar, transfers the tenure without such necessary consent, such transfer is incomplete and a nullity, for one of the elements required to make it complete, and without which the title is defective, is wanting. As against the zemindar, therefore, the purchaser can have no rights. He cannot require the zemindar to take rents from him; nor, if the zemindar have a right of entry, can he resist him in the exercise of that right. But, as between the zemindar and the tenant, what is the effect of such conduct on the part of the tenant? Does the act of the tenant cause a forfeiture of the tenure, and give the zemindar a right of entry? The zemindar, as we have observed, is not bound to recognise the transfer, nor to look for his rent to the transferee, and, if the tenant fail to pay the rent, he may exercise his rights as landlord, whatever they be; but, so long as the recorded tenant or his heirs continue to pay rent, we think that the zemindar cannot evict such tenant, and himself take actual possession of the tenure. If the tenant absconds or die without heirs, the previous transfer by him of the tenure to a third party would be no obstacle to the zemindar's entering upon possession, for such transfer being incomplete and illegal would not prejudice the zemindar's right to do with the land as he is entitled to do by law; but, so long as the tenant is present, and pays his rent regularly, the landlord cannot, we think, enter into actual possession. If the terms of the settlement between the landlord and tenant do not provide for the forfeiture of the tenure, should the tenant make an unauthorized transfer, and the tenant himself continues to pay the rent, the landlord cannot take possession. What is above stated does not, we think, differ from the ruling of the late Sudder Court quoted by the Judge. That decision ruled that the landlord was not bound to recognise, or to receive rent from, parties to whom tenants not having a right to transfer had sold their lands. And here also we say that the zemindar is not bound to recognise the transferee in any way; that the obligation of the recognised tenant to pay rent continues to exist; that the act of the tenant does not impugn the rights of the zemindar; and that, when the zemindar's right to enter into actual possession accrues, he may do so in spite of the transferee, should the latter be then in possession. The zemindar has in the present case sued for actual possession, and not merely to declare the transfer illegal. For the reasons given above, we do not think him entitled to enter upon actual possession; and we must, therefore, reverse the order of the Lower Court giving him possession. It is unnecessary in this case to determine whether the Judge's finding as to the custom of the country is legally correct or not. For the sake of the argument, we have accepted it to be so; and, admitting, as the Judge finds, that the tenure is not transferable, we still think that the zemindar has no right to take actual possession so long as the rent is paid by the recognized tenant or his heirs, and not by a stranger. We decree the appeal with costs.

The 13th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Onus probandi—Suit for possession by Lakherajdar formerly Putneedar.

Case No. 3107 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 18th May 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 10th December 1864.

Nubo Kishen Mookerjee (one of the Defendants), *Appellant,*

versus

Promothonath Ghose and others (Plaintiffs), *Respondents.*

Baboo Tarucknath Sein for Appellant.

Baboo Tara Prosunno Mookerjee for Respondents.

Where a lakherajdar, suing for possession of land of which he has been dispossessed by the present putneedar, is, from his having been the former putneedar of the village in which the land in question is situate, able to show the exact position of the village during his tenure of it, the *onus* is on him to prove that the land was lakheraj during the period that he held the village in putnee.

The plaintiff, as *lakherajdar*, sued for possession of certain land of which he had been dispossessed by the defendant, the present *putneedar*.

The *putneedar* answered that the plaintiff was formerly *putneedar* of the village in

which the lands are situated; that he was sold out under Regulation VIII. of 1819 for arrears of rent; and that, after 1790, when he was *putnee talookdar*, he fraudulently called the *mál* land *lakheraj*, and remained in possession after his talook was sold; that he, having all the rights of a zemindar, has ousted him under the power vested in him under Section 10 of Regulation XIX. of 1793.

After remand from this Court, the Lower Appellate Court held that, as defendant admitted that he had dispossessed the plaintiff under the special power vested in him by Regulation XIX. of 1793, Section 10, it was for the defendant to show that the land was of the nature warranting the exercise of the extraordinary power therein given; and, as defendant had failed to prove this, plaintiff was entitled to recover the possession which had been illegally disturbed by defendant.

Defendant now appeals specially, urging that, under the special circumstances of this case, in which the plaintiff, from having been former *putneedar* of the village, has been in a position to prove the area of the *mál* village, the *onus* is upon him of showing in the first place that the land in dispute is not within the land of the *putnee* village, after which the burden of proving the allegation set up by him will rest on defendant.

We think that there can be no doubt that the general rule is, as has been laid down by the Judge, and has been sanctioned by the ruling of this Court dated 12th April 1864, *viz.*, that in cases in which a zemindar has ousted a *lakherajdar* under the powers vested in him by Section 10 of Regulation XIX. of 1793, and the *lakherajdar* sues to recover possession, it is for the defendant zemindar to prove in the first instance that the *lakheraj* was created subsequent to that date, and not for the plaintiff, who was in possession of the land as *lakheraj* until he was ousted by the defendant, to prove that the *lakheraj* was created previous to that date. But the special circumstances of this case seem to us to take it out of the general rule, and to require that, when the plaintiff has, from his former circumstances, special facility for showing the exact position of the village during his tenure of it, it is for him to show first the proof for his contention, and, on his having done this, it then remains for the defendant to substantiate the plea raised by him. We, therefore, remit the case to the Judge, directing him to call on plaintiff to prove that the land was *lakheraj* during the period that he held the village in *putnee*, and, when plaintiff has done this, he will then call on the defendant to prove his plea, and he will then pass whatever orders the justice of the case seems to require.

The 13th March 1866.

Present:

The Hon'ble G. Loch, J. P. Norman, and L. S. Jackson, *Judges.*

Res judicata.

Case No. 320 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 24th March 1863.

Salgram Singh and another (Plaintiffs), *Appellants,*

versus

Maharajah Rajendur Kishore Singh Bahadoor and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Unnodapershad Banerjee* for Appellants.

Moonshee Ameer Ali Khan Bahadoor and *Baboos Kishen Succa Mookerjee, Roopnath Banerjee*, and *Kalee Kishen Sein* for Respondents.

Suit laid at Rupees 9,401-2.

Case No. 465 of 1863.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 11th August 1863, affirming a former decision passed by himself, dated the 24th March 1863.

Suchee Misrain (one of the Defendants), *Appellant*,

versus

Salgram Singh and others (Plaintiffs), *Respondents*.

Baboo Kishen Succa Mookerjee for Appellant.

No one for Respondents.

Suit laid at Rupees 161-13-5.

Case No. 3488 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 17th September 1863, affirming a decision passed by the Sudder Ameen of that District, dated the 8th June 1863.

Salgram Singh (Defendant), *Appellant*,

versus

Lalla Luleet Ram Singh and others (Plaintiffs), *Respondents*.

Baboo Roopnath Banerjee for Appellant.

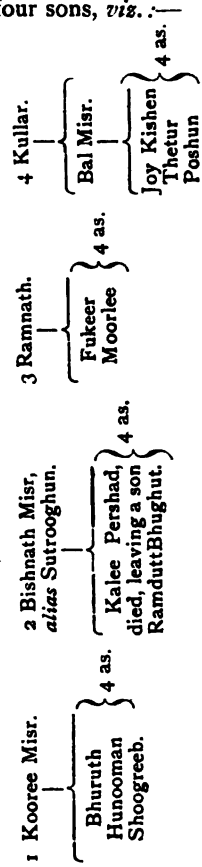
Baboos Kishen Succa Mookerjee and *Kalee Kishen Sein* for Respondents.

With reference to two inconsistent findings of the late Sudder Court in two suits, one declaring the sale of the rights of the defendants' husbands to be valid, and the other invalid—HELD by a majority of the Court that, as in the earlier of the above suits the rights of the ladies were under determination, the Moonsiff ought to have abstained in the latter suit from coming to an independent conclusion on that point, and accordingly the Sudder Court's decision in the former suit was upheld.

Loch, J.—THE plaintiff sues to recover possession of the whole of Mouzah Punjroah with mesne-profits, from which he alleges that he was ousted by the Rajah, defendant, in the commencement of 1264 F. S. He sues also to set aside certain deeds of sale, bearing date the 27th February 1856, in favor of Bhugwan Dutt Tewaree, a servant of the Maharajah defendant.

A great deal of litigation has been going on between several parties in respect to this property; and it is necessary, for a right understanding of the plaintiff's claim and of that of the opposing parties, to show how the property came into the hands of the parties from whom plaintiff and defendant allege that they derive their titles.

From the decision of the late Sudder Court, dated 8th September 1859, at page 1259 of the Sudder Dewanny Reports for that year, it appears that litigation was then going on between Luleet Ram and Salgram Singh, both claiming to be purchasers or mortgagees in possession of the village. Three special appeals were then before the Court, and we find the following pedigree given. Googhee Misr, the ancestor of the family, had four sons, *viz.*:—



The plaintiff alleges that in 1253 he obtained three zur-i-peshgee leases, comprising the whole village, from the proprietors, *viz.*, from Joy Kishen 4 annas, Sutrooghun 4 annas, Fukeer Misser, Moorlee Misser, and Bhurut Misser 8 annas; that, when he went to take possession, he found the village already in the hands of Sobnath Ojha, a previous mortgagee; that plaintiff paid off the

debt due to him and entered upon possession; that the proprietors then dispossessed him, and he brought three actions to recover possession with mesne-profits, and was successful in all three cases in December 1851; that, in execution, he sold the rights and interests of the proprietors, and purchased them himself on 7th November 1853, and in September and November 1854, and 2nd August 1858, and so became proprietor as well as zur-i-peshgeedar of the whole village; that Sugertoon Misser and Sreegopal Misser (the former the son of Thetur Misser, and the latter of Hunooman Misser), and Moorlee Misser, without re-paying the zur-i-peshgee lease, or satisfying the claim of plaintiff under the decree, sold their rights and interests to the defendant Maharajah in the name of his servant Bhugwan Dutt Tewaree; that, in execution of a decree against plaintiff held by one Motee Lal, the whole village was, under directions of the Civil Court, put under charge of a Surburakar by the Collector; but, owing to the opposition of the defendant Rajah, he was unable to make any collections, and was re-called, and from that time the plaintiff has been dispossessed, and the entire village been in the hands of the defendant Rajah; that he has failed to pay the Government revenue which plaintiff, to save his property from sale, has been obliged to liquidate.

The Maharajah defendant claims a 5-anna and a fraction share of the village as purchased from Moorlee Misser, 1 anna 18 gundahs, and from Sugertoon Misser, son of Thetur Misser, and Sregal Misser, son of Hoonooman Misser, 3 annas and a fraction, under two deeds of sale, dated 27th February 1856, and states that he took possession after having paid the zur-i-peshgee money due to the plaintiff; that he is in possession of what he purchased, and no more; that he has not disturbed the plaintiff's possession.

There are two other defendants whose statement it is necessary to notice, and these are Hunsa Misrain and Suchee Misrain, who are widows of Thetur Misser and Poshun Misser, and claim a 2 annas 6 pie share in the village which they held as heirs of the above-named parties, and for which they have obtained a decree against the plaintiff during the course of the promiscuous litigation that has been going on between all parties connected with this property.

The other defendants, who are the descendants of the former proprietors, contend that they have been made parties to the suit unnecessarily; that plaintiff purchased the rights and interests of Bhurut Misser, 1 anna 10 gundahs of Sheo Rutton Misser, Fukeer Misser, and Joy Kishen Misser, and holds possession of the same.

Luleet Ram was not at first made a party to the suit in the Lower Court.

The Principal Sudder Ameen holds that, under the decision of the High Court, bearing date the 31st March 1862, the plaintiff was entitled to an 8-annas share, *viz.*, 4 annas the property of Joy Kishen and his brothers Poshun and Thetur, and 4 annas the property of Sutrooghun; that he had failed to prove his allegations of having been ousted by the Maharajah, and, therefore, the Lower Court gave him a decree for the moiety of the village, but dismissed his claim for mesne-profits, and saddled him with all the costs.

It is now necessary to turn to the proceedings taken in the three special appeals before the Court in 1859, which, as before stated, comprised the litigation going on for this property between the plaintiff Salgram Singh and Luleet Ram. The Court remanded the case for further investigation on certain points which need not be mentioned, as that order was superseded by a subsequent order in review passed on 21st April 1860, page 501, and the following issues were laid down by the Court:—

1st.—What right and interest in the village of Panjroah were under attachment for unsatisfied decrees on the 12th March 1853, the date of the purchase of Luleet Ram?

2ndly.—What right had Hoonooman, Shoogreeb, Thetur, and Poshun on that date in the village of Punjroah?

3rdly.—What is the extent held as stated by Luleet Ram (Salgram?) under his purchase in November 1853, and September and November 1854?

"To the extent of the rights and interests under attachment for unsatisfied decrees on the 15th March 1853, those rights then being under custody of the law, the purchase of Luleet Ram will be of no effect."

"To the extent of the rights of the four parties mentioned in the second issue, Luleet Ram's claim will be valid, as also for any shares covered by Luleet Ram's vendor's title, and not purchased by Luleet Ram (Salgram?) at the different sales in-execution."

The case was decided on 6th June 1860 by the Judge in conformity with the above instructions; and, from his decision, six special appeals were filed, which were disposed of by the High Court on 31st March

1862, this Court affirming the decision of the Court below.

The Judge held on the *first* issue fixed by this Court that on 15th March 1853 (the date of Luleet Ram's purchase) the three attachments made by the Civil Court on 28th April 1852 were in full force, and covered the 4-annas share of Sutrooghun and the 4-annas share of Joy Kishen, Thetur, and Poshun; that, as Bhurut and Moorlee had, on 14th March 1853, paid the amount of the decree due by them into Court, the sale of their shares to Luleet Ram on the following day could not be impeached.

On the *second* issue, the Judge found that the joint share of Thetur, Poshun, and Joy Kishen was under attachment on the 15th March 1853; that the share of Hoonooman and Shoogreeb, which was comprised within that of Bhurut, was not under attachment; and that Bhurut had released his own share from attachment by paying the amount due by him on the 14th March, the day prior to Luleet Ram's mortgage.

On the *third* issue, the Judge held that Salgram, under his execution-sales of November 1853, and September and November 1854, is entitled to an 8-annas share of the village which was recorded at the time of settlement in the names of Sutrooghun and Joy Kishen, and in regard to these shares, the mortgage and conditional sale to Luleet Ram are collusive and inoperative. The share of Joy Kishen comprised that of Thetur and Poshun; but that Luleet Ram's mortgage, as respects the share of Bhurut, including those of Hoonooman and Shoogreeb, must be held valid.

We have thought it necessary to refer very largely to this decision of 18th March 1862, because the judgment of the Lower Court is based upon it, and it clearly recites what is the extent of the interest held by the plaintiff Salgram in the village in dispute, which amounts, therefore, to 8 annas, and not to the whole. That decision further enables us to see that the 8-annas share declared to belong to Salgram does not comprise, nor in any way interfere with, the share purchased by the Maharajah defendant, who derives his title from Moorlee Misser and from Sreegopal, son of Hoonooman Misser.

We may here observe that the late Sudder Court in their decision of 31st March 1862 was in error in supposing that all the six special appeals then before the Court were made from the decision of the Judge, dated 6th June 1860. There were four appeals from that decision, two by Luleet Ram, and two by Salgram; and there were two others by Salgram, Nos. 631 and 632, from a judgment passed by the Principal Sudder Ameen on 13th September 1859, to which we shall further allude, in favor of Suchee Misrain and Hunsa Misrain against Salgram Singh for a 2-annas and 6-pie share of this property. All the appeals were brought up together and disallowed.

Having now in some measure cleared the way to a right understanding of the course of litigation that has been going on, we are able to determine the position of the parties to this suit. The judgment of the late Sudder Court of 31st March 1862 decided that Luleet Ram was entitled to the 4-annas share belonging to Bhurut, Hoonooman, and Soogreeb, and also to the 4-annas share belonging to Fukeer and Moorlee Misser. The Rajah, who is the principal defendant in the case, purchased, as is now shewn us, 1 anna 18 gundahs and a fraction from the share of Moorlee, and 3 annas 2 gundahs from the heirs of Hoonooman Misser: so we need take no further notice of this 8-annas share declared by the above decision to belong to Luleet Ram, leaving him and the Rajah defendant to settle any conflicting claims they may have regarding this property.

The judgment of 31st March 1862 also declared the plaintiff Salgram Singh entitled to the other moiety of the property, *viz.*, 4 annas in the name of Sutrooghun, and 4 annas in the names of Joy Kishen, Thetur, and Poshun.

There are, however, two claimants to a part of this property decreed to Salgram Singh, whose interests must not be overlooked—the widows of Thetur Misser and Poshun Misser, Hunsa Misrain and Suchee Misrain, who claim 2½ annas. They brought a suit against Salgram in June 1858 to recover possession, and obtained a decree on 23rd April 1859, which was confirmed in appeal on 13th September 1859. From this decision, Salgram Singh preferred two special appeals which were rejected on 31st March 1862, and consequently the orders of the Lower Courts, declaring Hunsa Misrain and Suchee Misrain entitled to 2½-anna share, the property of their respective husbands, Thetur and Poshun, was confirmed. In disposing of the present case, the Lower Court has not pronounced any opinion regarding the effect of that decree, but has passed it over; and, resting on the decision of the Sudder Court of 31st March 1862, has held Salgram entitled to the whole of

the 8 annas share; and from this order an appeal No. 465 of 1863 has been preferred.

A special appeal has been preferred (No. 3488 of 1863) by Salgram Singh against the order of the Principal Sudder Ameen, making him liable for the Government revenue of 8 annas of Mouzah Punjroah in the suit of Luleetram. In this he urges that, as he is not in possession, he is not liable for the Government revenue.

We will dispose of the claim of Hunsa Misrain and Suchee Misrain first. These ladies brought their suit against Salgram in June 1858, and obtained a decree in April 1859, which was confirmed in appeal on 13th September 1859, and the special appeal of Salgram was finally disposed of on 31st March 1862. Salgram, however, coolly ignoring all these proceedings, brings his present action for the possession of the whole 16 annas on 16th September 1862. As regards a moiety of the claim, the decision of 31st March preceding had disposed of that; and, as he had been a principal defendant in the suit brought by these ladies in 1858 in which they obtained a decree, respect should have been paid to that decree. It may be said that the judgment of the Sudder Court of 31st March 1862 prevented the Lower Court from taking notice of it, inasmuch as by that judgment the 8 annas share had been declared the property of Salgram. So far as regards his dispute with Luleetram, that is true; but the Court in passing that order never intended to interfere with rights already declared by a competent Court, or summarily to set aside decrees which were not before it in appeal. Indeed, it may be said that the Court, in rejecting the special appeal of Salgram from the order passed in the suit of these ladies on 13th September 1859, recognised their right, and we certainly think it would be unjust to set aside a solemn decree obtained by the ladies, and which Salgram was not in a position to call in question in the present suit, by permitting the decision of 31st March 1862, which, as between Luleetram and Salgram, is perfectly correct, to override the previous decision of 13th September 1859. Salgram, in bringing his present action, most unwarrantably concealed the real facts of the case in respect to these ladies. Therefore, we think that they are entitled to have a share of 2 annas 6 pie out of the 8 annas of the property decreed to Salgram, being the share belonging to their husbands Thetur and Poshun in the 4 annas *hissah* recorded in the name of Joy Kishen. Salgram will pay all the costs of these parties.

In respect to the dispute between Salgram Singh and the Rajah, we think that Salgram is entitled to recover possession of 5 annas and 6 pie from him. We do not concur with the Lower Court that plaintiff has always been in possession. We think there is ample evidence on the record to prove dispossession, and we think it very unlikely that plaintiff would unnecessarily have plunged into this vortex of litigation, had he not, as he represents, been ousted. It appears to us that, through the influence of the Rajah, the Surburakars appointed by the Collector in 1837 (1264) to collect the rents due to Salgram Singh were prevented doing so, and were obliged to give up their employment; and since that time the estate has remained in the hands of the Rajah. We disbelieve the evidence given by Pearee Lal and Peer Buksh, witnesses originally called by the Rajah, and examined again by this Court, who depose that the collections were made jointly, and as soon as made were paid to each proprietor in proportion to his respective share, 2½ annas to Hunsa Misrain and Suchee Misrain, 5½ annas to the Rajah, and 8 annas to Salgram Singh. These witnesses say that they were the servants of the proprietors jointly. There is nothing to prove this. They are admittedly servants of the Rajah, and acknowledge to having realized the whole rent from the estate. It was for the Rajah under these circumstances to show that he did not receive more than his own share of the rents, and this we think he has entirely failed to do. We hold him liable, therefore, to the plaintiff for mesne-profits to the extent of 5½ annas of this property from the date of dispossession in 1264, the actual sum to be ascertained in execution of decree.

Costs as regards the Rajah defendant will be in proportion to the amount decreed and dismissed, and bear interest from the date of decision. Mesne-profits, when ascertained, will bear interest from the date of decree.

The costs of the other defendants will be paid by themselves, for they were necessary parties to the suit, and it was their own double dealings that has caused much of this litigation.

With regard to the special appeal, we think that Salgram Singh must be held responsible for the Government revenue to the extent of his share in the property, and as he has obtained a decree for mesne-profits from the date of dispossession, he can have

no valid objection for not paying the Government revenue. With this modification, we affirm the appeal. The parties to pay their own costs.

Norman, J.—By the decision of the late Sudder Court of the 31st March 1862, the rights of Luleetram, Hunsa Misrain, and Suchee Misrain, were declared. As regards the rights of Luleetram, whether the result of the remand order, the finding upon it, and the subsequent decision of Court on the special appeals, is satisfactory or not, the decision is now binding, and cannot be questioned in this suit. As regards the rights of Hunsa Misrain and Suchee Misrain, it appears that the late Sudder Court on the same day and by the same judgment affirmed two inconsistent decisions as to their right. One, a decision of the Judge, who held that their husbands' estates were under attachment, and were sold to Luleetram; the other, of the Principal Sudder Ameen, who held that the husbands were not bound by the acts of the elder brother, and consequently that the sale was invalid. Each party had an equal right to execute the decree, and therefore, in my opinion, it is impossible to hold it to be binding on either.

I would, therefore, uphold the decision of the Principal Sudder Ameen, who adopts the finding of the Judge and the opinion of the Sudder Court as expressed in the decision of the 31st March 1862 in accordance with that of the Judge. It is, in fact, the conclusion which is suggested by the history of the case especially in its early stages. Indeed, the only ground relied upon by the vakeels for these ladies before us was that the decision of the 31st of March is conclusive as to their rights.

With this exception, I agree with the judgment which has been written by my learned brother Loch.

Jackson, J.—After hearing the vakeels on both sides upon the point on which the two learned Judges are disagreed, it appears to me that Mr. Justice Norman's opinion is preferable.

We are in this dilemma that the late Sudder Court, by its decision in March 1862, when the six special appeals relating to the subject-matter was before it, affirmed at the same time two inconsistent findings of fact.

In this state of things, it seems to me that the finding in favor of Suchee Misrain and Hunsa Misrain must give way.

1st. Because it seems very nearly to fall within the terms of Section 12, Regulation III. of 1793, which was then in force: for in the suits already pending between Salgram on the one hand, and Luleetram and the several vendors on the other, the rights of these ladies were already under determination, and were eventually made the subject of a distinct issue, and the Moonsiff ought, therefore, to have abstained in the suit brought much later by those ladies from coming to an independent conclusion.

2ndly. Because the conclusion at which he did arrive was confessedly based upon the decision come to by the Judge in a particular stage of the other suits, which decision was afterwards set aside and reversed, and it can only be ascribed to inadvertence that the conclusion so arrived at was allowed to stand.

For these reasons, I would disregard the decision in favor of Hunsa and Suchee Misrain, and, concurring with Mr. Justice Norman, would declare Salgram entitled to 8 annas of the estate, and would, therefore, decree his appeal against those ladies, but, under the circumstances, without costs.

The 13th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Sale for arrears of revenue (Regulation XI., 1822)—Benamee purchase for defaulting proprietors—Joint Hindoo Family—Presumption of joint property.

Case No. 2998 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 22nd May 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 5th November 1862.

Kalee Doss Mookerjee and others (Plaintiffs), *Appellants,*

versus

Mothooranath Banerjee (Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter* and *Rajendurnath Bose* for Appellants.

Mr. R. T. Allan for Respondent.

Under Regulation XI., 1822, a *benamee* purchase for the defaulting proprietors at a sale for arrears of revenue is no *ipso facto* illegal and void.

Where the manager of a joint Hindoo family re-purchases *benamee*, the presumption is that the property so re-purchased is held by him for the benefit of the joint family.

Seton-Karr, J. — THIS case was remanded on the 25th November 1864 by Justices Loch and Seton-Karr for the Judge to consider the effect of a revenue-sale for arrears held under Regulation XI. of 1822, and also of a decree obtained against the property in dispute by one Mothooranath.

On the last occasion, when the case was before the Court, the plaintiffs were respondents, and the remand was obtained at the instance of the defendant, who contended that the two proceedings above referred to extinguished the rights of the plaintiffs, and that they were consequently out of Court.

The Judge has now endorsed this contention, and has ruled that the sale for arrears of revenue extinguished the rights of the plaintiffs; that, after the default, the property was re-purchased for and on behalf of one proprietor only, whose rights are held by the defendants; that the decree referred to in favor of Mothooranath, of 1254, declared the right purchased by him to be that of Haro Mohun alone; and that the plaintiffs had consequently no just claim to any share.

The facts, which were fully stated in the order of remand, are briefly these. Ram Kant and Kumola Kant were two brothers. The former had six sons, whereof Haro Mohun was one. Ram Kant sold his share to his brother, who afterwards re-sold the same to Haro Mohun. In 1837, or 1244, the share was sold for arrears of public revenue under Regulation XI. of 1822, and was purchased in the name of Sreekant, and he again sold the same to Munsook. One Mothooranath had a decree against Haro Mohun, in whose name originally the property had been held, and Mothooranath, after some trouble, succeeded, by a suit brought in 1856, in proving that Haro Mohun held *benamee* through Munsook. Accordingly, the property was put up for sale in execution, and the rights and interests of the debtor were sold and purchased by the decree-holder now represented by the defendant, respondent.

The case has been very fully argued by Mr. Doyne for the now unsuccessful plaintiffs, and by Mr. Allan for the defendants, and the effect of the Sale Law of 1822, Regulation XI., Sections 4, 13, 19, and 20, has been much disputed. Reference has also been made to the earlier Sale Law, Regulation VII. of 1799, and to the Sale Laws of 1840 and 1845, to show the intent and policy of the Revenue Laws on the subject of secret purchases for and on behalf of defaulting proprietors.

Mr. Doyne's contention, shortly put, is that the object of the Revenue Laws, as contained in the Sections quoted, is to enable the Revenue Authorities to detect malpractices at such sales, and to put up the properties again to auction within a certain specified time. Mr. Allan, on the other hand, contends that the rights of all the shareholders become *ipso facto* annihilated by such sales, and that, when Haro Mohun re-purchased in the name of Munsook, he re-purchased for himself alone, and not for the original shareholders.

It appears to me that Mr. Doyne's argument is sound, and that an error runs through the whole of the Judge's decision in this respect. The family is shown to be joint, and Haro Mohun is admitted to have been the managing member. In the sale consequent on the decree obtained against him by Mothooranath, only the rights and interests of the debtor Haro Mohun were sold. It is true that the rights and interests of the other sharers had been extinguished for the time by the sale for arrears of revenue. But it seems equally clear that they revived, and must be held to have revived, under the secret purchase for and on behalf of Haro Mohun. We can have no doubt that a suit, if brought by the other shareholders for their shares against Haro Mohun after the re-purchase, would lie. What is there to prevent a suit lying against the purchaser of Haro Mohun's rights only? There is nothing in the provisions of any Section of Regulation XI. of 1822 which can be construed to prohibit such an action, though we may admit that, by the later Sale Laws, and by the avowed policy of the Legislature in revenue-matters, a suit would not lie by any one to oust a certified purchaser on the ground that he held for some one else.

It is quite clear, however, that the present action is distinct from such a case. It is one in which the ordinary presumptions of Hindoo Law as to joint estates do exist, and in which they have not been rebutted or displaced.

My conclusion then is that, as the family is joint, and as only the interests of the judgment-debtor were sold to Mothooranath, and as the re-purchase by Haro Mohun was not against the policy of the Sale Laws, and is a separate transaction, whereby the interests of the other sharers revived, the

decree should be in the plaintiff's favor to the extent of the shares sued for.

The Judge's decision is, therefore, reversed with all costs, and this decision governs case No. 2999 also.

Macpherson, J.—I agree in thinking that the decision of the Lower Appellate Court must be reversed with costs. Regulation XI. of 1822 does not render the purchase by Sreekant in his own name, but in reality *benamee* for the defaulters, absolutely illegal and void. There is, therefore, no reason why the trust on which Sreekant held the property which he purchased should not be declared and enforced by the Courts. The Courts actually have declared that the purchase was in trust for Haro Mohun. This being so, I think further that, as Haro Mohun was the manager of a joint family in estate, the ordinary presumption of Hindoo Law is applicable, namely, that Haro Mohun's interest in this property was held by him for the joint family, and not for his own sole benefit. The question as to whether Haro Mohun did or did not hold for the joint family has not been decided in any of the litigation which has taken place. The *onus* thus lies on those who allege the property belonged to Haro Mohun alone, to prove that it was exclusively his. They have not proved this: and the presumption remains that Haro Mohun held for the benefit of the joint family. Consequently, the decision of the Lower Court is wrong, and must be reversed, and judgment will be given for the plaintiff in this case, as also in case No. 2999.

The 13th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Evidence (Proof of tenancy)—Admission.

Case No. 3027 of 1865.

Special Appeal from a decision passed by Baboo Nund Coomar Banerjee, Additional Principal Sudder Ameen of Chittagong, dated the 11th August 1865, reversing a decision passed by the Moonsiff of that District, dated the 28th July 1864.

Shaikh Bakur Ali Chowdhry and others (Plaintiffs), *Appellants,*

versus

Shaikh Ashkur Ali and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellants.

Baboo Gopal Lal Mitter for Respondents.

A mere admission by the defendant of plaintiff having purchased a jote (without proof of plaintiff's name being entered in the Zemindary Register, or of his having ever got possession of, or paid rent for, the jote) is insufficient to prove that he was ever in the position of defendant's tenant.

THIS was a suit for a declaration of the plaintiff's rights in a certain ryottee tenure, and to cancel the sale thereof made under Act X. of 1859.

The plaintiff's allegation is that he bought the tenure from one Seetaram, the ryot in possession, and held under Dewan Ali, who had purchased the proprietary right of the estate from the original owners, Mahomed Wasil, Abdool Sarun, and Nasiroollah. The defence was a denial *in toto* of both the sales.

The first Court found for the plaintiff, but the Principal Sudder Ameen on appeal held that, as the plaintiff's name was not registered in the zemindary-books, and as he had given no proof that he had ever got possession of, or paid rent for, the tenure, his suit must be dismissed, and that the sale under Act X., by which the tenure was sold for arrears of rent due from the registered tenant Seetaram, could not be set aside.

It is now urged specially that the defendants had themselves admitted in a former suit that the sales had taken place as stated, and that, in accordance with these admissions, the special appellant was the owner of the tenure, and could not be deprived of his purchase by a collusive suit brought against Seetaram.

We see no reason to interfere. The so-called admission of the special respondents is not shown to have had any after-effect. The special appellant has not been able to prove by any evidence that he ever got possession of the *jote*, ever attorned to the zemindar, or ever paid him rent. His name was not entered in the Zemindary Register, nor did he, so far as appears from the record, ever make any attempt to have it substituted for that of his alleged vendor Seetaram. No

deed of sale has been filed, and no evidence given in support of the purchase, other than the "admissions" above referred to, and we agree with the Principal Sudder Ameen in thinking these, under the circumstances, insufficient to prove that the special appellant was ever in the position of the special respondent's tenant, or that the rent-suit brought against Seetaram, the tenant in possession, was collusive.

Taking this view of the case, we dismiss this special appeal with costs.

The 14th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Trial of issue—Validity of Plaintiff's document disputed by defendant.

Case No. 3104 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 22nd July 1865, affirming a decision passed by the Moonsiff of Amtah, dated the 22nd July 1864.

Thakooranee Dossee (Defendant), *Appellant,*

versus

Goluck Chunder Biswas and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Mitter, Onoocool Chunder Mookerjee, and *Nil Madhub Sein* for Appellant.

Baboo Luckhee Churn Bose for Respondents.

When a plaintiff comes into Court relying on a pottah, the genuineness of which is disputed by the defendant, the Court is bound to adjudicate the issue and to decide whether the lease is valid or invalid.

THE special appellant in this suit brought a case originally under Act X. of 1859 against a ryot named Nobin Chunder for rent. He was opposed by the present special respondent as intervenor under Section 77 of the Act, but succeeded notwithstanding in getting a decree.

The intervenor then brought the present suit to try the question of title, and in support of his right produced a *pottah* alleged to have been granted by Prosunno Coomar Chatterjee, the uncle of the present special appellant.

The Court of first instance did not think the *pottah* proved, but nevertheless decreed in plaintiff's favor on the evidence of witnesses who deposed that the land belonged to the plaintiff's tenure, backed by a decree passed in 1851, which showed that in that year the talookdar sued the plaintiff for rent on the land now in dispute, and obtained a decree.

The Principal Sudder Ameen, without going into the question of the plaintiff's title as based on his *pottah*, dismissed the appeal on the strength of the decree above referred to, and on the evidence of witnesses which showed that the land always belonged to the plaintiff.

The defendant appeals specially, urging that, as the plaintiff came into Court on the basis of a *pottah*, the Principal Sudder Ameen ought to have gone into the question, whether that deed was true or false, and have decided the case upon it; and that the mere fact of the plaintiff's holding land in some way or other in 1851 is no proof that he holds it now as a tenure of the description stated by him in his plaint.

We think that the special appellant's objection must be allowed, so far as relates to the *pottah*. As the special respondent came into Court on the strength of that document, and as the special appellant from the first denied its genuineness, the Principal Sudder Ameen was bound to adjudicate the issue, and to say whether the lease was valid or invalid. But if he had found it to be insufficiently proved, we do not think that, under the circumstances, he would be prevented from looking into the other evidence, especially as one part of the defence, namely, that which denies the existence of any holding of the plaintiff of the *benamee* tenure of Ramdhun Ghose, is negatived by the special appellant's own admission in the decree of 1851. The case will be remanded, therefore, in order that the Principal Sudder Ameen may first decide regarding the *pottah;* if he hold that to be bad, he will go into the evidence of the special respondent's title and possession of the land mentioned in the decree of 1851 from that date up to the present, and if he find it proved that the special respondent has held possession of that land, and has paid rent for it all along, he will give him a decree in accordance with the admission of the then talookdars, the failure of the *pottah* notwithstanding. Costs will follow the result.

The 15th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Mahomedan Law—Endowment—Grant of perpetual lease by Trustees.

Case No. 2519 of 1865.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 18th July 1865, reversing a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of that District, dated the 21st May 1862.

Shoojat Ali *alias* Baboo Meah (Defendant), *Appellant,*

versus

Zumeerooddeen and others (Plaintiffs), *Respondents.*

Baboos Mohendro Lal Shome and *Mohinee Mohun Roy* and *Moulvie Syud Murhamut Hossein* for Appellant.

Baboos Greesh Chunder Ghose and *Greeja Sunker Mojoomdar* for Respondents.

According to Mahomedan Law, the trustees of an endowment cannot create a valid mourosee tenure at a fixed rent by granting a lease of any portion of the *wuqf* property.

THIS was a suit instituted on the 30th December 1861 to recover the possession of 18 beegahs of *wuqf* land granted to the plaintiffs under a lease by some women who claim title as heirs of certain *khadims.*

The land formed part of a *wuqf* estate consisting of 250 beegahs which had been released in a proceeding for resumption by the Special Commissioner on the 15th of April 1841.

The defendant is the *mutwullee,* who was declared to be in possession of the property by the Magistrate in September 1854 (20th Assin 1261).

The Principal Sudder Ameen dismissed the suit.

On appeal, the Judge, on the ground that "the land was released to the so-called *mutwullee,* and the plaintiffs' lessors" assumed that the plaintiffs' lessors had title to grant leases, and, therefore, reversing the decision of the Principal Sudder Ameen, gave the plaintiffs a decree.

On appeal to this Court, Mr. Justice Kemp and Mr. Justice Seton-Karr remanded the case, on the ground that the Judge had not enquired into the title of the plaintiff's lessors or their power to grant leases, or into the question whether such lessors had been in possession within such a period as to prevent the claim from being barred by limitation.

On the remand, the Judge found that "the title of plaintiffs' lessors was as good as that of the so-styled *mutwullee,* being derived from the same source, namely, the decree of the Special Commissioner." And on the *second* point, he found that the plaintiffs' lessors had been in possession down to the time of the proceedings in the Act IV. case. And the Judge adhered to his former decision, reversing that of the Principal Sudder Ameen.

The special appeal was presented to this Court, which came on before Loch and Norman, JJ. The Court would have reversed the decision at once upon the ground that the release of the Special Commissioner could give no title, and that there was nothing to show that the *khadims* had any power to grant leases. But as, from instances given in the judgment of the Judge, it was apparent that *khadims* had been for a long period in possession of shares or portions of this property, the Court thought it might possibly turn out that such portions might be held by some sort of service tenure, such as the obligation of sweeping, or finding sweepers to keep the mosque clean.

The case was accordingly again remanded.

Issues were fixed by the Court below as follows; *first,* had the *khadims* more than a life-interest? The Judge finds that on this point nothing satisfactory could be ascertained. The evidence adduced by the respondents shows that formerly there were four *khadims,* and now there is only one. And the evidence fails to show how the four were paid, and why they have been reduced.

The *second* issue is—Was the office of *khadims* tenable by females? The Judge says it is clear that a female could not perform the office of a *khadim.*

The *third* issue was—Had the *mutwullee* any power of interference with, or any power to confirm, leases granted by the *khadims?* On that point, he says that the evidence of the Golahdars of the Salt Gunge proves that Baboo Meah had no power to interfere with leases granted by other shareholders of the endowment.

He finds, *first,* that it is proved from certain *taidads* the original endowment of 1250 bee-

gahs had become split into portions amongst the shareholders. *Secondly*, that there were female proprietors among the shareholders, and he proceeds to say that he adheres to his former judgment.

Against this judgment the defendant appeals.

We are of opinion that the judgment of the Judge must be reversed, and the judgment of the Principal Sudder Ameen affirmed.

This Court showed in its former judgment (2 Weekly Reporter, page 189) that the defendant must be taken as against these parties to be the *mutwullee*. We find that, in the proceedings before the Special Commissioner, the lessors of the plaintiffs and others claimed to be in possession of the *wuqf* property as "*khadims*, collectors, trustees, servants, and sweepers," *not as absolute owners*. The language of the Special Commission in describing the so-called *khadims*, some of whom were women, as *Kabazaus*, shows that he meant to express no opinion about their title. In effect, he calls them *Kabazaus* "people whom I found in possession." Yet, strange to say, the Judge relies on this term as showing that the plaintiffs' lessors had some title greater than that which they would possess as *khadims*.

But let it be assumed for the purpose of argument that the *khadims* had the same rights in the trust property as the present defendant; that the word "*khadim*" was used in the sense given in Wilson's Glossary, page 584, as meaning the person who had charge of a religious bequest or endowment. We lay it down broadly that all the co-trustees of the endowment could not have created a valid mouroosee tenure at a fixed rent by granting a lease of any portion of the *wuqf* property, and *à fortiori* no one or more of such trustees without the consent of the others could do so.

The general principle of Mahomedan Law is that *wuqf* of property dedicated to God is inalienable (*see* Hedaya by Hamilton, Vol. III., pp. 335, 344; Baillie's Digest, page 594; *see* also 2 Moore's Indian Appeals, page 421, Jewun Doss Sahoo *versus* Shaikh Kuberooddeen). So far does this extend that it has been held that a *mutwullee* cannot mortgage the property even temporarily for the repair or other benefit of the mosque (Moulvie Abdoollah *versus* Rajessuree Dossee, 7 Select Reports, page 268).

In Baillie's Mahomedan Law, page 596, it is said that, when the Superintendent of a "*wuqf* has let a mansion appropriated for "the use of the poor for more than a year, "the lease is unlawful. In the absence of "any condition, the approved doctrine is "that a lease of estates in land may be "decreed to be lawful for three years, unless "it be for the benefit of the *wuqf* to annul them; and that, with regard to leases "of other property, they should be decreed "to be unlawful when they exceed one "year, unless it be for the benefit of the *wuqf* "to sustain them. But this varies with the "change of places and times."

Again, "it is not lawful to let a *wuqf*, "except for the rent of similar property. "But when a *wuqf* has been let for three "years at a known rent, equal to that of "similar property, so that the lease is lawful, "it is not to be cancelled, though rents "should rise or fall during the period."

Mr. Macpherson appears to us to lay down the true rule. He says: "Probably the principle which ought to govern all such cases "is that those alienations and those alienations only which fall within the scope and "spirit of the endowment are to be supported." (Macpherson on Mortgages in the Mofussil, page 38.) There is a decision (Dalrymple *versus* Khondkar Azeezul Islam, Sudder Dewanny Reports, 31st March 1858), in which it appears to have been considered that, "where the office of *mutwullee* "is hereditary, and he has a beneficial "interest in the property, his property must "be looked upon as a heritable estate "burdened with certain trusts, the proprietary right in which is vested in the *mutwullee* and his heirs, and in such case there "appears no sufficient reason why the incumbent should not exercise the right "possessed by other proprietors to grant "leases even in perpetuity." That position appears to be unsupported by any authority, and unsound in principle.

This Court remanded the present case for an enquiry as to whether the *khadims* had any special property or power of alienation.

Nothing of the kind is shown to exist, and the result, therefore, is that we must take the property to be *wuqf*, though in the possession of trustees who may possibly succeed by hereditary right. We pronounce the lease void. The trust property will remain in the possession of the *mutwullee*.

We reverse the judgment of the Court below, and dismiss the suit with costs in all the Courts and interest.

The 16th March 1866.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Mesne-Profits—Set-off.

Case No. 348 of 1865.

Regular Appeal from a decision passed by Moulvie Imdad Ali Khan Bahadoor, Principal Sudder Ameen of Tirhoot, dated the 29th June 1865.

Rotee Rumun Oopadhya and another (Defendants), *Appellants,*

versus

Greeja Nund Oopadhya (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Kalee Mohun Doss for Respondent.

Suit laid at Rupees 14,391.

A set-off is not admissible in a suit for mesne-profits, which is not a suit for a debt within the meaning of Section 121, Act VIII. of 1859.

THIS was a suit to obtain *wasilat* or mesne-profits in respect of certain mouzahs for a period commencing with the year 1265.

Three objections are made by the appellants to the decision of the Court below:—

(1.) They say that the claim for the first year's rent, that of 1265, is barred by lapse of time. It is, however, conceded that the last *kist* of that year must have been received by the defendant within time, and possibly all of them were so, as the plaintiff says they were. While, on the other hand, the defendant who alone could show whether in fact any of the *kists* of that year were received by him more than six years before the filing of the plaint gives no evidence on this point. We, therefore, agree with the Lower Court in concluding from the evidence that no part of the plaintiff's claim is barred by the operation of the Limitation Act.

(2.) The appellants urge that the Court below was wrong in refusing to look into and consider certain items of set-off which the defendants claimed. But this is a suit for *wasilat;* and we are of opinion that, as such, it is not a suit for a *debt* within the words of Section 121 of Act VIII. of 1859. Although the Civil Procedure Code specifically allows a suit to be brought for mesne-profits alone, without coupling with it a claim for the land itself, we do not think that the character of the subject of the suit is thereby altered. Mesne-profits, as contemplated by the framers of Section 10 of the Civil Procedure Code, although severed from a claim for possession of the land, appear to us to remain still of the nature of damages for the wrongful withholding of that possession, and not to come within the description of money had and received to the plaintiff's use. On this view of the question, the Lower Court was quite right in not entertaining the defendant's claim of set-off. We further think that the defendant's claim of set-off was not made out by the evidence. All the items of which it consists, as far as we can understand them, are of one character, namely, claims for re-payment of money alleged to have been paid on behalf of the plaintiff. But there was scarcely a shadow of evidence to show that any of these items were, wholly or in part, monies which the plaintiff, as against the defendant, was ever bound to pay, and certainly none to show that the payment of them by the defendant was made under such circumstances as entitled him to call on the plaintiff for re-payment.

(3.) The appellants lastly object that the Lower Court was wrong in deciding against the existence of a certain zur-i-peshgee lease which the defendants set up to show that they had not had possessory enjoyment of a portion of the land during the whole of the period for which the *wasilat* was claimed. Herein we again agree with the Lower Court. The alleged lease is not put in. The supposed lessee does not seem to have been called as a witness, and the only evidence, even remotely bearing upon the point, is the record of a money-decree on a bond which seems to have been obtained by such lessee, and which might possibly have formed the basis or consideration for a subsequent mortgage or hypothecation; but of any such mortgage or hypothecation having been actually effected, we find no trace whatever.

Except on the foregoing grounds, the judgment of the Lower Court is altogether unimpeached. We, therefore, affirm it with costs.

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The 16th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Case No. 271 of 1865.

Execution of decree—Hindoo Law of Inheritance—Step-mother—Sister.

Regular Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Backergunge, dated the 14th June 1865.

Bhuggobutty Debia (one of the Plaintiffs), *Appellant,*

versus

Koroona Moyee and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Nil Monee Sein* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Suit laid at Rupees 5021-3-10½.

Suit for execution of a decree of certain property pledged as security by *A* on account of his father's debt, against *A's* step-mother and his sister as mother of a minor son, on whose admissions the plaintiffs got a decree. The former, as step-mother, could take nothing at all, nor could the latter take for her minor son except in the total absence of other heirs. But the former, owing to the neglect of the legal heirs, claimed a title to the property by limitation. Instead of giving the plaintiffs a simple decree against the step-mother, the case was remanded for further investigation as to the precise rights of the parties and as to the legal effect of the original decree.

THE facts which lead to this appeal are as follow :—

One Raj-Doollubb, as far back as 1817, became indebted to Shumbhoo Chunder Chuckerbutty. As he was unable to liquidate the debt, his son Poorno Chunder, on the 16th September 1825 (2nd Assin 1232), executed a *kistibundee* in favor of the creditor, promising to pay the money due between 1232 and 1242, and pledged five parcels of real property as security.

In 1847, Shumbhoo Chunder brought a suit on the above document against Koroona Moyee and Jugodumba, and, on their admissions, got a decree in the Court of the Principal Sudder Ameen.

The present suit is now brought by the plaintiffs, who are the representatives of Shumbhoo Chunder, to execute the said decree on the five properties pledged in the *kistibundee*, and to set aside an order in the Miscellaneous Department of the 30th September 1863, passed by the Principal Sudder Ameen, whereby the properties claimed by the plaintiff and put up to sale were released from attachment.

The position of the parties is shown by the subjoined family-tree :—

Rughoo Nundun.

- Unno Poorna, Sister of Raj Doollubb
  - Bhugwan Chunder Sein (Defendant).
- Raj Doollubb, married (1) Koroona Moyee (defdt.) (2) Ram Monee.
  - Poorno Chunder (son) deceased
    - Jugodumba (daughter)
      - Chunder Coomer (Defendant).

In answer to the plaintiff's suit, Chunder Coomar denied the *kistibundee* as fabricated, and also stated that Koroona Moyee had no interest in, or possession of, the property which had been held by the defendant for 19 years.

Bhugwan Sein stated that neither Koroona Moyee nor Chunder Coomar had any right in the property which, according to Hindoo Law, devolved on him.

Koroona Moyee filed no written statement, and took no steps in the case.

The Principal Sudder Ameen has tried this case in a very unsatisfactory manner, and with a very imperfect view of the real point at issue, and the language of his judgment is, in some places, extremely confused.

He finds, in effect, that the *kistibundee* is not proved, and he dismisses the suit of the plaintiffs. At the same time, he holds that Chunder Koomar is not the legal heir, and he refuses to enquire into the right of Bhugwan or to decide in a separate suit, brought by Chunder Koomar, whether he or Bhugwan be the legal heir to Poorno Chunder.

It appears that two cases were tried by the Principal Sudder Ameen, one by the plaintiffs, appellants before us, and one by Chunder Coomar. The appeal in the separate case brought by Chunder Coomar lies to the Judge, and is not before us; but we observe that the Principal Sudder Ameen ought to have written a separate decision in this case, though he was right in trying the two cases together.

We may here at once declare that, though the question of the genuineness of the *kistibundee* itself was pressed upon us by the respondent, Chunder Coomar, who alone of the defendants has appeared in our Court, we must refuse to enter into any consideration of its merits or to give any opinion on the evidence in support of the same, as the Lower Court has done. The suit of the appellants is brought to enforce a decree passed on the *kistibundee*, which decree has

become final. The issue drawn up by the Lower Court on this point was not incorrect, although the Principal Sudder Ameen wrongly allowed himself to be drawn away into a consideration of the merits of the *kistibundee*. No suit has been brought by any one to set aside the *kistibundee* as fraudulent and collusive, and the only question that arises on the subject is, whether the decree of 1847 was in reality procured against the heirs of Poorno Chunder, and whether the property in dispute is bound by that, and is liable to satisfy it?

Now, it appears to us that on this point there has been no decision by the Lower Court while there is no evidence sufficient to enable us to pass any decision thereon.

According to Hindoo Law, the natural heir to the property of Poorno Chunder would be, apparently, Bhugwan Chunder. It seems admitted that Chunder Coomar was not born until some time after the death of Poorno Chunder, and failing heirs to this person the inheritance would re-ascend to Raj Doollub, and, through his sister Unno Poorna, would descend to Bhugwan. On this point, however, we give no decided opinion. We merely indicate what, to our thinking, failing other special circumstances, would be the natural course of Hindoo succession.

Then, as regards the effect of the decree given in 1847 on the admission of Koroona Moyee and Jugodumba. In that suit, both these ladies appeared, the former as the wife of the deceased Raj Doollubb, and as the step-mother of Poorno Chunder deceased; and the latter as the widow of Tarinee Sunkur Sein, deceased, and as the mother of an infant not yet named.

Now, it is quite clear that Koroona Moyee, as the step-mother of Poorno Chunder, could take nothing at all under any circumstances, nor could Jugodumba take for her minor son except in the total absence of other heirs, and unless the inheritance of Poorno Chunder after his death has been held by his widow—contingencies of which we know nothing, but which are thrown out in the course of argument.

The plaintiff's own written statement broadly declares that neither Bhugwan nor Chunder Coomar ever had any possession of the inheritance of Poorno Chunder, and, if they had not committed themselves to this statement, the decision of the High Court of the 16th of December 1862, which has been referred to in this case, and which is noticed by the Lower Court, clearly rules that Chunder Coomar, who in that case appeared by his guardian as plaintiff, had not yet shown that he was the rightful heir under Hindoo Law, and consequently that he had no right to question the grant of a *potta* by Koroona Moyee whom he had admitted to have been in possession before him.

The pleader for the plaintiffs, appellants, urges on us to consider that, even if Koroona Moyee be not the legal heir of Poorno Chunder, she has yet been in possession for a long time, and has acquired a prescriptive title to the property. In this view, he contends that her rights may be sold, as she practically represents the original debtor, and as the appellants are not bound to search out the heirs and reversioners of Poorno Chunder wherever they may exist.

This being the state of things and the contention of the various parties, we think that one of two courses is open to us. We may either give the plaintiffs a simple decree against Koroona Moyee, and allow them to put up to sale her interest in the property, whatever that may be, leaving the real heirs of Poorno Chunder to take any steps they may think fit, or we may remand the case for further investigation as to the precise rights of the parties, and as to the legal effect of the decree of 1847.

The latter course is the one which seems to us fit to be adopted in order to settle the contention, and so, if possible, to avoid separate, harassing, and expensive litigation.

The Principal Sudder Ameen will again take up this case at once, and will endeavour to find out from the evidence on the record who were the heirs of Poorno Chunder at the time of the decree of 1847, and whether Koroona Moyee or Jugodumba had then any legal interest in the property, and whether they could bind the same for the debt of Poorno Chunder. If necessary, he may take any further evidence on this point which may be tendered by the plaintiffs, or by Koroona Moyee, Chunder Koomar, or Bhugwan Chunder, within a reasonable time after the record reaches him.

If the Court should find that, in 1847, the estate of Poorno Chunder was not legally represented by Koroona Moyee and Jugodumba, and that their consent could not bind the property, it is obvious that the plaintiffs under their decree might take nothing. The Principal Sudder Ameen may, however, consider whether the decree on her own consent would not bind Koroona Moyee personally, and he may also consider the plea now

raised by the plaintiffs to the effect that Koroona, though not the heir, has, owing to the neglect of legal heirs, acquired a title by limitation, and that the property, whether held by her, or by the defendant Chunder Koomar, with her permission, is still liable to sale in satisfaction of the plaintiffs' decree and claim.

The case is returned to the Lower Court under Section 354 of the Code, and it should be taken up at once. A finding should be recorded on the point laid down, and the record be returned to us with any further evidence with the least possible delay.

The 16th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Onus probandi—Suit by purchaser of equity of redemption against subsequent purchaser—Concealed title—Proof of possession.

Case No. 3195 of 1865.

Special Appeal from a decision passed by the Judge of Patna, dated the 11th September 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 1st December 1864.

Syud Fuzlool Ruhman (one of the Defendants), *Appellant,*

versus

Moulvie Ali Kureem (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. V. Doyne and *Baboo Kishen Kishore Ghose* for Appellant.

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Respondents.

In a suit, by the alleged purchaser of the original proprietor's equity of redemption, to establish his right to redeem, against a subsequent purchaser of the same proprietary rights, the plaintiff is bound both to establish his original deed of purchase, and to prove either actual possession or receipt of *huk ajiri* or some portion of the proceeds of the property.

THIS is an appeal, the facts in which are somewhat complicated.

It appears that, on the 21st of May 1841, Ameerunissa, the proprietress of Mouzah Shahpore Doomree, leased the same to Mahomed Ali (husband of Budlun, and father of the plaintiff Ali Kureem), and to his brother Wahed-al-Huk, husband of Buseerun. The two brothers advanced on the lease, which was one of the usual zur-i-peeshgee form, 4,725 rupees, and made over their share to their wives as security for their dower.

As to the fact of the lease there does not appear to have been any controversy, but the plaintiff alleges that Ameerunissa, on the 28th of July 1844, sold him outright her proprietary title in the said mouzah.

The defendant, on the other hand, purchased the same mouzah on the 26th of November 1858 from the heirs of Ameerunissa, and brought a suit for the right of pre-emption, and obtained a decree by compromise for two-thirds of his claim.

After the Mutiny, in which Ali Kureem was compromised, the share of Budlun, the wife of plaintiff's father (the advance on which share the plaintiff claims to have paid off) was sold as the property of Ali Kureem, and purchased by a third party. Budlun then sued to set aside this sale, and got a decree.

Subsequently, Fuzl-al-Ruhman, the defendant in this suit, sued Budlun to recover possession by paying off her claim against the estate, and obtained a decree. Ali Kureem, the present plaintiff, intervened unsuccessfully; and hence this suit and the appeal to us.

The plaintiff sues to cancel the sale by the heirs of Ameerunissa, to establish the sale of the property to himself, to be maintained in possession of one-half of the mouzah in respect of which he alleges that he has paid off Budlun's share, and to obtain possession of the other half by paying off the claims of Buseerun, the wife of his father's brother.

Both Courts have given the plaintiff a decree. The first Court recites all the documents, and concludes from them, and from the oral evidence, that the execution and delivery of the deed of sale in 1844 have been fully proved, and that nothing has been brought by the defendant to rebut the proofs of the plaintiff.

The Judge arrives substantially at the same conclusion, and in special appeal three points are taken before us—

1st.—The general issue of limitation.

2ndly.—The admission of improper and illegal evidence; and,

3rdly.—The priority which, under the law, should be given to a subsequent registered deed over a prior unregistered one.

It must be borne in mind that this suit is not one brought by a mortgagor against a mortgagee, but one in which the plaintiff claims to have purchased the original pro-

prietor's equity of redemption, and sues to establish his right to redeem against a defendant the purchaser of the same proprietary right by a subsequent transaction.

In such a case, the plaintiff would be bound to establish not merely his original deed of purchase, but also to show that he has been in possession of the property, if not, indeed, by actual possession of the village, at least by the receipt of *huk ajiri*, or some portion of the proceeds.

The Judge does not find with precision and clearness whether the deed, now put forward by the plaintiff for the first time after a long series of years, is genuine and reliable. He seems to hold that there is nothing to show that Ali Kureem had not purchased the property, and that the proceedings disclose nothing inconsistent with the existence of a concealed title vested in Ali Kureem. He says further that, although the Government, after the Mutiny, failed to trace out Ali Kureem's property with a view to confiscation, it does not follow that the same, or his rights in the same, do not exist.

This reasoning appears to us inconclusive, and the way in which the case went to trial before the Judge is not fair to the defendant, as it does not put the *onus* of proving clearly a concealed and disputed title distinctly on the shoulders of the plaintiff. There is no satisfactory and sufficient finding as to the truth of the deed of sale regarding which the circumstances appear, to say the least, suspicious, and which was never propounded, and the title based on which was never specifically asserted in a distinct shape for 18 years or so after execution.

Neither does the evidence adduced to prove possession after purchase, or assertion of proprietary right, seem to us to have been well weighed by the Judge, as it ought to have been, considering the peculiarities in this case, and the remarkable discrepancy as to time of the payment of Budlun's share of the advance, though it has not escaped the Judge's notice, appears to show that the plaintiff was not very clear as to his own position and circumstances.

As we think the case must be remanded, we note some of the points on which the enquiry seems defective, and the inferences and conclusions to be vague.

In the original lease of 1841, it was stipulated that a sum of 39 rupees should be paid annually to the lessor. What proof is there on the record that the plaintiff, who became proprietor in 1844, ever received any portion of this reserved sum; or what satisfactory explanation is there of his non-receipt of any portion of the same?

The document of the 8th of December 1848 is one of those to which the defendant's Counsel objects, on the second ground of appeal, as improperly received. It is an *ikrar* between Khyrut Ali, the father of the defendant, and Ali Kureem, the plaintiff, for the division of certain lands in Mukdoompore, but not apparently in *Shahpore Doomree*. This evidence, it should be remembered, is not conclusive against the defendant. It is evidence of an assertion of right only, and the Judge should consider to what property the allegation of a zemindary right of Ali Kureem does refer, and how far the document carries this assertion. At the close of the paper, there is some allusion to Shahpore and to certain undefined contingencies. The Judge should weigh this document carefully.

Some stress has been laid by both parties on the language used in the document of the 5th of May 1853, which is a decision of the Principal Sudder Ameen on a claim for compensation brought by Ali Kureem and others. The Judge should consider carefully the description given by the plaintiff of himself in that suit, to what villages it applies, and what it may be taken to show.

The Judge should also consider, as we have already observed, that the plaintiff, on his own showing of a concealed title, or of one never positively asserted in the shape it now assumes until 1862, is bound to prove not only his purchase, but the receipt of rent under that purchase, or at least his exact position after the purchase. If he cannot prove his title-deed satisfactorily, he is out of Court; and if he be held to have proven his title-deed, but not to have shown possession within twelve years anterior to the date of suit, he would be barred under the general Law of Limitation, and the ruling of the Privy Council in Volume VIII. of Moore, page 199, in the case of Maharajah Nitresur Singh.

The Judge, we observe, may not be wrong in considering the facts and the law-point of limitation together, but he should give a clear decision both as to the title and as to possession within 12 years before suit, with reference to our remarks as above.

Finally, he should take into consideration the Law of Registration, Act XIX. of 1843, Section 2. The case relied on by the respondent on this head, and reported at page 261 of Hay's Reports for 1862 is not exactly

in point; for in that suit the learned Judges held that the possession of the unregistered claimant had been fully proved, and that it would be an extreme and harsh construction of the law to eject him in favor of a subsequent and registered purchaser.

On the whole, then, we remand the case to the Judge, who will carefully re-consider his judgment with reference to our remarks. The Judge will put the plaintiff to the strict proof of his title-deed which is impugned by the defendant. The Judge will also demand strict proof of possession or of exercise of proprietorship within 12 years of the date of suit, and he will consider how far the various expressions used in the documents relied on by the plaintiff appear to him to assert a claim and a title consistent and conformable to those now sued on; and after giving weight to any thing adduced by the defendant to invalidate the plaintiff's case, if he does then think the plaintiff has made out his *title*, he will consider how the Registration Act applies to the contest between the parties, and decide the case accordingly.

The 19th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Arbitration (Enforcement of award)—Inheritance.

Case No. 344 of 1865.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 25th July 1865.

Ram Coomar Singh (Plaintiff),

Appellant,

versus

Dewan Ram Jeebun Singh and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellant.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondents.

Suit laid at Rupees 3,77,597-15-4.

A plaintiff cannot sue for moveables by a suit to enforce an award of arbitration. He may sue for damages and losses sustained with regard to his share of ancestral property, under his general rights of inheritance, whether adjudicated upon by a previous award of arbitration or not; and as regards lands, he may sue either for the enforcement of the award, or upon his general rights. In the latter case, the defendant can plead the award, and, if proved to be good, and capable of execution, the Court may give effect to it. In the former case, the plaintiff must show good cause for not suing out execution of the award within six months.

Dewan Ramnath, the late dewan of the present Maharajah of Domraon, left him surviving the defendant Ram Jeebun, his son, and Ram Coomar the plaintiff, the son of another son, who died during the lifetime of his father, and also left certain property, real and personal.

The uncle and the nephew having quarrelled, appointed the Maharajah as their arbitrator. The Maharajah, by an award, pronounced each entitled to a half share of the whole family property in lands and personal effects. By this division, some villages were made over entire to each party, and the partition as regards other villages was made in other ways.

Of the landed estates, it is admitted, possession was taken by each party according to the arbitration award, with the exception of certain villages allotted to the plaintiff, which were held in *ijarah* by a farmer under a lease given by the defendant before the award.

The plaintiff sued for possession of these villages before the Principal Sudder Ameen, who gave him a decree.

On appeal, the Judge reversed this order, throwing doubts upon the validity of the arbitration award, on the ground of its not having been executed within six months as required by Regulation VI. of 1813. The High Court upheld the order of the Zillah Judge, on the ground that a lease given before reference to the private arbitration could not be disturbed by the award of the arbitrator. It is alleged that the Lower Court is not right in asserting that the arbitration award was *not* produced before the Lower Appellate Court in that case; but, after all, this is immaterial as to what we have now to decide. Further, the plaintiff sued for rents due to him from ryots of the villages awarded to him, and was opposed by the defendant, who *intervened* in those cases denying the validity of the arbitration award, and who succeeded in causing these claims of the plaintiff to be dismissed.

The defendant is further alleged by the plaintiff to have refused to join with him in realizing sums jointly due from several debtors of the family, and to have himself and separately settled and compromised with many such debtors, and to have injured his own as well as the plaintiff's rights by allowing many joint claims and dues to become affected by the Law of Limitation.

prietor's equity of redemption, and sues to establish his right to redeem against a defendant the purchaser of the same proprietary right by a subsequent transaction.

In such a case, the plaintiff would be bound to establish not merely his original deed of purchase, but also to show that he has been in possession of the property, if not, indeed, by actual possession of the village, at least by the receipt of *huk ajiri*, or some portion of the proceeds.

The Judge does not find with precision and clearness whether the deed, now put forward by the plaintiff for the first time after a long series of years, is genuine and reliable. He seems to hold that there is nothing to show that Ali Kureem had not purchased the property, and that the proceedings disclose nothing inconsistent with the existence of a concealed title vested in Ali Kureem. He says further that, although the Government, after the Mutiny, failed to trace out Ali Kureem's property with a view to confiscation, it does not follow that the same, or his rights in the same, do not exist.

This reasoning appears to us inconclusive, and the way in which the case went to trial before the Judge is not fair to the defendant, as it does not put the *onus* of proving clearly a concealed and disputed title distinctly on the shoulders of the plaintiff. There is no satisfactory and sufficient finding as to the truth of the deed of sale regarding which the circumstances appear, to say the least, suspicious, and which was never propounded, and the title based on which was never specifically asserted in a distinct shape for 18 years or so after execution.

Neither does the evidence adduced to prove possession after purchase, or assertion of proprietary right, seem to us to have been well weighed by the Judge, as it ought to have been, considering the peculiarities in this case, and the remarkable discrepancy as to time of the payment of Budlun's share of the advance, though it has not escaped the Judge's notice, appears to show that the plaintiff was not very clear as to his own position and circumstances.

As we think the case must be remanded, we note some of the points on which the enquiry seems defective, and the inferences and conclusions to be vague.

In the original lease of 1841, it was stipulated that a sum of 39 rupees should be paid annually to the lessor. What proof is there on the record that the plaintiff, who became proprietor in 1844, ever received any portion of this reserved sum; or what satisfactory explanation is there of his non-receipt of any portion of the same?

The document of the 8th of December 1848 is one of those to which the defendant's Counsel objects, on the second ground of appeal, as improperly received. It is an *ikrar* between Khyrut Ali, the father of the defendant, and Ali Kureem, the plaintiff, for the division of certain lands in Mukdoompore, but not apparently in *Shahpore Doomree*. This evidence, it should be remembered, is not conclusive against the defendant. It is evidence of an assertion of right only, and the Judge should consider to what property the allegation of a zemindary right of Ali Kureem does refer, and how far the document carries this assertion. At the close of the paper, there is some allusion to Shahpore and to certain undefined contingencies. The Judge should weigh this document carefully.

Some stress has been laid by both parties on the language used in the document of the 5th of May 1853, which is a decision of the Principal Sudder Ameen on a claim for compensation brought by Ali Kureem and others. The Judge should consider carefully the description given by the plaintiff of himself in that suit, to what villages it applies, and what it may be taken to show.

The Judge should also consider, as we have already observed, that the plaintiff, on his own showing of a concealed title, or of one never positively asserted in the shape it now assumes until 1862, is bound to prove not only his purchase, but the receipt of rent under that purchase, or at least his exact position after the purchase. If he cannot prove his title-deed satisfactorily, he is out of Court; and if he be held to have proven his title-deed, but not to have shown possession within twelve years anterior to the date of suit, he would be barred under the general Law of Limitation, and the ruling of the Privy Council in Volume VIII. of Moore, page 199, in the case of Maharajah Nitresur Singh.

The Judge, we observe, may not be wrong in considering the facts and the law-point of limitation together, but he should give a clear decision both as to the title and as to possession within 12 years before suit, with reference to our remarks as above.

Finally, he should take into consideration the Law of Registration, Act XIX. of 1843, Section 2. The case relied on by the respondent on this head, and reported at page 261 of Hay's Reports for 1862 is not exactly

in point; for in that suit the learned Judges held that the possession of the unregistered claimant had been fully proved, and that it would be an extreme and harsh construction of the law to eject him in favor of a subsequent and registered purchaser.

On the whole, then, we remand the case to the Judge, who will carefully re-consider his judgment with reference to our remarks. The Judge will put the plaintiff to the strict proof of his title-deed which is impugned by the defendant. The Judge will also demand strict proof of possession or of exercise of proprietorship within 12 years of the date of suit, and he will consider how far the various expressions used in the documents relied on by the plaintiff appear to him to assert a claim and a title consistent and conformable to those now sued on; and after giving weight to any thing adduced by the defendant to invalidate the plaintiff's case, if he does then think the plaintiff has made out his *title*, he will consider how the Registration Act applies to the contest between the parties, and decide the case accordingly.

The 19th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges*.

Arbitration (Enforcement of award)—Inheritance.

Case No. 344 of 1865.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 25th July 1865.

Ram Coomar Singh (Plaintiff),

Appellant,

versus

Dewan Ram Jeebun Singh and others (Defendants), *Respondents*.

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellant.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondents.

Suit laid at Rupees 3,77,597-15-4.

A plaintiff cannot sue for moveables by a suit to enforce an award of arbitration. He may sue for damages and losses sustained with regard to his share of ancestral property, under his general rights of inheritance, whether adjudicated upon by a previous award of arbitration or not; and as regards lands, he may sue either for the enforcement of the award, or upon his general rights. In the latter case, the defendant can plead the award, and, if proved to be good, and capable of execution, the Court may give effect to it. In the former case, the plaintiff must show good cause for not suing out execution of the award within six months.

Dewan Ramnath, the late dewan of the present Maharajah of Domraon, left him surviving the defendant Ram Jeebun, his son, and Ram Coomar the plaintiff, the son of another son, who died during the lifetime of his father, and also left certain property, real and personal.

The uncle and the nephew having quarrelled, appointed the Maharajah as their arbitrator. The Maharajah, by an award, pronounced each entitled to a half share of the whole family property in lands and personal effects. By this division, some villages were made over entire to each party, and the partition as regards other villages was made in other ways.

Of the landed estates, it is admitted, possession was taken by each party according to the arbitration award, with the exception of certain villages allotted to the plaintiff, which were held in *ijarah* by a farmer under a lease given by the defendant before the award.

The plaintiff sued for possession of these villages before the Principal Sudder Ameen, who gave him a decree.

On appeal, the Judge reversed this order, throwing doubts upon the validity of the arbitration award, on the ground of its not having been executed within six months as required by Regulation VI. of 1813. The High Court upheld the order of the Zillah Judge, on the ground that a lease given before reference to the private arbitration could not be disturbed by the award of the arbitrator. It is alleged that the Lower Court is not right in asserting that the arbitration award was *not* produced before the Lower Appellate Court in that case; but, after all, this is immaterial as to what we have now to decide. Further, the plaintiff sued for rents due to him from ryots of the villages awarded to him, and was opposed by the defendant, who *intervened* in those cases denying the validity of the arbitration award, and who succeeded in causing these claims of the plaintiff to be dismissed.

The defendant is further alleged by the plaintiff to have refused to join with him in realizing sums jointly due from several debtors of the family, and to have himself and separately settled and compromised with many such debtors, and to have injured his own as well as the plaintiff's rights by allowing many joint claims and dues to become affected by the Law of Limitation.

The plaintiff further alleges that no portion of the *moveable* property was divided; that a part of it, owing to the conduct of the defendant, had been destroyed, and part has been entirely appropriated by the defendant.

The plaintiff accordingly now sues substantially (though not in express words), stating that as his title to the lands allowed to him by the arbitration award has been questioned and put in jeopardy; that as he has without a suit no means of enjoying quite possession of these lands, or of recovering possession of those of which he had not hitherto obtained possession; and that as he has also no means of recovering all the damages that he has suffered by the alleged misconduct and the opposition of the defendant, he now sues.

It is also a point in plaintiff's case that the defendant, whenever he had any occasion to say anything regarding the arbitration award, had repudiated its validity. Therefore plaintiff has brought the present action generally for his share of the inheritance through the grandfather, claiming at the same time one village Baradcha, as the self-acquired property of his own father and a deceased brother.

The defendant at first demurred to the action of the plaintiff, on the ground that plaintiff should have sued to enforce the arbitration award; and then proceeded to deny the right of the plaintiff to recover or hold anything under that award, pleading that, by a custom in the family, as the eldest heir, defendant *alone* was entitled to hold and enjoy the whole property.

The plaint and supplemental plaint were received, and issues framed by the Principal Sudder Ameen and the former Judge of the district, and the parties proceeded to trial before the present Judge. The Judge considered the plaint to be bad, and dismissed the case of the plaintiff on the grounds recorded in his decision.

The sum and substance of these grounds appear to be that the plaintiff could only sue to enforce the award, and, not having done so, cannot even by this plaint ask for that award being confirmed in his favor.

As regards the claim for personal properties, the Lower Court thinks that the plaintiff has not given sufficient detail to enable the defendant to answer properly the demand.

Against this decision, the plaintiff has appealed.

Judgment.—After fully hearing the pleaders on both sides, we are of opinion that the plaint as now brought is *not* open to the objections taken by the Lower Court, and that even if the plaint were bad, and the issues already framed did not meet the proper case of both the parties, still the Court under the present law is required, and is able to frame issues at the trial of the case on the facts elicited from the statements of the parties before it, and thus to decide the real contention between them.

We hold that, as regards the personal property and the damages claimed by the plaintiff, he had no remedy under the arbitration award, for no details are given, and by law the award could be valid only as regards the lands.

We further hold that the acts of the defendant had compelled the plaintiff to come in Court for a declaration of his title, even for the lands of which he had possession after the award, because his quiet enjoyment of them had been prejudiced by the acts of the defendant.

It is true that the plaintiff could, if he liked, have sued only to enforce the award of arbitration for the lands allowed to him by the award, both to those of which he had already taken formal possession, as well as to those of which he had not obtained possession, but in our opinion plaintiff is not restricted to that relief alone.

The tenor of the order of the former Zillah Judge, dated the 28th February 1862, passed in the former case brought by the plaintiff for the possession of the lands allowed to his share, but farmed by the defendant; and the answer of the defendant, when the plaintiff sued for them again in the Collectorate, after the expiration of the lease upheld by the High Court, in which answer the defendant again denied the title of the plaintiff, as well as the validity of the arbitration award; and the general conduct of the defendant in repudiating the award on every occasion, as well as his alleged opposition to its being carried out, show that even if the plaintiff ought, in a technical view, to have sued only for the enforcement of the award, he still had sufficient reason to consider that his general rights were so entirely contested by defendant that he must no longer restrict himself to that action, but must sue generally for his rights of inheritance.

We have already noticed that the plaintiff could not sue for moveables, by a suit to enforce the award. Next if the plaint-

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iff has a right to recover damages and losses alleged to have been suffered by him with regard to property falling to his share by inheritance, we think that he can sue for them under his general rights of inheritance, whether adjudicated upon by a previous award of arbitration or not. Again, if we turn to the provisions of the arbitration law then in operation (Regulation VI. of 1813), we find that, if plaintiff had sued to enforce the award regarding the lands, whether it was previously carried out in part or not carried out at all, he could only obtain relief on showing good cause for his delay in suing out execution of the award.

Moreover, under the law, the plaintiff had the option of either suing for the enforcement of the award, or of suing upon his general rights, and the defendant could, if he like, have rested his defence upon the arbitration-award, which he has not done.

It has been argued that both parties filed copy of the award, and, therefore, plaintiff should have sued on it.

Now, it is clear defendant's pleas in his defence (*vide* 6-7) were utterly inconsistent with his relying on the award as his title, and so we could not decide as in an action on an award admitted to be binding by and on both parties. On the other hand, the plaintiff below and twice here in the most unequivocal terms has said: "I am now "ready to stop litigation as to my general "rights regarding lands, if you (defendant) "will fully act up to and carry out the "award as to all those claims of mine re-"cognized by it." Defendant's pleader said he had no authority to accept this offer, except such as might be inferred from his client filing the award. This, of course, is no authority, and, however much we might wish that a family-dispute among the heirs of a chief servant of the Maharajah of Doomraon should have been settled by his arbitration, the want of authority in defendant's pleader constrains us to proceed to decide the suit on plaintiff's general rights as put before us in this suit.

But here we are met by the fact that the Court below has taken little or no evidence on many points, even relating to the plaintiff's claim for land, and none as to the other claims of the plaintiff. This evidence is necessary. We may add that, in trying this portion of the general claim of the plaintiff, there is nothing to preclude the award being proved and put in evidence by either party, either generally or with reference especially to the allegation of the plaintiff regarding property self-acquired by his father. We add it will be for the Lower Court also to consider whether in this very case the plaintiff cannot be permitted to ask for the award being enforced in his favor as regards the lands in dispute.

As regards the claim for personal property, we hold that, if plaintiff has not given the necessary details regarding this portion of the claim, as stated by the Judge, the Court below should call for further explanation as to the claim of the plaintiff in this respect, and then the proofs of the plaintiff thereon should be gone through item by item.

The Lower Court in this part of the case will also have to consider and decide if the plaintiff is entitled to recover losses alleged to have been involved by defendant's misappropriations, or by the negligence and opposition of the defendant to carry out the arbitration-award regarding the equal partition of all immoveable property and personal effects.

As to mesne-profits, the Lower Court will consider and decide what is due as such to plaintiff for lands, which the defendant may have without any lawful excuse kept out of plaintiff's legal possession, either by retaining it in his own or by farming it to others.

In regard to costs of the case with reference to lands, we think the plaintiff is entitled to all costs to the extent of the landed property that may be found to have been wrongly kept out of his possession, and to which he was legally entitled, as well as for all lands in the quiet enjoyment of which the plaintiff may have been disturbed by defendant's successful intervention.

The costs for the money claimed will depend upon the amount (if any) at which the Court below may find the liability of the defendant.

The Lower Court will also have to decide whether any and, if any, what portion of the claim of the plaintiff as to personal property is under the law barred by limitation.

In conclusion, we may point out that we do not hold that the right of the plaintiff as regards the lands of the villages in a suit for rents due from some ryots, as to which claim the defendant may have successfully intervened, is affected by the limitation of one year under Section 77 of Act X. of 1859.

Under these circumstances, we remand this case to the Lower Appellate Court to try this case with reference to the above remarks.

The 19th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Income Tax—Onus probandi—Manager—Appointment of others without transfer of power.

Case No. 2869 of 1865.

Special Appeal from a decision passed by Mr. E. C. Craster, Officiating Judge of Rajshahye, dated the 31st May 1865, affirming a decision passed by Mr. W. Wright, Principal Sudder Ameen of that District, dated the 13th July 1864.

Ramnath Ghose (Plaintiff), *Appellant,*

versus

Amrit Moyee Dossee and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Mohendro Lal Shome and *Bhuggobutty Churn Ghose* for Respondents.

Suit for share of Income Tax by a co-sharer who, the Lower Court found, was the defendant's manager. HELD that the mere production of a deed showing that the defendant had in it nominated other persons to collect the rents of her share, without proof of cessation of possession, did not shift the *onus* from the plaintiff of proving that he had ceased to hold possession of the defendant's share as her manager, or that the defendant and not the plaintiff had actually collected the rents.

THE special appellant sued to recover from two female co-sharers the Income Tax which he alleged he had been *compelled* to pay for their shares in a property and as *their manager;* also for damages for the loss he had suffered in fines for not filing the required schedules in time; and, further, for the loss that he had suffered owing to his moveable property being sold to realize the amount due on account of the said Income Tax.

The special appellant asserts that, long before the period for which he was thus compelled to pay the Income Tax in question, he had been *discharged* from the *managership* by the defendants, and that they had appointed their own men to look after their affairs and to collect the ren's of their shares.

One of the defendants having admitted her liability for her share, a decree was accordingly given in the first case to the plaintiff, appellant, as against her, for the amount of the Income Tax paid, but not for any portion of the further loss alleged to have been suffered by the plaintiff.

The Lower Appellate Court found as a fact on the evidence in respect to the other defendant that the special appellant *was the manager,* and had not succeeded in proving that he had made over possession of the share of the defendant to others, or had given to this principal any account, or obtained any discharge. That Court accordingly held plaintiff not to be entitled to sue for the Income Tax paid by him without showing collections by the defendant, and accounting for money collected during his management, or without rendering accounts generally.

Against this order, the special appellant appeals, urging that, when he succeeded in showing that the defendant had appointed her own men to collect the rents due to her, his right to be her manager ceased, and that the fact of his having rendered or not rendered accounts of his management was immaterial in this case, because the defendant might sue him for any money due to her; but that he was even now entitled to demand what he had already paid for her as Income Tax due by her for a period subsequent to his alleged removal.

We agree with the Lower Appellate Court that the mere fact of the defendant's having appointed by deed other persons to collect the rents of her share does not prove that the plaintiff had ceased to hold the possession of the share of the property of the defendant as her manager, or that she (defendant), and not the plaintiff (special appellant), had actually collected these rents.

The plaintiff was bound to show that he had ceased to hold any real possession of the share of the defendant. Both the Lower Courts most clearly find as a fact on evidence that the plaintiff never made over in any way the possession of the share of the defendant, and that he was at the time for which the Income Tax was realized from him the manager of the defendant with defendant's property under his control.

If the plaintiff had given proof that the defendant had made collections of her share on her account or by others as her managers or agents, plaintiff might have urged that, even if he had not rendered the accounts of his management, still he had really been obliged to abandon possession of the share of the defendant's property owing to her own acts of the character above mentioned, and was, therefore, not legally bound to pay for the said defendant the Income Tax due from her share for a period subsequent to

the plaintiff being deprived of the management of the said share.

The mere production of a deed showing *only* that the defendant had nominated other persons to collect the rents of her share does not, in our opinion, even make out for plaintiff such a *primâ facie* case as would shift the *onus* from the plaintiff, or justify our stating that he had sufficiently stated his case.

Under the circumstances, as the decision of the Judge, based on the finding of fact that the plaintiff was still the manager of the defendant's share, is not in any manner shown to be erroneous in law, we see no reason to interfere with the decision of the Lower Court, and accordingly dismiss this special appeal with costs.

The 21st March 1866.

Present:

The Hon'ble W. S. Seton-Karr and J. B. Phear, *Judges.*

Limitation—No deduction for legal disability of sons claiming as representatives of father.

Case No. 3147 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 28th June 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 14th September 1864.

Nusheeram Roy (one of the Defendants), *Appellant,*

versus

Shushee Bhooshun Roy (Plaintiff), *Respondent.*

Baboo Gopal Lal Mitter for Appellant.

Baboo Nursingh Chunder Mitter for Respondent.

Suit to recover money advanced on a bond granted by plaintiff's father, on the allegation that the money advanced was the plaintiffs, who were minors at the time. In the absence of proof of knowledge on the part of the defendants of the *benamee* character of the father's position, it was held that, whether the money of the loan really belonged to the plaintiffs or not, they could only sue as the representatives of their father, and that Section 11, Act XIV. of 1859, prevented them from deriving any advantage from their minority in computing the period of limitation.

THIS was a suit filed on the 3rd June 1864 to recover certain money advanced on a bond, dated in March or April 1851. The bond was granted to the plaintiffs' father, but the plaintiffs alleged that the money advanced was the money of the plaintiffs, who were minors at the time. No mention of this circumstance, however, is made in the bond itself, and no evidence was given to show that the defendants were ever aware of it. The money sued for became due under the bond in March or April 1858. On this state of facts, the defendants set up that the action was barred by the Statute of Limitation. The Court of first instance overruled this defence. It was again raised before the Court of Appeal, but no express decision was there given upon it, although that Court eventually determined the case in favor of the plaintiff.

On special appeal before us, the defendants again urge that the lapse of time has deprived the Lower Courts of all jurisdiction to hear the case, and we are of opinion that this objection must be upheld. It is clear that, whether the money of the loan really belonged to the plaintiffs or not, they can only sue in this case as the representatives of their father: for no attempt even has been made to show that the defendants, or any of them, were ever aware of the *benamee* character of the father's position. This being so, by the plaintiffs' own showing, the cause of action accrued during the father's lifetime, because they account for the bond having come into the defendants' possession by reason of the steps which the father took to enforce it. Time has, consequently, been running against the plaintiffs from the beginning, because the last proviso of Section 11 of Act XIV. of 1859 prevents them from deriving any advantage from their minority. And it is admitted that, if nothing has happened to stop the running of time, the suit is barred. We, therefore, allow the appeal, and reverse the decision of the Lower Appellate Court with all costs.

The 21st March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Pre-emption (Right of—by co-sharer in estate at sale in execution of decree).

Case No. 3485 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 7th August 1865, reversing a decree passed by the Sudder Ameen

of that District, dated the 6th September 1864.

Imamooddeen Sowdagur (Defendant), *Appellant,*

versus

Abdool Sobhan and others (Plaintiffs), *Respondents.*

Baboos Kalee Kishen Sein and *Grish Chunder Ghose* for Appellant.

Mr. R. E. Twidale for Respondents.

Where part of an estate is sold in execution of a decree, a co-sharer in the estate is a partner in the thing actually sold, and, according to Mahomedan Law, is entitled to the right of pre-emption.

THREE objections are taken to the Principal Sudder Ameen's decision in this special appeal.

It is contended—

(1.) That the thing sold, *viz.*, a decree for possession of land with *wasilat*, is not, according to Mahomedan Law, the subject of pre-emption.

(2.) That the special respondent was not a partner in the property sold; and

(3.) That with respect to certain other land, sold by the vendor, but not included in the decree, the Law of Limitation applies, as this suit was not brought within one year of the purchaser's taking possession of the property.

None of these objections are, we think, tenable. On reading the bill of sale, we find that a full detail of all the property included under the decree was given, and express mention was made of the lands, fisheries, &c., which were to pass under the conveyance. There can be no doubt that the property itself was sold, and not merely a prospective right to recover it under a decree.

The special respondent was admittedly a co-sharer in the estate, part of which was the subject of the decree, and, as the land itself passed under the bill of sale, he was clearly a partner in the thing actually sold, and would, therefore (*vide* Macnaghten's Mahomedan Law, Chapter IV., page 205), have the right of pre-emption (*vide* also Hedaya, Vol. III., Ch. I., p. 562).

With regard to the *third* objection, we observe that the special appellant gave no proof of his allegations in the Lower Court. He filed a single kubooleut, and examined a single witness in attestation of it; but nothing was said about the date of his possession, no evidence was adduced regarding it, no issue framed, and no finding come to.

The special appellant's case was made to rest solely on the neglect of the "*shuffee*," *i. e.*, the special respondent to perform the preliminary ceremonies necessary to support his right of pre-emption, and on this issue the Court found against the defendant.

We see, therefore, no reason to interfere with the Principal Sudder Ameen's decision, and dismiss the special appeal with costs.

The 21st March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Sale in execution of Revenue-paying estate—Released rent-free lands.

Case No. 397 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 4th November 1865.

Dol Gobindmony Dabae and others (Defendants), *Appellants,*

versus

Shaikh Imdad Ali and others (Plaintiffs), *Respondents.*

Mr. E. W. Peacock and *Baboo Juggadanund Mookerjee* for Appellants.

Baboos Dwarkanath Mitter and *Banee Madhub Banerjee* for Respondents.

Suit laid at Rupees 3,941-10½.

By a sale in execution of the rights and interests of a judgment-debtor as recorded proprietor of a Government resumed revenue-paying estate, released rent-free lands lying in the estate do not pass to the purchaser.

PLAINTIFF No. 1 sued, declaring that plaintiff No. 2 held under a deed of gift the villages which the Government released under an order of Government desiring its revenue officers not to proceed to the assessment of resumed lands under 50 beegahs; and that defendants purchased at a sale in execution *Lot Tantiparah, Towjee No. 597*, and under color of that purchase ousted plaintiff No. 1 from certain lands, a half share of which the said plaintiff No. 1 had purchased by private sale from the other plaintiff.

The pleas of defendant are, that the sale in execution was for *Lot Tantiparah*, a resumed mehal *without any reservation as to released lands*, and that it comprised all rights and interests in the 17 *villages specified* in the sale-notification and proceedings.

The Lower Court decided that the resumed *Lot Tantiparah*, bearing No. 597 on the Government rent-roll, as a *rent-paying*

estate, with its fixed sudder jumma specified, was all that passed under the sale, and that the *released* lands *not* being part of *any rent-paying estate*, the judgment-debtor's rights and interests in the *released* lands were not and could not have been sold as part of those in the rent-*paying* estate, but that such rent-free *released* lands were plaintiff's, just as other released lakheraj lands are the property of other lakherajdars.

The Lower Court accordingly decreed plaintiff's suit.

Defendant appeals to this Court, and relies on this point, *viz.*, that the *zemanamah* or receipt by the local village officers of the attachment specified the 17 villages that included the released lands lying in them: and that the sale-notification and proceedings did the same; and that consequently the released villages are part of those purchased by defendant at such sale.

Judgment.—We have to consider what there was offered for sale and sold. It is admitted that the rights and interests of the judgment-debtor in *Lot Tantiparah No. 597 on the Government rent-roll* was sold with its specified sudder jumma payable to Government by the recorded proprietor, *i. e.*, the judgment-debtor. But released lands as those claimed by defendant do not pay any sudder jumma. These are not in any way on the Government rent-roll. The rights and interests of the judgment-debtor as the recorded proprietor of a Government rent-roll and revenue-paying estate are quite independent of the rights and interests of a lakherajdar in lands not paying revenue to Government.

The appellant lays stress on the fact of the specification of the villages in the sale-proceedings, but such statements of villages topographically known to be villages of the Lot will not of itself affect individual rights, or deprive the owners of released lands of their property.

On the whole, then, we are clearly of opinion that the rights and interests of the judgment-debtor as recorded proprietor of the Government resumed revenue-paying estate *Lot Tantiparah* No. 597 on the rent-roll passed to the purchaser, and *no more*.

In this view, we consider that the appellant has no just grounds of appeal, and we accordingly dismiss this appeal with costs.

The 22nd March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges*.

Assignment of Debt.

Case No. 3348 of 1865.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 8th August 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th March 1865.

Bishen Chunder Saelah Mohajun (Plaintiff), *Appellant*,

versus

Gokool Chunder Lahata (Defendant), *Respondent*.

Baboos Onookool Chunder Mookerjee and *Khettur Mohun Mookerjee* for Appellant.

Baboo Banee Madhub Banerjee for Respondent.

Defendant assigned a debt due to him by certain parties to plaintiff. Plaintiff accepted the assignment, and gave defendant a release from the amount of the debt assigned to him. HELD that plaintiff, the assignee, could have no action against defendant, the assignor.

THE plaintiff and defendant were partners, and adjusted their accounts, which showed a sum due by defendant to plaintiff. Certain third parties owed a sum of money to the defendant, who thereupon assigned the debt over to plaintiff, who accepted the assignment, and granted a release to the defendant. These third parties were then sued by the plaintiff, but his case was dismissed in consequence of the assignment not being proved. Plaintiff, then, on failure of his first suit, brought his present action against his former partner for the sum covered by the assignment which had broken down, and the Lower Courts dismissed the plaintiff's claim as untenable.

The plaintiff now appeals specially, urging that the transaction disclosed no such accepted assignment to him as released the defendant from paying the amount of the debt on failure of the substituted debtor to pay the same.

The Lower Court's proceedings show that defendant assigned the debt due to him by certain parties to plaintiff; that plaintiff accepted the assignment, and gave defendant a release from the amount of the debt assigned to him. Under these circumstances, he can have no action now against the defendant, the assignor; and we dismiss the special appeal with costs.

The 22nd March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Liability of agent of one share-holder to other share-holders for money drawn by him under a power from his principal.

Cases Nos. 2753 and 3392 of 1865.

Special Appeals from a decision passed by Mr. E. G. Birch, Judge of Shahabad, dated the 23rd August 1865, affirming a decision passed by Moulvie Iradut Ali Khan, Principal Sudder Ameen of that District, dated the 29th May 1865.

Shaikh Walee Mahomed and others (Defendants), *Appellants,*

versus

Fatima Bibee (Plaintiff), *Respondent.*

Messrs. C. Gregory and *R. E. Twidale* for Appellants.

Moonshee Ameer Ali Khan Bahadoor and *Baboo Romanath Bose* for Respondent.

A and *B* cannot obtain a decree for their share against their co-heir *C's* agent who may have under a power from *C* drawn money held in deposit in a Court and belonging to all the co-sharers, if the agent did not draw as trustee for *A* and *B*, though he may have, when paying over to *C* the money drawn by him under *C's* authority, taken from him a bond by way of precaution to protect himself from any future possible claim by *A* and *B*.

In the first case the heirs of the widow of Alum Ali, the brother of Sadut Ali, sued the special appellant and the heirs of Sadut Ali.

Sadut Ali had, after the death of his brother Alum, authorized the special appellant by a power of attorney to draw the sum of Rupees 2,472, the surplus proceeds of a property of Alum Ali sold in execution of a debt due from the latter.

The plaintiffs are now found to be entitled to a one-fourth share of the money in deposit as heirs of Alum Ali.

The special appellant pleaded that he had made over the entire sum drawn by him to Sadut Ali.

The plaintiffs, as well as the heirs of Sadut, deny the fact, and appear to assert that only 800 rupees were paid.

The Courts below found that the special appellant had paid only 800 rupees to Sadut Ali, and a decree was given for one-fourth share to the plaintiff against the heirs of Sadut Ali, and also jointly against the special appellant; *firstly*, because, as the Lower Appellate Court remarks, it was proved that he had not paid the whole (but only a part) to Sadut; *secondly*, because he paid over 800 rupees to Sadut at his own risk. These two reasons are somewhat inconsistent, but are at least insufficient to fix the special appellant with the liability, because, if the special appellant did not pay to Sadut what had been drawn under the authority of a *mookhtarnamah* given by him, the heir of Sadut alone can call upon the special appellant for the money, and can sue him for the same. If the special appellant was in any way responsible for the money to those who were legally entitled to any portion of it, and 800 rupees out of that proportionate sum so taken was paid to Sadut Ali, when Sadut Ali, irrespective of the *mookhtarnamah* given by him, was entitled to the three-fourths of the money as heir of his brother Alum Ali, deceased, this payment to Sadut cannot, in our opinion, warrant a decree against the special appellant, although his non-payment of the remainder to Sadut Ali might or might not be a separate cause of action. The special appellant is, however, in no way bound to account for the money to the plaintiffs, as he is no way privy to them, nor was he ever alleged or supposed to draw the deposit in trust for them on their authority. If the special appellant had been sued in the capacity of trustee for them, the decree against the heirs of Sadut, who is supposed to have obtained only 800 rupees, would not be a correct decree.

In the second special appeal, the special appellant had sued the heirs of Sadut for money alleged to have been lent by him to Sadut on a bond. Both the cases were tried together below, and the Courts below, finding that there was no consideration for the bond, except the payment of 800 rupees out of the Rs. 2,472 drawn by the special appellant, dismissed the suit.

The bond is alleged by the special appellant to have been received in return for money paid by him from his own funds. In the former case he pleads that the whole of the money drawn by him was paid to Sadut. If the heirs of Sadut Ali had admitted that they had received the whole of 2,472 rupees, and this bond was taken by the special appellant as regards the one-fourth share of others besides Sadut Ali by way of precaution against the claims of other heirs, or if that had been found distinctly as a fact *in either of the two cases*, the reasons of the Lower Appellate Court for considering that the bond was not executed for any money paid by the special

appellant from his own funds, but was taken merely as a security for the possibility of a suit being brought against the special appellant by any person or persons representing the interests held by the plaintiffs in the first case, would be perfectly valid reasons.

We would not, however, have held that the taking of any such precaution would render the special appellant liable for the demand made against him by the heirs of the widow of Alum Ali. The special appellant pleads that the Income Tax Returns disbelieved by the Lower Court are not only signed by Sadut Ali, but also by the husbands of those of her heirs who sue him for their share of the surplus money. If the papers are so signed, as is alleged by the special appellant as against the plaintiffs, there might be an inference of the payment to Sadut of the entire sum drawn by the special appellant as admitted in that paper; but the document is found as a fact to have been written by the special appellant, and signed by Sadut without his knowledge of its contents, and cannot be used against the heirs of Sadut who are sued under the bond.

We are not made aware how far and upon what terms these parties agreed to allow the two cases to be tried together, and whether they had or had not agreed to abide by the result of the evidence produced in the former case.

The bond appears to be admitted to have been written by Sadut, but, it is said, was given, not in consideration of any money, but only as a security for the possible claim of other heirs, and the Lower Appellate Court seems to us to remark against the *bona fides* of the special appellant's claim under the document, but not against the genuineness of the deed when the Court below speaks of the special appellant's bringing his suit to harass the heirs of Sadut. We do not see the warrant for the Lower Appellate Court to say that this suit under the bond is brought, because the defendants (meaning thereby the heirs of Sadut) had sued before for the purchase-money, as the case for it was brought by the heirs of the widow of Alum Ali, who had sued the plaintiff as well as the heirs of Sadut.

It, in fact, appears erroneous for the Lower Appellate Court to have thought that in both cases the heirs of Sadut Ali and those of the widow of Alum stood against the special appellant as one and the same party with equal interests.

In this view of the case, we order that the special appeal be decreed with costs in the first case, No. 2753, and the decision of both the Lower Courts reversed with costs, and the claim of the plaintiffs dismissed as against the special appellant.

The case of the bond No. 3392 we order to be remanded to the Lower Appellate Court to re-try it with reference to the above remarks.

The 22nd March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Act XIV. of 1859, Section 20.

Case No. 224 of 1865.

Regular Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Backergunge, dated the 9th May 1865.

Moulvee Abdool Ali (one of the Defendants), *Appellant.*

versus

Meer Mahomed Mozuffur Hossein Chowdhry and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellant.

Mr. R. V. Doyne and *Baboo Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 99,814-9 annas 3 pie.

A suit having been instituted on behalf of minors by their guardian, he subsequently, in fraud of the minors, sold their decree to a third party, who was merely *benamee* for the defendant in that suit. No execution ever was had of that decree. The minors, when they came of age, sued to have the sale of their decree declared fraudulent and void, and to have their name substituted on the record for that of the *benamee* purchaser, and they prayed that they might be allowed to take out execution of this decree. HELD that, the whole transaction being fraudulent, execution might be issued by the minors, although more than three years had elapsed since any proceeding had been taken under the decree.

THE respondents before us were the plaintiffs in the Court below. Some years ago, and during their minority, the defendant, Abdool Mujeed Chowdhry, professing to act

as their guardian and next friend, instituted a suit on their behalf against the defendant Abdool Ali to recover from him a sum of upwards of Rupees 62,000 to which the plaintiffs were entitled. Abdool Ali is the plaintiffs' grandfather. Abdool Mujeed Chowdhry, being about to get a decree for the minors, came to an understanding with Abdool Ali, and sold to him, for a nominal consideration of Rupees 51,000, the right, title, and interest of the plaintiffs in that suit. The purchase was made by Abdool Ali *benamee* in the name of Woozeeroonissa, whose name was substituted in the record for that of the original plaintiffs, and in her name the decree was finally given. Abdool Ali thus became both plaintiff and defendant in the suit. He nevertheless appears to have continued the farce of defending it, but in appeal the decree which had been passed against him was upheld. It is not proved that he ever paid any portion of the Rupees 51,000.

The plaintiffs, having attained their majority, instituted the present suit against Abdool Ali and their former guardian, making Meheroonissa, the representative of Woozeeroonissa, who is now dead, also a party. The object of the suit is to obtain a declaration that the sale of the plaintiffs' rights in the former suit to Woozeeroonissa *benamee* for Abdool Ali was fraudulent, and ought to be set aside, and that the plaintiffs are entitled to recover from the defendants the amount which might have been recovered under the decree in the former suit.

The Lower Court gave judgment in favor of the plaintiffs. In appeal, it is contended that judgment should have been given in accordance with the terms of a *solenamah*, or deed of compromise, which was presented in Court during the hearing of the case. But the Lower Court has rightly rejected that *solenamah*, considering the plaintiffs not to be bound by it (although they admit having executed it) under the circumstances. On the evidence we have no doubt whatever that Abdool Ali acted dishonestly and fraudulently by the plaintiffs in the matter of the *solenamah* as in every other matter connected with the plaintiffs' claim. It is clear that, the plaintiffs having been induced to agree to certain terms, and to sign the *solenamah*, Abdool Ali would not carry out fully his part of the agreement, and then, when the plaintiffs brought on their case for hearing, attempted to get the *solenamah* filed at the last moment without the knowledge or consent of the plaintiffs. The suit was pending more than nine months before it was decided by the Lower Court; and, if Abdool Ali did not examine all the witnesses necessary for his defence, we cannot see that he has any one to blame for the omission save himself. Moreover, when this appeal was last before this Court, no complaint was made on this score, and no application was made for leave to examine further witnesses as to any actual payment of the consideration money of 51,000 rupees. The High Court, on the application of Abdool Ali, then remanded the case to the Lower Court for a distinct finding as to the circumstances under which the *solenamah* was presented in Court, and the remand order referred to no other question whatever. It certainly appears to us that, if the appellant had any objection to urge as regards the conduct of the suit, and his not having had due opportunity of preparing and putting in his evidence, the objection should have been taken when the appeal was formerly before the Court, and not now for the first time, when it has been sent up again after the remand-order has been complied with.

Then, it is said that the suit is barred by limitation. Possibly, if the plaintiffs were to apply for execution of the old decree, some objection might be raised under Section 20 of Act XIV. of 1859, on the ground that more than three years had elapsed since any proceeding, &c., has been taken on that decree. But, considering the fraudulent nature of the whole of this transaction, and reading Section 20 along with Sections 9, 10, 11, and 12 of Act XIV. of 1859, we have no doubt that execution might properly issue, even although more than three years have elapsed.

Mr. Doyne, however, contends that at any rate he is entitled to have it declared that the appellant Abdool Ali holds the decree in the former suit as a trustee for the plaintiffs, and to an order that Abdool Ali do pay to the plaintiffs the sum of Rupees 99,814-9-3, being the amount which might have been received under that decree. We think the plaintiffs are entitled to such a declaration and order. And as by a decree in this form it appears to us that the plaintiff's position will be simplified, and the realization of the amount due to them will be facilitated, we declare and order accordingly. To this extent only do we alter the decree of the Lower Court. The plaintiffs are entitled to interest, and to all costs both in this and in the Lower Court.

The 22nd March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence—Cazee's deposition—Admission.

Case No. 2885 of 1865.

Special Appeal from a decision passed by Mr. A. Davidson, 2nd Principal Sudder Ameen of Hooghly, dated the 20th July 1865, modifying a decision passed by Moonshee Sadut Hossein, Sudder Ameen of that District, dated the 7th December 1864.

Hurish Chunder Dutt and others (Defendants), *Appellants,*

versus

Teen Cowree Dutt and others (Plaintiffs), *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboos Hem Chunder Banerjee and *Banee Madhub Banerjee* for Respondents.

The deposition by a Cazee of the vendor's admission to him of a sale and receipt of the consideration, together with the conduct and statements of the parties, form legal evidence of the sale as against the vendors.

PLAINTIFFS in this case sued for possession of land on an alleged title by a purchase, and put in a deed of sale.

The defendants generally denied plaintiffs' claim. One defendant, however, stated that there had been a deed executed as of sale, but that there had been an arrangement at the time that the transaction should be of the character of a mortgage.

The first Court did not consider the plaintiffs' claim proved as to the defendants who entirely denied it, but decreed possession to the extent of the admission of the other defendant.

On appeal, the Lower Appellate Court held that plaintiffs' deed was proved, especially referring to the deposition of a Cazee stating the admission to him by the vendors of the sale and receipt of the consideration. The Lower Appellate Court added that the attempt to prove a mortgage had utterly failed. The Lower Appellate Court accordingly decreed plaintiffs' suit.

Defendant appeals specially, urging that the Cazee's statement of what the vendors admitted before him is no evidence, and that the admitting defendant's statement is no proof that the deed was one of sale as propounded by plaintiff. *Lastly*, that possession and dispossession should have been distinctly found by the Lower Appellate Court.

Judgment.—We think that the deposition of the Cazee and the conduct and statements of the parties formed legal evidence, on which, together with the probabilities deducible from the facts, the Lower Appellate Court could come to the finding of fact as to the deed, at which it did come. The point of possession then would not have substantially affected the result.

Seeing thus no grounds for this special appeal, we dismiss it with costs.

The 23rd March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Settlements—Right to Julkur of large navigable rivers.

Case No. 3068 of 1865.

Special Appeal from a decision passed by Mr. H. Richardson, Officiating Additional Judge of Jessore, dated the 20th July 1865, modifying a decision passed by Baboo Tarakant Bidyasagur, dated the 20th January 1864.

The Collector of Jessore (Plaintiff), *Appellant,*

versus

Mr. J. Beckwith and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. R. E. Twidale and *Baboo Bhowanee Churn Dutt* for Respondents.

A settlement Dol includes all that ordinarily passes as assets of the settlement, but not what is exclusively reserved as the right of the State, *e.g.*, the right to the julkur of large navigable rivers, which, according to Clause 2, Section 4, Regulation XI., 1825, never passed to private individuals with whom Government made settlements.

IN this case the Government is special appellant, and the point pressed upon us is that the Lower Appellate Court has erred in holding that, because the julkur of large navigable rivers was not specifically excluded amongst the items excluded in the settlement Dol of 1791, therefore such julkur is included in that Dol, and passes to the private zemindar or his representative.

We consider this objection valid.

The settlement Dol will include all that ordinarily passes as assets of the settlement, except what is specified in terms as excepted

in the Dol. But it will not on that account legally include what the law itself declares is not included, and is exclusively reserved as the *sole right* of the sovereign—such for instance as the right of the State to the julkur of large navigable rivers. *Vide* Section 4, Clause 2, Regulation XI. of 1825, which shows that, by established usage, the right to such julkur never passed to private individuals, *i.e.*, to those with whom Government made settlements.

In this view we decree the appeal and to this extent, and remand the case for final disposal with reference to these remarks.

But, looking at the circumstances of these cases and the conduct of the parties, we think each party should bear their own costs.

The 24th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Sale of Dewuttur property in execution of decree.

Case No. 377 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 25th August 1865.

Prannath Panrey (one of the Defendants), *Appellant.*

versus

Sree Mongula Debia (Plaintiff) and another (Defendant), *Respondents.*

Baboos Shib Chunder Mojoomdar and *Sreenath Banerjee* for Appellant.

Baboos Sreenath Doss and *Unnoda Pershad Banerjee* for Respondents.

Suit laid at Rupees 6,150.

Where a decree expressly declares that whatever right *A* has in a Dewuttur property is to be sold in execution, the decree-holder is entitled to insist on that right being sold, though *A* holds the property only as shebait.

We dismiss this appeal with costs.

The suit is brought, under Section 246 of Act VIII. of 1859, to set aside an order made by the Lower Court on the objection of the appellant Prannath Panrey. That order was to the effect that the rights of Kishen Pershad Surma in certain *Dewuttur* lands could not be sold in execution of a decree against him (Kishen Pershad Surma) which had been obtained in a former suit by the present respondent. Kishen Pershad holds these lands as Shebait; and Prannath came in and contended with success that, as the next heir in succession to Kishen Pershad, he had a right to object to the sale going on. The Court having allowed the objection, this suit is brought to set aside the order.

As the original decree against Kishen Pershad expressly declared that whatever right he had in the *Dewuttur* property was to be sold in execution, we have no doubt that the plaintiff was entitled to insist on that right being sold. What the extent of that right is, or what a purchaser at a sale of it will take, it is unnecessary for us now to consider.

The 24th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Hindoo Law (Mitakshara)—Widow in joint undivided family (Succession of—to Husband's share)—Withdrawal of claim by co-sharers.

Case No. 141 of 1865.

Regular Appeal from a decision passed by Moulvie Itrut Hossein Khan Bahadoor, Principal Sudder Ameen of Sarun, dated the 23rd December 1864.

Mouhurun Koonwur Pauper (Plaintiff), *Appellant,*

versus

Thakoor Pershad and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Roopnath Banerjee* for Appellants.

Messrs. R. T. Allan and *C. Gregory*, and *Baboos Kishen Kishore Ghose, Unnoda Pershad Banerjee*, and *Kalee Kishen Sein* for Respondents.

Suit laid at Rupees 12,797-13-4-16.

According to the Mitakshara Law, where property is joint and undivided, a widow cannot succeed, but is entitled to maintenance only. The withdrawal by her husband's brothers of their claim to his share cannot give her a title to succeed to it.

The plaintiff in this suit, the widow and alleged heiress of one Ram Golam Sing, sued to recover possession of certain mouzahs and to cancel the sales thereof made by Rash Beharee Sing, the father of her late husband, on the ground that, according to the Mitakshara system of Hindoo Law, a father had no right to alienate ancestral property without the consent of his son.

The defence, or rather so much of it as need be considered in the present appeal, was (1) that Ram Golam, the plaintiff's husband, was insane, and therefore incapable of inheriting; and (2) that the property being joint and undivided, Ram Golam's widow could not by law succeed, but was only entitled to maintenance.

The Principal Sudder Ameen dismissed the plaintiff's suit on these grounds, and the same issues are now to be considered in appeal.

On the first issue, it is contended by the appellant that the law refers to persons who are insane or idiots from their birth, but that a person becoming insane at some subsequent period after his right to property has vested cannot thereby be deprived of it; and that, as, under Mitakshara Law, a son is entitled to a share of ancestral property from the moment of his birth, the point which the Principal Sudder Ameen ought to have decided was whether Ram Golam was born insane, or whether he became so subsequently only.

It will be more convenient, however, to take the second point first; and, with reference to it, we observe that the appellant herself, in her petition of plaint, admitted that the property which she sought to recover was in its nature joint and undivided. She stated that Baboo Ram Churn Sing, the widow of Badul Sing, and Baboo Gobind Sing, the brothers of Rash Beharee Sing, who had brought a suit for the reversal of Rash Beharee's illegal sales, had been induced to withdraw their claims "contrary to their legal rights and the principles of Hindoo Law, and had thereby wasted and ruined the paternal property."

Now, it is a principle of Mitakshara Hindoo Law, that, where property is of this nature, a widow is not entitled to succeed, but has a claim for maintenance only.

The appellant's vakeel admits his inability to contest this point, although he argues that, as the co-sharers, *i. e.*, the brothers, have withdrawn their claim, no stranger has the right to oppose the plaintiff's suit; but this argument involves a fallacy, as no withdrawal by the co-sharers could mend the plaintiff's case, or give her a title to succeed to her late husband's share. Under no possible circumstances could she be the heir so long as the property was joint and undivided.

For these reasons we agree with the Principal Sudder Ameen, and dismiss the appeal with costs, without going into the question involved in the first issue.

The 27th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Benamee sale in fraud of creditors (by Husband to Wife).

Case No. 3417 of 1865.

Special Appeal from a decision passed by the Judge of Patna, dated the 18th September 1865, reversing a decision passed by the Moonsiff of that District, dated the 14th February 1865.

Bhowanee Pershad and others (some of the Defendants), *Appellants,*

versus

Oheedun (Plaintiff) and another (Defendant), *Respondents.*

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Appellants.

Mr. R. E. Twidale and *Moonshee Ameer Ali Khan Bahadoor* for Respondents.

A wife cannot sue for confirmation of possession of property sold in fraud of his creditors by her husband to her in the name of another.

THE plaintiff sued for confirmation of her possession in the property in dispute on an allegation that the property was purchased by her from her husband, not however in her own name, but in that of the defendant, special appellant, who has lately caused his name to be registered in the Collectorate.

The plaintiff must either rest her case upon the plea that the purchase from her husband was *bonâ fide*, which must be proved before any decree is given to her, or abide by the result of the admission made by her pleader before the Court of first instance to the effect that the sale was simply a benamee transaction to defeat creditors.

The wording of the plaint may be doubtful as to the nature of the sale from her husband pleaded by the plaintiff, but the subsequent admission of her pleader removes all doubts, and shows that she is not pre-

pared to prove any real purchase from her husband.

It is true the plaintiff alleges herself to be in possession, and that the Lower Appellate Court has found that fact for her, but, according to the view we take of her case, this fact cannot avail her.

The Lower Appellate Court agrees with the plaintiff with regard to the fraudulent nature of the transfer, but refuses to act according to a series of precedents regarding such transactions, simply upon the ground that fraud in the plaintiff presupposes equal fraud in the defendant.

With reference, however, to an uninterrupted course of decisions passed upon the point now before us (*see* pages 92 and 221 of Volume III. of Sutherland's Weekly Reporter), we feel no hesitation in holding that, in this case, plaintiff is not entitled to obtain any relief from Courts of Justice, and her case must, therefore, be dismissed with costs.

We accordingly reverse with costs the order of the Lower Appellate Court, and, decreeing this special appeal with costs, uphold the decree of the first Court.

The 27th March 1866.

Present:

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

Judgment of Appellate Court (Reasons of).

Case No. 1776 of 1865.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 26th April 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th April 1864.

Shamee Mahomed (one of the Defendants), *Appellant,*

versus

Prodhan Palee and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. W. M. Bourke and *Baboo Bungsheedhur Sein* for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

It is not a ground for reversing, in special appeal, the judgment of a Lower Appellate Court, that such Court, in confirming the decision of the Lower Court on facts, has not set forth the reasons for its decision. Nor is the insufficiency of additional reasons where such are given a ground for either reversing the judgment of the Lower Appellate Court or ordering a new trial.

THE ground taken by the special appellant is that the Judge, in confirming the judgment of the Court of first instance, has not set forth his reasons with that particularity which the Procedure Code requires, that he has omitted to notice certain matters of fact, such as registration and long possession, which ought to have materially influenced his judgment, and that the reasons he has assigned for his decision are weak and inconclusive

In this way it is contended there is evident on the face of the decision a defect in investigation which has produced error in the judgment upon the merits, and the special appellant is therefore entitled to a new trial.

Mr. Bourke referred us to cases at pp. 6 and 381 Marshall, which he urged were in point.

We find that the Judge adjudicated upon one issue of fact, which, it is admitted, was the one material issue in the case, and that in that point he adopted fully the conclusion and, apparently, the reasoning of the Principal Sudder Ameen. In such a case he was not, we think, bound under Section 359 of the Code of Civil Procedure, or upon any general principle, to set out the reasons for his decision with the same fulness as if he was deciding the case in the Court of first instance, or as if he was reversing the judgment below. He has indeed supplied some additional reasons which seem to have occurred to his own mind, and which do not appear to strengthen the judgment of the Court below him. But the insufficiency of these additional reasons, or the absence of any, would not in such a case justify us in special appeal, either in reversing the judgment or in ordering a new trial.

The cases cited do not appear to us to be in point. In one of them, the Judge below had, upon a statement of a particular fact directly at variance with the record, held enquiry as to a material point unnecessary or inadmissible.

The other was a case where the Lower Appellate Court had reversed the judgment of the Court of first instance.

The special appeal is dismissed with costs.

The 27th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoo Nauth Pundit, *Judges.*

Suit by decree-holder—Default to produce witnesses.

Case No. 3551 of 1865.

Special Appeal from a decision passed by Mr. R. J. Richardson, Judge of Zillah Behar, dated the 30th August 1865, affirming a decision of Baboo Gunga Churn Shome, Principal Sudder Ameen of that District, dated the 9th January 1865.

Ramaunghonarain (one of the Defendants), *Appellant,*

versus

Bessin Laul (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* and *Baboo Mohesh Chunder Chowdry* for Appellant.

Baboos Kishen Succa Mookerjee, Nilmadhub Bose, and *Obhoy Churn Bose* for Respondents.

In a suit brought by a decree-holder to establish that certain property belonged to his debtor who alleged that she had parted with the same to her two daughters, one of the daughters having died during the pendency of the suit, her husband who claimed as her heir was opposed both by the debtor and her surviving daughter. HELD that the Lower Court had not sufficiently considered this change of circumstances, and was wrong in considering the default of the surviving sister to produce her witnesses as the default of the husband of the deceased sister. Case remanded for a complete trial.

IT appears that, when plaintiff asked for the property in dispute to be sold as that of his debtor, the two daughters of the latter intervened, pleading that it was made over to them by their mother, the said debtor, long before the decree, and that they were in possession of the property. These objections being allowed in the execution-case, the plaintiff has brought this action to prove that the property was that of his debtor, and not that of her two daughters. While the case was proceeding below, one of the two daughters, the wife of the special appellant in case No. 3551 of 1865, died, and the special appellant claims to be her heir. While this woman was alive, it was the interest of her sister, the appellant in the other case (No. 18 of 1866), to assist her sister; and whether the defence set up by these two daughters was a *bonâ fide* claim, or a mere device of the debtor to protect her property, it was the interest of the debtor also to support both her daughters. The death of one of these daughters has brought on a complete change in the conduct of these two parties. The mother, who had not appeared before to oppose the defence of her two daughters, felt it her duty to interpose and raise objections to the claim of the husband of the daughter deceased, and it became the interest of the other daughter not to assist the husband of her sister, deceased, as she might, in case of her deceased sister's claim being disproved, be entitled to succeed to the whole, either under any gift alleged to have been made to her sister and herself with the right of survivorship, or only to her, or as heir to her mother after her death. It appears that the deceased sister had relied on the evidence to be produced by her sister, but after her death the special appellant, perceiving the change that had naturally crept into the tactics of the sister and the mother, petitioned the Court of first instance to be allowed to produce independent evidence. This request was never granted, although we are told the prayer was more than once repeated by the widower.

The Courts below, overlooking this change arising from the fact of the death of one of the two daughters, a fact patent on the record, have treated the neglect of the surviving sister as the neglect of the special appellant, while the neglect of the other party may have been a voluntary act from interested motives, in which this special appellant cannot participate.

We remand the case to the Court of first instance, first to try whether, for property alleged to have been absolutely granted by the mother of the deceased wife of the special appellant to the said wife, he or his mother-in-law is the heir of the deceased sister. Only in case of his being able to establish his rights as such, should he be allowed to carry on the case as the representative of his deceased wife. The mother or the surviving sister, whoever of these two suc-

ceeds in establishing herself to be the heir of the deceased, if willing, should be allowed to represent the deceased. The Court should also enquire whether the mother had executed any *Uttanamah* or *Uttanamahs* to her daughters, and, if so, what were its or their contents and conditions, and whether any possession was passed or was intended to be passed from the date of such deed or deeds.

It should, in construing the meaning of any deed or deeds that it may find proved to have been executed by the mother, look to the fact of change of possession, as well as to the power of the mother to execute such a deed or deeds, as well as to the necessity for such an execution. It should, even if the possession be found to have been retained by the mother, investigate whether it was possession held by the mother in her own behalf, or as trustee for her daughters, and the Court should find whether possession was first made over to the two daughters, whether it was for any portion of the property still held by the other daughter, and, as regards the share of the daughter, deceased, whether possession of it has been since resumed by the mother as heir of her daughter, deceased. The Court is not required to give any decree to the plaintiff, without being satisfied that there was no good and valid gift to the two daughters, or that it was one intended to come into operation only after the death of the mother, and that the mother had all along held possession of the property in her own right, or that merely permissive possession and not possession of right was given over to the daughters or so given to defraud the creditors. As the case of the special appellant in this case of 1865 is to be remanded, we think it proper to remand the case of the surviving sister No. 18 of 1866, because, as against the decree-holder, she is entitled to prove that he has no right to sell that which she may succeed in proving to have been *bonâ fide* acquired by her from her mother before the attachment made by the plaintiff. It follows that the Court of first instance would not be precluded from giving a decree to the plaintiff if, from the facts of the case, it is satisfied that the allegation of transfer to the daughters was altogether a false plea set up in fraud of the said decree-holder. In looking at the case in this light, the Court should investigate whether the debtor had kept to herself any other property available to the decree-holder and sufficient to pay his dues.

The 28th March 1866.

Present :

The Hon'ble C. B. Trevor and F. A. Glover.

Judges.

Ejectment (under action of Court)—Presumption of its being real and bona fide.

Case No. 3628 of 1865.

Special Appeal from a decision passed by the 2nd Principal Sudder Ameen of the Twenty-four Pergunnahs, dated the 11th September 1865, reversing a decision passed by the Moonsiff of that District, dated the 16th May 1865.

Shaikh Budurooddeen and others (Plaintiffs), *Appellants,*

versus

Haneef Mullick (Defendant), *Respondent.*

Baboo Woopendur Chunder Bose for Appellants.

Baboo Kalee Kishen Sein for Respondent.

An ejectment alleged to have taken place under direct action of Court, and supported by documents issued by and filed in the Court, must be presumed to have been real and *bonâ fide* until the party ejected proves that all these proceedings were fictitious, and that he never lost possession of the land, but still holds it.

THIS was a suit to recover possession of a *jote* consisting of 16 beegahs 12 cottahs by reversal of a decree of the Criminal Court awarding possession to the defendant. The plaintiff's allegation is that the defendant was ejected by the zemindar under an Act X. of 1859 decree in 1269 B. S., and that he (plaintiff) then got a pottah from the proprietor, dated the 5th Srabun 1269 B. S.

The defendant pleaded that, after the expiry of his first lease, the zemindar gave him a fresh pottah dated 9th Jeyt 1269, and that he has all along been in possession of the land.

The first Court decreed in plaintiff's favor, holding his pottah to be genuine.

But on appeal the Principal Sudder Ameen considered that there had been no real ejectment of the defendant under the decree, that his pottah of Jeyt 1269 was valid, whilst that of the plaintiff was palpably false.

The plaintiff now appeals specially, urging (1) that no notice has been taken of the evidence of several witnesses adduced by him to prove his case; and (2) that the Principal Sudder Ameen has decided against special appellant by inference only, without going into the evidence, which proved the ejectment of the special respondent from the land.

We think that there must be a remand. No notice has been taken of the evidence adduced by the special appellant to prove his lease, the reason apparently being that the Principal Sudder Ameen had already inferred from the circumstances of the case that the special respondent had never really been ejected. We do not understand on what evidence he came to that conclusion, for the documents on the record tend to show the direct contrary, and the only ground for the Principal Sudder Ameen's opinion is not supported by the facts of the case. The evidence in support of the ejectment is distinct. There is the decree ordering it, there is the return of the Nazir certifying that special respondent had been ejected, and there is the receipt of the decree-holder himself acknowledging that he had recovered possession. Nothing could be *primâ facie* clearer than this, but the Principal Sudder Ameen has held all these to be mere "paper transactions," because the zemindar afterwards recovered rent from the special respondent, which circumstance shewed that he was still in possession, and that he had never been ejected. Now, the ejectment is certified to have taken place in 1259 B. S., and the suit was for rent due in the year 1258 B. S., a circumstance which at once disposes of the Principal Sudder Ameen's argument.

As the ejectment is alleged to have taken place under direct action of Court, and is supported by documents issued by and filed in the Court, it must be presumed, until the contrary be shewn, that the ejectment was real and *bonâ fide*, and it is for the special respondent to prove that all these proceedings were fictitious, that he never lost possession of the land, but holds it still under his second pottah. The rent-decree does not benefit him, as it was for an arrear that accrued before the alleged ejectment.

If the special respondent be able to prove the fictitious nature of the ejectment-proceedings, the case of the plaintiff will fall, for his adversary will then be holding under a prior lease from the owner of the land, and will have the superior title. If, on the contrary, the ejectment be established, the Principal Sudder Ameen will consider the evidence adduced by the special appellant in support of his pottah, and, after taking such evidence as both parties may be able to produce, pass such orders as may seem just and proper.

The 28th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Estoppel.

Case No. 3421 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 6th September 1865, affirming a decision passed by the Moonsiff of that District, dated the 29th December 1864.

Dinonessa Ahalya (Plaintiff), *Appellant,*

versus

Asgur Ali and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Mr. R. E. Twidale and *Baboo Kishen Succa Mookerjee* for Respondents.

A, the defendant in the present case in which a vendee from *B* is plaintiff, is not estopped as to such vendee by anything that may have occurred in another case in which a third party was plaintiff, and *A* and *B* were co-defendants, but is quite competent to question the title of *B*.

PLAINTIFF, special appellant, Dinonessa, sues to recover certain lands, on the allegation that Noor Banoo and Amzad Ali formerly held them; that in 1211 Mughee, Amzad Ali sold half to plaintiff, and that she remained in possession till 1214, when she was dispossessed by the defendant Asgur Ali and Dewan Bibee. These parties claim the property as having belonged to their ancestor Hoossein Ali, and they moreover allege that, during their minority, Amzad Ali took possession of the property under a deed executed by their mother, and that, after they had reached majority, they sued for and acquired possession of it in 1211 Mughee, a few days previous to the alleged sale to the plaintiff. Asgur Ali, it may be observed, obtained possession of his 10 annas, and Amzad Ali gave a farkhuttee to Dewan Bibee for her 6 annas.

The Lower Courts dismissed the plaintiff's claim.

Plaintiff now appeals, specially urging, *1st*, that, as in a suit in which a third party was plaintiff, and Asgur Ali was one of the co-defendants, and Amzad Ali was another co-defendant, the deed of sale by Amzad Ali was not denied by the defendant Asgur Ali, it is not competent to him in the present case between a vendor from Amzad Ali and himself

to question the instrument which he did not question in that suit; and, *2nd*, that the Lower Courts should not have looked at a copy of the release to Dewan Bibee until defendant had satisfactorily accounted for the absence of the original.

It is quite clear that the defendant in the present case, in which a vendee from Amzad Ali is plaintiff, is not estopped by anything that may have occurred in a case in which a third party was plaintiff, and Amzad Ali and himself were co-defendants; that consequently he was quite competent in the present case to question the title of plaintiff's vendor, Amzad Ali. As to the second point, the copy, we note, was not objected to in the Court of first instance, and therefore, though it would have been more correct had the Court required the filing of the original, we see no sufficient reason to interfere in special appeal, but reject the application with costs.

The 29th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Splitting of Cause of Action—Section 7, Act VIII. of 1859.

Case No. 369 of 1865.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 16th August 1865.

Mothoor Mohun Mundul and others (Plaintiffs), *Appellants,*

versus

Khemunkuree Dossee and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee, Dwarkanath Mitter, and *Hem Chunder Banerjee* for Appellants.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Respondents.

Section 7, Act VIII. of 1859, requires that, if all rights arising out of the same cause of action are not sued for together, the portion abandoned cannot be separately sued for afterwards; but it does not enact a similar penalty for all rights under the same or similar titles, the right to sue for which may require different issues to be tried, and may arise under different dates and different causes of action, and the defendants as to which different properties may be either only one party or different parties altogether.

THE plaintiff in this case sues in his own rights, and also as the heir to the estate of his deceased uncle Buloram.

He sues for his double share out of the property of which a share was decreed to Ram Doolal and Ram Gopal, the sons of Becharam his brother, *viz.*, out of the property standing in the name of Mokoondram (the deceased son of the plaintiff), the husband of Khemunkuree, defendant. This property the said Khemunkuree had claimed in the case of Becharam's sons as her husband's self-acquired, but by the decision in that case, it was pronounced to be a portion of the joint-family property. A share of this was not, however, decreed to Buloram, as he had not sued for it.

In the present case, plaintiff, as regards his own rights, sues for his 4-annas share in four villages; but, as regards the 8-annas share of Buloram, for only three villages out of the four standing in the name of Mokoond. It appears that one of these four villages was originally in the name of some member of the joint family, and had been afterwards transferred in the name of Mokoond by a conveyance; and a share of it being alleged by Buloram to have been in his possession until he was dispossessed, he had sued for his 8-annas share of this village, and recovered a decree for it.

When Becharam's sons sued, they treated all the four villages as of one class.

The present plaintiff also sued for his double share out of the property standing in Becharam's name, and which his sons now claim to be his self-acquisition. Though a share of these properties was not claimed by Buloram, yet they were virtually decided by the decisions passed in the case of Buloram and of Becharam's sons to be joint property, and not any exclusive acquisition of Becharam.

The Zillah Judge, in his present decision, recites that Buloram had claimed also lands standing in the name of Becharam. It is admitted that he did not sue for the share of the four villages standing in the name of Becharam now in dispute, but it was not shown to us that, among the property sued for by Buloram, any was standing in the name of Becharam.

As far as plaintiff's own rights are concerned, we see no reason why he should not obtain a decree to the extent of his one-fourth share.

The defendants, Ram Doolal and Ram Gopal, cannot repudiate the effect of the former decisions pronounced in their presence; and, if those decisions did not bind any other property than the lands then in dispute, it is clear they have not succeeded

in this case to establish that, out of the properties now in dispute, those standing in the name of their father were his self-acquisitions.

Moreover, we hold that Section 2 of Act VIII. of 1859 does not bar this portion of the plaintiff's claim.

The sons of Becharam had claimed the property standing in the name of the son of the plaintiff as property joint between them and the plaintiff, excluding Buloram from any participation; but the decision of the High Court was that the property was joint. The Court, it is true, on finding that it had given a decree for 8 annas of a portion of this property to Buioram, without his having sued for it, withdrew the order so passed in favor of Buloram, yet it did not, by the order it passed, to the effect that the sons of Becharam should hold half, and the present plaintiff the other half of it, ever mean to decide against their former decree that the said property was joint between the aforesaid parties and the plaintiff, but not joint between all these and Buloram.

The statement of the plaintiff regarding the property standing in the name of his son, as recorded in his answer to the plaint of Buloram's sons, cannot, we think, be a bar to this suit, since the High Court has decided that that property is joint, and there is nothing in the answers of the plaintiff to both the former cases, or in the present plaint as regards the property standing in the name of Becharam, which can preclude him from suing for a share of it in this case, on the ground of the same being a part of the joint-family property.

In respect to the claim of the plaintiff as heir of Buloram, we hold that the plaintiff is not barred by Section 7 of Act VIII. of 1859.

This claim of Buloram was based upon this right of action, that from all that he possessed as his share of the ancestral property alleged to be joint between him and his brother Gireedhur, and generally standing in the name of the said Gireedhur (the father of the present plaintiff, Mothoor, and his brother Becharam), he (Buloram) was dispossessed conjointly by Mothoor, the present plaintiff, and the sons of Becharam, on a particular date by a particular means, *viz.*, the effect of an alleged private partition, which was held to be invalid.

The property standing from the time of purchase in the name of Mokoond, and that standing in the name of Becharam, were never admitted to be joint-family property. We observe that Buloram had never obtained possession of these, and accordingly he was never *dispossessed* from them, though he might have been kept out of possession of his share of them.

In order to sue for these, Buloram had to claim them from his co-sharers as joint property, and, on being refused by his opponents a participation in them, he might take his cause of action from the time of such a refusal, and then sue in Court to prove that these properties were neither self-acquired, nor, as regards only a portion, joint between the other co-sharers besides the said Buloram, but that they were part of the common joint-family property in which he was entitled to share. For these Buloram must have sued on his title of joint partnership, and had to disprove three different claims, while, for those he had sued for, he really sued only on his title of previous possession, which he had acquired as a member of the joint family.

When the sons of Becharam sued for a share of the property held in the name of Mokoond, Buloram might fairly avoid complicating, if not misjoining, his own case, by asking also for a share of that property; nor was he bound to sue for it along with his former suit, as well as to sue for his share of the property standing in the name of Becharam, if his right to these were based, as we think, upon different causes of action, or even if he then believed that these two properties actually belonged to the persons in whose names they respectively stood. It cannot be said that, if he did not then sue, he abandoned his claim for them, though it was only after his instituting his former case that these properties were found and pronounced to be a part of the joint-family estate.

It appears to us, then, on all the facts of this case, that it is not one to which Section 7, Act VIII. of 1859, should be applied. In the present suit, in order to decide the plaintiff's claim, it is true it will be necessary to decide the same questions of fact regarding rights arising from a joint partnership, as was found necessary in the former case of Buloram. It cannot be said that Buloram's former suit, on his ground of dispossession, could not have been decided without any reference to the title under which he alleged to have held possession which he complained he had lost, as the Court deciding it might have confined itself to the enquiry of the fact whether he had peacefully held possession or not; and the proof of the

fact of that possession would have been quite sufficient to shew, *primâ facie*, that the title under which he so held before was of joint partnership rights. Buloram's claim for the two items now in dispute would not, if it had been brought before, together with his former suit, have rested on the ground of possession and dispossession, and could not have been decided without looking to the alleged right under which possession may have been withheld from him. As regards these properties, the issue would have been whether the properties in dispute were or were not the exclusive properties of those in whose names they respectively stood, or joint between only some of the members of the family, or joint in respect to all. No such issues were required to be tried in Buloram's former case, and it was no fault of his that his case was tried with that of Becharam's sons, in which two of these issues arose, for one out of the two items of properties now in dispute—that is, that property which stood in the name of Mokoond. Further, it is no fault of the present plaintiff or Buloram, and consequently no reason for applying Section 7, if Buloram's case, owing to the defendants in it denying his right of joint partnership, was tried upon the general grounds of such proprietorship.

Section 7 of Act VIII. of 1859 requires that, if all rights arising out of the *same cause of action* are not sued for together, the portion abandoned cannot be separately sued for afterwards, but does not enact similar penalty for all rights under the *same* or similar titles, the right to sue for which may arise under *different* dates and *causes of action*, and the defendants as to which different properties may be either only one party or different parties altogether.

It is to be observed, moreover, that for the property for which Buloram was then suing his action was joint against the present plaintiff and Becharam's sons, while his right of action for these two items now claimed could only be against Becharam's sons for one item of property, and against the son of the present plaintiff for the other, but for both of which these two sets of defendants could in no way jointly or on like grounds be answerable. A good criterion for finding whether the action brought by Buloram and the present claim through him are both founded on the *same cause of action* is to see if any plea of limitation was required to be counted for the claim of properties sued for and those not sued for by Buloram from any one particular day or from different dates, for each item according to the respective dates of each separate cause of action.

Two cases have, however, been cited against, and one only for, the plaintiff. The case of Shum-soonessa *vs.* Buzzul Ruheem, No. 256 of 1862, dated the 13th February 1863, reported in page 286 of Marshall's Reports, supports our view. The real principle decided by the Court in that case is that the second action for restoration of a Company's paper entrusted to her husband by the plaintiff on a different date from those on which she had made over other Company's papers for which she had sued before and obtained a decree, was not barred by the institution of the first case, though the plaintiff, it is clear, had a knowledge of the existence of this paper before she brought her first action, and the Court adds: "Nor do we think that, under "the circumstances of the case, plaintiff may "not fairly plead that she has a distinct and "separate cause of action for the recovery "of this piece of paper made over to the "defendant on a particular date."

It is true that the Judges state: "That the "plaintiff could not have been actuated by "any fraudulent or dishonest motive in omit-"ting this portion of her claim from her "former suit," but she might still have been debarred from suing in the second case if the law prevented any such case being brought. When, again, at the end, the Judges record "that, considering that the "action is founded on the alleged fraudulent "misappropriation by the defendant of the "property given to him in trust, we think "it extremely desirable that the case should "go to trial on its merits," they did not mean to say that the subsequent action is not barred by the former suit, because the subsequent suit is brought on an allegation of fraud, because, if the subsequent action was barred under the law, no allegation of fraud could protect the plaintiff. There can be no doubt regarding what the Judges meant on this point, because, immediately after the passage quoted above, they add: "If the law allows *this* as we hold it to do." The subsequent case would therefore have been allowed even if the right of action had not been based on an allegation of fraud, for if the law allowed this second case to be instituted, because of its having a different cause of action from that or those in the former case, the case would proceed upon that sanction of the law, and not upon any allegation of fraud of the defendant. In the

special appeal No. 2431 of 1864, dated 2nd February 1865, reported in page 148 of the Civil Rulings of Vol. II., Sutherland's Weekly Reporter, it is clear that the defence of the defendant, who was in special appeal for want of legal authority of the High Court to find facts considered to be one and the same defendant in both the cases, was one and the same in both the suits, and so there was not any ground to plead in this subsequent case, what is pleaded in the present suit, that the defendants in the subsequent suit are different from the defendants in the former case. The same remarks apply to case No. 21 of 1865, dated 16th May 1865, reported in page 25 of the Civil Rulings of Vol. III. of Sutherland's Weekly Reporter.

Neither in the former case, nor in the present case, any limitation is pleaded.

In fact, the real cause of action for these two items of properties now in dispute to the said Buloram or any person claiming through him may not improperly be said to arise on it being decided in the former suits that all the properties standing in the name of Mukoond (the son of the present plaintiff) and in the name of Becharam were part of the joint estate of the family, and not the exclusive property of those in whose names they stood. Even if it be supposed that the decisions in the former cases could not affect the property standing in the name of Becharam, this would be no ground for applying Section 7 to the present claim for this property, though it would shew that, even for the two items now in dispute, there were separate causes of action, and that, whether separate or one in every case, a cause quite different from that which Buloram had for the properties he had sued for, and that it is necessary in this case to try *de novo*, whether the property standing in the name of Becharam was joint property common to the family, like the property standing in the name of Mukoond.

It is clear that in this case the sons of Becharam have failed to prove that the property standing in the name of their father was his self-acquisition.

On a full consideration of all the facts of the case, and after hearing at length the arguments of Counsel on both sides, we cannot come to the same conclusion as the Judge has done.

We would therefore decree with costs of all the Courts the entire claim of the plaintiff, both for his own share as well as for his rights as heir to Buloram. No costs are to be allowed to the plaintiff for that portion of the property which was decreed below, and against which no objection was taken before us by the defendants, respondents.

The 29th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Onus probandi—Collection of rent direct from tenant in possession—Admission or rejection of documents.

Case No. 2194 of 1865.

Special Appeal from a decision passed by Mr. H. S. Thompson, Principal Sudder Ameen of Backergunge, dated the 15th May 1865, reversing a decision passed by Moulvie Sumeerooddeen Ahmed Khan, Moonsiff of that District, dated the 19th September 1864.

Raj Chunder Roy Chowdhry and others (Plaintiffs), *Appellants,*

versus

Shaikh Abbas and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboos Chunder Madhub Ghose and *Shib Chunder Mojoomdar* for Respondents.

Whether a defendant admits the existence of the superior tenure of a plaintiff over the whole or only a part of the under-tenure under which the defendant

pleads to hold under the tenure of the plaintiff, and whether the defendant pleads the existence over a part of his own under-tenure of tenures independent of the plaintiff's under-tenure, but within the same talook in which the tenure of the plaintiff is situated, the *onus* is on the defendant to prove that he has collected rent direct from the ryot in possession.

A Civil Court is not bound to admit or reject documents, because they have been admitted or rejected by a Revenue Court.

In this case, whether the defendants admit the existence of the superior tenure of the plaintiff as extending over the entire portion of the last under-tenure pleaded by the defendants, as is stated before us by the special appellant, or only admit its existence over a portion of it, as is pleaded by the respondent, it is clear that, in either case, the *onus* is upon the defendants. The Lower Appellate Court has, however, put it upon the plaintiff, special appellant, with regard to the proof of the existence of this last under-tenure, as well as other tenures pleaded by the defendant, above as well as below the under-tenures of the plaintiff. If the defendants have any such tenures, quite unconnected with the tenure of the special appellant, but lying within the same talook within which the plaintiff's tenure is admittedly existing, and which gives to the defendants, as holders of the last tenure of the claim, a right to collect rent direct from Jan Mahomed, the tenant in actual possession of the lands in dispute, the *onus* to prove its existence is equally upon the defendants, as it is not within the power of the plaintiff to prove a negative regarding their existence, and the disproof of the fact will not prejudice anybody but the defendants.

Further, it is clear that the Lower Appellate Court has received certain documents on behalf of the defendants, simply on the ground of these having been proved and admitted by the Revenue Court in the Act X. case, to set aside which this action is brought in the Civil Court by the plaintiff, special appellant.

The Lower Appellate Court should receive and weigh all evidence produced before it by both the parties in this case, not simply by looking, as it has done, to the admission or rejection of them by the Revenue Courts; nor should it consider any document admissible and proved, until it is duly established before it. In like manner, it is not required to reject any document of any party simply upon the ground that it was rejected by the Revenue Court.

As we apprehend that justice has miscarried in this case, we remand it to the Lower Appellate Court for re-trial, with reference to the above remarks.

The Lower Court of appeal should also distinctly find, and record its reasons for the finding, whether the plaintiff has succeeded or failed in proving his statement that he has all along held possession of the lands in dispute, by collecting direct from Jan Mahomed and other ryots, if there are any besides the former.

The 29th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Partition (by one shareholder).

Case No. 2843 of 1865.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 21st June 1865, reversing a decision passed by the Moonsiff of that District, dated the 19th April 1864.

Bujrungee Lal (Plaintiff), *Appellant,*

versus

Syud Velaet Hossein Khan and others (Defendants), *Respondents.*

Baboo Anund Gopal Paleet for Appellant.

Baboo Kishen Kishore Ghose for Government, Respondent.

Where an estate is not held in joint tenancy, but in separate possession, a butwarah of the whole estate for the purpose of apportioning land in proportion to the jumma of the shareholders who had severally entered into engagements with Government for their respective portions of revenue, cannot be insisted upon by one of the proprietors under Section 30, Regulation XIX., 1814.

This is rather an intricate case, in which the appellant's suit for partition has been dismissed. The law on the subject seems to bear very hardly on persons in the position of the appellant; but, following various decisions of the late Sudder Court, which we are not prepared to declare to be wrong, we dismiss this appeal with costs. The cases specially referred to are to be found in the Sudder Court's Reports for 1855, page 264; for 1857, page 1277; and for 1859 at page 1376.

The 29th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Joint property—Suit by purchaser from one of several shareholders.

Case No. 2140 of 1865.

Special Appeal from a decision passed by Moulvee Nazirooddeen Mahomed Khan Bahadoor, Principal Sudder Ameen of Hooghly, dated the 10th May 1865, reversing a decision passed by Baboo Jadub Chunder Deb, Moonsiff of Sulkea, dated the 30th June 1864.

Muknoo Jan Bibee and others (Defendants), *Appellants,*

versus

Gholam Ruhman Mollah and others (Plaintiffs), *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Tarucknath Sein for Respondents.

Suit by purchaser from one of several shareholders of a joint property for the proper share of his vendor. The defendant having claimed the whole of the joint property as that of his vendor by a private partition, and having failed to prove that partition, the Lower Court was right in decreeing joint possession to the plaintiff, and declaring that the defendant, who at the best may have purchased his vendor's share, had nothing to do with the property decreed to the plaintiff.

THE special appellant pleads that the plaintiff had no right to sue for any specific lands, when there was no butwarah between the vendor of the plaintiff and his other co-sharers, and that the Court below is not right in stating that he, the special appellant, had no rights in the lands in dispute.

The plaintiff is a purchaser from a certain shareholder of a joint property, and sued as such for the proper share of his vendor in that property. The possession of his vendor being joint, he sued for a joint possession, but, for the sake of valuing the case, represented in his plaint that his suit was for that quantity of lands which by a division of it between all the shareholders would fall to *his* share.

The decree, as given, is only for such a joint possession.

The special appellant opposed the claim of the plaintiff, on the ground that he had purchased the whole of the property, of which a share was claimed by the plaintiff, alleging that his (the defendant's) vendor had, by a private partition, obtained that whole as a part of his share.

This private partition was not proved.

The purchase of the special appellant being thus of the entire property, and he having claimed it as that of his vendor by a private partition, which was disallowed, it was not wrong for the Lower Appellate Court to state that he, the defendant, special appellant, had nothing to do with the property in dispute.

The share claimed by the plaintiff being of one shareholder out of several joint-shareholders, even if the defendant, special appellant, can be supposed to have purchased at least a right to the joint possession of the share of his vendor in the property, the whole of which he had wrongly claimed, the share of the defendant must necessarily be quite separate from that purchased by the plaintiff, and decreed to him as belonging to his vendor.

We see no reason to allow the special appeal, and reject it with costs.

The 30th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Interest—Sale of judgment-debtor's property in furtherance of irregular order.

Case No. 2588 of 1865.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 27th July 1865, modifying a decision pvssed by the Principal Sudder Ameen of that District, dated the 15th December 1862.

Shaikh Oazutool Huq (one of the Defendants), *Appellant,*

versus

Phoolun and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboo Kishen Succa Mookerjee* for Appellant.

Messrs. R. T. Allan and *C. Gregory* and *Baboo Unnoda Pershad Banerjee* for Respondents.

Want of notice to a judgment-debtor is an irregularity in an order granting interest to the decree-holder, which vitiates all the processes issued for the sale of the debtor's property in furtherance of an order so irregularly passed, however regularly the processes may have been issued, and notwithstanding that knowledge of the intended sale may have been brought home to the debtor by their means.

A DECREE was obtained by a certain party against the plaintiff in this case on the 22nd May 1849. Execution was taken out on the 14th January 1853, and certain pro-

perty was attached on the 7th August of the same year, and the day of sale was fixed by proclamation for the 5th December. Before the sale, the judgment-debtor paying in principal and *interest*, the Sudder Ameen on the 3rd of December directed the interest to be returned, the creditor, through his negligence in taking out execution, not being entitled in his opinion to receive it.

The decree-holder appealed to the Judge against the order refusing to him interest, and on the 23rd March 1854, the Judge, without calling on the other party to appear, declared the decree-holder entitled to interest, and remanded the case to the Sudder Ameen to calculate the amount due. It is well here to remark that, whilst the appeal was pending, and five days before the passing of the Judge's order, *viz.*, on the 18th March, the words "struck off" as regards this case appear in the register book of cases pending in execution, with the signature of the Sudder Ameen annexed.

On the 15th April 1854, the decree-holder applied for execution, and on the 19th April no fresh attachment having been taken out, a proclamation was issued, fixing the 3rd July as the day of sale. The property was then sold to realize the interest 210 rupees, and was purchased by the defendant in the present suit for Rupees 1,320.

On the 22nd July 1854, the present plaintiff, the judgment-debtor, petitioned the Sudder Ameen, urging that he had no notice of the sale; he deposited the interest, and prayed that the sale might be set aside. The interest was taken conditionally, and on 4th May 1855, the Principal Sudder Ameen before whom the matter then came (the Sudder Ameen's Office having been intermediately abolished) set the sale aside, and on appeal to the Judge, his order was confirmed. In special appeal to the late Sudder Court, this order was reversed on the 16th April 1857, the Court being of opinion that the case had not been struck off, and the matter was remanded to the Lower Court. On the 2nd June 1858, after remand, the Principal Sudder Ameen reversed the sale on the ground that no notice of the sale had been posted in the village. On appeal the Judge on the 5th August 1858 reversed that order and upheld the sale, an order which, in special appeal, was confirmed by the late Sudder Court on the 30th December 1858.

Plaintiff then brought the present suit to set aside the sale, and the Judge has given him a decree. The Judge is of opinion that the original execution-case had been struck off by the Principal Sudder Ameen; that it consequently was necessary, on bringing it again on the file, to issue a new attachment; that, as this new attachment had not been issued, the sale, whether proclamation had been issued or not, was bad, and must, therefore, be reversed. He decreed, therefore, the reversal of the sale of the property, possession of which the purchaser had not acquired, and he declared the purchaser entitled to a refund of his purchase-money with interest from the plaintiff.

Defendant now appeals specially, urging that the Judge is in error in holding that a new attachment was necessary; that the Courts have repeatedly held that, on reviving execution, if the previous attachment has not explicitly been removed, no new attachment is necessary; that the order of the Sudder Ameen in his register book striking the case off the file, after an appeal against his order had been preferred to the Judge, was a nullity, and the execution-case was all along alive, and the attachment continuing; that moreover the proclamation of sale is the essential process, and the Judge does not find that this was irregularly issued; that consequently the sale should be confirmed; or in case the Court is of opinion that the finding of the Judge is not sufficiently distinct for his finding as to the legality of proclamation of sale, it should remand the case to the Judge for a clear finding on this point.

We have heard the pleaders on both sides at great length, and, after giving every attention to what has been urged before us, we think that it would be difficult to support the Judge's decision on the ground on which it has been based by him; but on other legal grounds that judgment is maintainable, and it in every way does justice between the parties.

The Judge, in the execution-case, heard the appeal from the order of the Sudder Ameen refusing the decree-holder interest without serving notice on the other, as he was legally empowered to do under Clause 2, Section 2 of Regulation IX. of 1831, made applicable to his Court by Act VII. of 1839, if he considered the order so manifestly unjust and contrary to the practice of the Court as clearly to require revision; but on the case being remanded to the Sudder Ameen, it was incumbent on him to give notice to the other party before finally adjusting the interest, and to have given him thereby an opportunity of paying the same into Court. Instead of so acting, the Sudder Ameen passed the final order in the absence of the judg-

ment-debtor, and the proclamation of sale was issued in furtherance of an order so irregularly passed, and to realize a sum of the demand of which the debtor had no knowledge before the issue of the processes for sale. This irregularity in the original order vitiates, we think, all the processes issued with a view to bring the property for sale, however regularly they may have been issued, and notwithstanding that knowledge of the intended sale may have been brought home to the debtors by their means. The amount due to realize which the sale is to be made is one of the particulars required to be given in the proclamation of sale by Clause 2, Section 3, Regulation VII. of 1825, and it is equally necessary that the amount due should be known to the debtor before the issue of the proclamation, so that he may have an opportunity of paying the sum, as, considering the previous conduct of the debtor, it is presumable he would have acted in the present case, before his property is advertised. Under this view we see no ground for interfering with the decision of the Judge, but reject this special appeal with costs.

The 31st January 1866.

Present :

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Suit for Timber—Tainzas—Equitable lien.

Case No. 266 of 1865.

Regular Appeal from a decision passed by Mr. J. Pitt Kennedy, Recorder of Moulmein, dated the 5th May 1865.

Ko Kywetnee and others (Plaintiffs), *Appellants,*

versus

Ko Koung Bane (Defendant), *Respondent.*

Mr. R. V. Doyne for Appellants.

Mr. W. Marshall for Respondent.

Suit laid at Rs. 5,950.

Suit for value of timber from an alleged fraudulent purchaser, with full knowledge of plaintiff's lien on the timber under certain *Tainzas* or Revenue certificates granted by the Conservator of Forests to the owners of timber. HELD that, though the *Tainzas* were unendorsed, and therefore, by the custom of the country, did not entitle the holder to sell the property they represented, they still were a lien which prevented the owner from parting with it to third parties, except on the understanding that it was so burthened; and that consequently the defendant's purchase was burthened with plaintiff's previous lien, and might be brought to sale for the same.

THIS was a suit to recover Rs. 5,950, the selling price of 170 logs of timber alleged to have been mortgaged to the plaintiffs and in their possession.

It appears from the record (and the fact is not denied by those interested) that the plaintiffs advanced Rs. 4,000 to Shway Att, Mah Bwah, Shway Lah, and Shway Thoo, on a bond under which a lien was given on 400 logs of timber.

Some months after, 170 logs were, according to the plaintiffs' statement, made over to them by the debtors, they receiving in the first instance the "Tainzas" or Revenue certificates granted by the Conservator of Forests, and afterwards the logs themselves.

We may mention here, as the fact does not appear clearly on the proceedings, that these "Tainzas" or certificates are granted to the owners of timber when their logs float down the river from the great inland forests to a place within a few miles of Moulmein, named Kodoe. They are then numbered and identified according to the distinctive marks used by each timber dealer and impressed on each separate log, and certificates are granted by the Assistant Conservator of Forests stationed at Kodoe for the purpose, by which the Government export-duty on each log is ascertained and levied. No timber is allowed to pass down the river to Moulmein until these "Tainzas" are properly made out, and the documents themselves are then transferable by endorsement, and become, by the custom of the district, representatives of the timber; so that a merchant holding an endorsed "Tainza" is considered the owner of the timber mentioned in it.

The plaintiffs go on to say that, wishing to get the "Tainzas" endorsed, they took them to the borrowers, and that a dispute ensued regarding their restoration, the end of which was that the certificates were torn in halves in the scuffle. The torn halves which the plaintiffs carried off are filed with the record.

Plaintiffs then sued on their bond and got a decree, apparently on confession of judgment. In execution, they attached the 170 logs for which they had originally got the certificates, and endeavoured to bring them to sale. They were met, however, by the present defendant Ko Koung Bane, a

timber-dealer of Moulmein, on the ground that he had bought the logs some days previous, and his objection was considered valid. The plaintiffs then brought this suit to recover the value of the timber from Ko Koung Bane, alleging that the sale was a fraudulent one entered into by the purchaser with a full knowledge of the plaintiffs' rights in the 170 logs in question.

The defence is that the purchase was a *bonâ fide* one for value, without notice.

The Lower Court found (1) that there was no mortgage of the timber; (2) that the plaintiffs never had possession of the 170 logs, and that the "Tainzas" gave them no special rights against them; and (3) that, although the defendant's conduct was suspicious, there was no sufficient proof that the purchase was *malâ fide* and with notice.

Against this decision the plaintiffs appeal, urging that the Recorder has come to a wrong conclusion on all these points. We proceed, therefore, to consider the evidence *seriatim*.

With regard to the bond, we entirely concur with the learned Judge of the Court below that it is not a mortgage. It is merely an acknowledgment of a loan of 4,000 Rs., with certain covenants for payment of principal and interest within a certain time. As security for this repayment, it gives the lenders an equitable lien on 400 logs of timber; but it is admitted that the 170 logs now in question were not specifically bound by that covenant. Indeed, there is nothing to show that, at the time the bond was executed, the borrowers had any timber at all in their possession. The fair presumption is that they had not, as the debt was incurred for the purpose of making advances for timber in the forests, and the 170 logs were not at Kodoe till some months afterwards.

But, be this as it may, there is nothing in the bond, standing by itself, that can operate as a mortgage on these particular timbers, and so far we find for the respondent.

Then as to the "Tainzas," had they the effect of giving absolute possession of the 170 logs to the borrowers, and, if not that, did they give any rights to the parties holding them, and operate as an equitable lien on the timber which they represented until the appellants' claims were satisfied?

The Judge below has found as a fact that the "Tainzas" were for a time in the appellants' possession. We think that the evidence, although not so clear as it might have been had the parties been properly examined, is sufficient to prove more than this, and that the balance of testimony inclines in favor of the appellants' story that the certificates were made over to them and remained in their hands till their interview with the borrowers, when the woman Mah Bwah snatched them from Kywetnee. But, granting that this person had possession of the "Tainzas," and was improperly deprived of them, we do not think that these documents gave him any actual possession of the timber. They were unendorsed, and therefore, by the custom of the country, the holder could not sell the property they represented. They, in short, appear to us to have been merely a security for the original debt—an equitable lien which prevented the owner of the timber from parting with it to third parties, except on the understanding that it was so burthened. There is no question of identity in this case. It is clearly found, and indeed the fact is not contested, that the "Tainzas" delivered over to the plaintiffs refer to the 170 logs now in suit.

We entirely discredit the evidence of the chowkeedar as to the giving of actual possession of the 170 logs to Kywetnee, and think that, at the utmost, the appellants, by having possession of the unendorsed "Tainzas," only acquired the right to follow the 170 logs, on which they had the equitable lien, into the hands of a third party.

We are not called upon to decide whether or not this right would have been in any way affected had the third party been an innocent purchaser for value, for, after hearing the evidence, we are unhesitatingly of opinion that the respondent is not entitled to that position. Everything is strongly against the supposition of his *bona fides*. He told two different and utterly irreconcileable stories about the way in which the certificates became torn. To the Assistant Conservator of Forests he stated, as appears from that official's order granting fresh "Tainzas," that the appellants had torn the papers in endeavoring to snatch them from the hands of the owners, and the evidence of Moung Quay Golory proves that, when the appellants' claim against these identical 170 logs was the subject of conversation between the borrowers, Koung Bane was present, and took part in it. It is clear from this that the respondent was perfectly and from the first aware that the logs were the subject of a dispute, and that his vendor's title to them was at the least not clear; and this knowledge, coupled with the fact that mutilated certificates only were given to him at

the time of purchase, was sufficient to put him upon further enquiry. Add, moreover, to this that the respondent is related to his vendors, that he bought the timber for much less than its value (which is established by the fact of his selling it at an advance of 8 rupees per log, only a few days afterwards), and that the transaction took place four days only before the institution of the appellants' suit; and we think there can be no doubt that the respondent had not only constructive but actual notice of the appellants' lien on the timber, and risked the ulterior consequences of his act in his present anxiety to "make a few rupees."

The learned Recorder, although he holds the sale to have been "a very fraudulent and reprehensible proceeding to all actors in it," acquits the respondent of everything but exceeding want of prudence and caution. For the reasons above given, we are unable to take this view of the case.

We find, therefore, on this appeal that, although there was no mortgage of the 170 timbers in the first instance, the possession of the "Tainzas" representing them subsequently gave the appellants, who are proved to have held them an equitable lien on the 170 logs purchased by the respondent, and that the respondent, when he bought them, was not an innocent purchaser, but had actual knowledge that they were so burthened.

We, therefore, decree the appeal with costs, the effect of which order will be to declare that the 170 logs of timber, purchased by Koung Bane, is burthened with Kywetnee's previous lien, and may be brought to sale for the realization of the same.

The 4th April 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Ineffectual attempt to resume a very old alleged Lakeraj tenure by an Auction-purchaser.

Case No. 14 of 1864.

Regular Appeal from a decision passed by the Judge of Midnapore, dated 8th October 1863.

Nobo Lal Khan and others (Defendants), *Appellants,*

versus

Maharanee Adheeranee Narain Koonwaree (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellants.

Mr. R. V. Doyne and *Baboos Juggadanund Mookerjee, Chunder Madhub Ghose,* and *Rajendurnath Bose* for Respondent.

An auction-purchaser was not allowed to resume lands held by the defendants under an alleged lakheraj title, because the defendants showed that an ineffectual attempt was made in 1793 to resume the grant, and that the title had been unchallenged ever since. Possession was thus carried back to a period anterior to 1790.

Seton-Karr, J.—THIS is a somewhat peculiar case. The purchaser at auction for arrears of revenue, who is the plaintiff, sued to resume some 242 beegahs of rent-free land within Narajole and other villages held by the defendants. On the 26th of May 1863, the Judge gave the plaintiff a partial decree. On the 8th of October 1863, the Judge reviewed his own order on the discovery of new evidence, and gave the plaintiff a decree for the lands excluded from the first decree. On the case coming up in appeal to the High Court, the plaintiff, under the ruling of the Full Bench in the well-known case of Sonatun Ghose, was allowed to amend her plaint, which she accordingly did by striking out the allegation that she brought her suit under Section 30 of Regulation II. of 1819. This being done, and the plaintiff refusing an offer of remand for fresh evidence to be taken, the appeal went at once to trial on the merits as it stood, and there being no evidence to discharge the *onus* laid on, and accepted by, the plaintiff, the decision of the Judge in her favor was set aside on the 11th of May 1865. Subsequently, a review was applied for and granted, on the grounds that the position of an auction-purchaser was very different from that of an ordinary zemindar, that the *onus* did not lie on such a person, and that the ruling of the Full Bench did not apply. This being done on the 22nd of December 1865, the case now comes to trial before us on the merits.

The appellants, who are the defendants in the Lower Court, now take up three legal objections to the right of the plaintiff to sue at all, before going into the merits.

First, it is argued that the plaintiff is out of Court, because she sues ostensively for lands more than 100 beegahs in extent, and that, under the ruling of the late Sudder Court, in the case of A. Forbes, Sudder Dewanny Reports, 26th of May 1860, page 592, followed by the High Court in other cases, the plaintiff would be bound to show that the defendants were holding under various sunnuds or under sunnuds covering land less in extent than 100 beegahs. The plaintiff, it is admitted, has not attempted to

show this, and now urges that this *onus* cannot be cast on her, seeing that the decision in review, admitting the case to trial on its merits, expressly ruled that the position of an auction-purchaser was different from that of an ordinary zemindar; and that the *onus*, in such cases, would, as before, lie on the defendant.

This point has been very fully argued by Mr. Doyne, and the pleader for the plaintiff, Baboo Juggadanund, on the one hand, and by the pleader for the appellant on the other. There is, it may be said, some little difference between the point urged before the Bench which admitted the review, and the point now taken. But, seeing that the auction-purchaser has been allowed to occupy a position different from that of ordinary zemindars, and to get rid of the *onus* of starting her case, we think the objection is one which cannot be urged with success at this stage. It will be for the defendants to show that the sunnud on which they rely covers more than 100 beegahs, and this cannot be done without going into the evidence. Consequently, as a bar to the actual prosecution of the claim, the objection ceases to have weight.

The *second* point urged by the defendant is that a decision of the Appellate Court, dated the 28th of October 1795, setting aside that of the Judge of the 6th of January 1794, has in effect decided that the plaintiff is not the person to sue, and that the right to resume belongs to Government. We cannot look on this decision as conclusive and effectual to bar the right of the plaintiff to institute this action, and we decide this *second* point against the appellant.

The *third* point relied on is that the recent judgment of the Privy Council in the case of Chundrawallee Debya, reported in No. 1, Volume V. of the Weekly Reporter, bars the plaintiff. We do not think that the limitation of 60 years can operate against the plaintiff, as a pure question of law, whatever effect any possession that might be shown for 60 years might possibly have. Their Lordships in that case quote the law as follows: "Nor shall any plea on the "part of the plaintiff, for the non-prosecu "tion of his claim of right during a period of "60 years after the origin of his alleged cause "of action ..... be deemed a sufficient "ground for taking judicial cognizance of any "suit so preferred." But here the plaintiff is an auction-purchaser at a sale for arrears of revenue, and she has not slept over her rights for 60 years, but has sued within 12 years from the date of her purchase. Clearly, then, she has a right, if not otherwise barred, which is not yet shown, to have her claim to resume regularly enquired into.

These three points being disposed of, we can proceed to consider the merits of the case. The Judge has ruled that the sunnud on which the defendant relies is a forgery, and that it was ruled to be a forgery by the first Court in 1794, although that decision is not legally in force, having been set aside by the Court of Appeal.

On reference to the decisions of 1794 and 1795, it appears, however, that the Judge of the day formed no such decided opinion as to the sunnud relied on being a forgery. The defendant, one Anund Lal Khan, described as zemindar of Narajole, was sued by Nuro Huri Chowdhry, who was farmer of a *tuppa* on the part of Government, for resumption of rent-free lands. The defendant then produced three sunnuds, numbered respectively, 15161, 18941, and 18942. The register was sent for from the *Bazisamin-dufter*, in which these rent-free lands are or should be entered, and it was seen that the last two sunnuds were correctly entered there. The first sunnud did not correspond in its number, for No. 15161 *in the register* related to lands in the possession of Mokoond Ram Chuckerbutty and four others. The former lands were therefore declared to be the right of the farmer on the part of Government, and the lands covered by the other two sunnuds were confirmed to the defendant. In appeal, as we have seen, the order was set aside by the Sudder Court, on the simple ground that the plaintiff had no right to sue, and that, under Section 12 of Regulation XIX. of 1793, the Collector, with the permission of the Board of Revenue, was the proper person to institute the suit. That Section was the law in force at that time, though it was afterwards rescinded by or exchanged for Section 30 of Regulation II. of 1819.

The same course was followed by the Judge on the present occasion as was followed by the Judge in 1794. The Judge sent for the register of these lands, and found that the sunnuds 18941 and 18942 tallied with the entries in the Collectorate books, but that the sunnud No. 15161 related, not to lands in Narajole of 276 beegahs 3 cottahs in extent, but to a small portion of land about 9 beegahs 3 cottahs in pergunnah Suboug. Therefore, the Judge concluded that the said sunnud was a forgery, and inferred that, though filed in 1793 in the

Civil Court, it might have been forged sometime between 1793 and December 1790.

The originals of these sunnuds are apparently not forthcoming, but we have sent for the records of the case of 1795, and find that a sunnud for 276 beegahs 3 cottahs, bearing the number not of 15161, but of 18941, was really before the Court in that case.

There may have been some confusion in the entries in the *Bazi-zamin-duftur* at the time, and it is very probable that the registers were not very accurately kept. But there is no ground whatever for the Judge's assertion that the sunnud on which the defendants now rely was found to be a forgery more than 60 years ago. The decision of the first Court was set aside in appeal, and, after all, it amounted to no more than an expression of opinion that the sunnud did not exactly tally with the register. No direct imputation of fraud is to be made out in the judgment.

The lands occupied by the defendant, and now claimed by the plaintiff in this appeal, may be fairly taken to have been held under color of that sunnud, whatever be its validity or genuineness. The case has been allowed to go to trial on that assumption, and the lands have been treated as those actually claimed at the close of the last century. No attempt was ever made on the part of the Collector or any one else to disturb the possession of the defendants, or to re-agitate the question. No evidence is now adduced by the plaintiff in this action to show that the lands which she claims are ostensibly held under different sunnuds, or under sunnuds less in extent than 100 beegahs. It would be quite impossible, at this distance of time, to discover whether there had been any positive forgery or not. But the inferences arising from the result of decisions in 1794 and 1795, and from the defendant's long and unchallenged possession, are wholly in the defendant's favor. There is no evidence which establishes the plaintiff's contention urged in appeal before us, that, while the defendants occupied the position of zemindars, they took the opportunity of setting up invalid rent-free subordinate titles for their own benefit. The presumption is most strong in the favor of the defendants, that their predecessors were in possession of the very lands now claimed in 1793, when the suit was brought by the farmer for lands in this very Narajole, and this being the presumption, which is not rebutted in any way, their possession, then, may be easily carried back beyond the 1st of December 1790, without any straining of inferences, or violation of probabilities.

Evidence on the part of the plaintiff to rebut the inferences arising out of the whole case on the defendant's favor, there is literally none; and in this state of things, the defendants, under Section 1, Clause 14 of Act XIV. of 1859, can maintain the ground even against an auction-purchaser as having held since the Permanent Settlement, whether the original grant was valid or not.

The present plaintiff, moreover, can be in no better position on the merits than those who in 1793 vainly attempted to resume the grant.

In this view of the case, the decision of the Judge ought to be reversed, and the suit of the plaintiff dismissed with all costs.

Macpherson, J.—I agree in thinking that the appellants are entitled to our judgment, and that the decree of the Lower Court should be reversed, and the suit of the respondent be dismissed with costs. The respondent seeks to resume certain lands comprising more than 100 beegahs. She proves that she has recently purchased the property at a sale for arrears of Government revenue: but she proves nothing else. She simply stands on her rights as auction-purchaser, and claims to be entitled to resume, unless the appellants can show that the lands have been held as lakheraj since before the Permanent Settlement. The appellants do show that so long ago as 1793 an ineffectual attempt was made to resume these lands, when the sunnud now relied on was pleaded. The result of that litigation was that, on appeal, it was in 1795 decided that, as the quantity of land which it was sought to resume exceeded 100 beegahs, the right (if any) to resume belonged to the Government, and not to the then plaintiff. It has been supposed that by those proceedings the sunnud was found conclusively and declared to be a forgery: a reference to the proceedings, however, shows that this is not the case. From that time until the present suit was instituted, no further attempt was made to resume. Looking at the whole evidence, the inference I draw is that the appellants and those whom they represent have been in possession under an alleged lakheraj title since before the Permanent Settlement. This inference I may legally draw, although there is no direct

evidence of possession prior to the Settlement. See Heera Monee Debia *vs.* Lokenath Mundul, 2 Weekly Reporter 135: and Sham Lal Ghose *vs.* Sekunder Khan, 3 Weekly Reporter 182. These cases rule that, in a suit such as this is, it is not necessary that the defendant should give direct proof of holding from before the Permanent Settlement, but that it is sufficient if he gives such evidence of long possession as satisfies the Court that the tenure is really as old as the Settlement, and not a modern appropriation.

The 5th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Mahomedan widow's claim for dower.

Case No. 3439 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 27th June 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 22nd March 1864.

Bibee Selamut (one of the Defendants), *Appellant,*

versus

Shaikh Mowla Buksh (Plaintiff), *Respondent.*

Moulvee Aftabooddeen Mahomed for Appellant.

Baboo Anund Gopal Paleet for Respondent.

A Mahomedan widow, even though she have a valid claim for dower against her husband's estate, cannot take possession of the estate as against the heirs, but must sue them regularly for the amount due to her.

PLAINTIFF, as the heir of one Salumut Ali, sues his widow for possession of that to which he is entitled under the Mahomedan law.

The widow alleges that she has a claim on the estate of Sulamut Ali for dower to the amount of 40,000 rupees; that she is in possession of his estate, and is entitled to retain possession of the same in satisfaction of her claim.

The Lower Courts find that, even on the assumption that defendant has a valid claim for dower against the estate of her late husband, still she cannot, as against the legal heirs, take possession of the same, but must sue them regularly for the amount due to her. They consequently decreed the plaintiff's claim.

Defendant now appeals specially, urging exactly what she urged unsuccessfully below; but we see no reason to question the soundness of the law laid down by the Lower Courts by which the legal heirs are protected, and claimants of the property have every opportunity of urging their claim in Court as against the heirs in possession. We dismiss the special appeal with costs.

The 5th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Ejectment from Indigo Factory—Damages—Indigo land—Chur land

Case No. 351 of 1865.

Regular Appeal from a decision passed by Baboo Doorga Pershad Ghose, Principal Sudder Ameen of Nuddea, dated the 4th July 1865.

Hurish Chunder Koondoo (Defendant), *Appellant,*

versus

Maharanee Bama Kalee Debia (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter and Judoonath Mookerjee for Appellant.

Baboos Sreenath Doss and Nil Madhub Sein for Respondent.

Suit laid at Rupees 9,486.

Suit for damages sustained by plaintiff during the period she was out of possession of an indigo factory with appurtenances. HELD that the Lower Court was right in taking, as the basis of its calculation of damages, a *bonâ fide* agreement entered into between the plaintiff and her lessees showing the amount of rent which she would have received yearly but for the illegal act of the defendant; that as the indigo land was an appurtenance to the factory, by ousting the plaintiff from the factory, all benefit derivable from chur lands fit only for indigo was lost by her; and that the sum which represented that loss had been rightly included in the calculation of damages to which plaintiff was entitled.

THE plaintiff in this case, Maharanee Bama Kalee Debia, in a previous suit recovered possession, from the defendants Hurish Chunder Koondoo and Grish Chunder Koondoo, of an indigo factory with appurtenances.

She now sues for Rs. 9,486, being the amount of damages sustained by her during the period she was out of possession.

The Principal Sudder Ameen determined that the plaintiff was entitled to damages; and, as the basis of calculation, he accepted an agreement executed by certain persons who had taken the factory on lease during the period of plaintiff's possession. The rent was fixed at 1,200 rupees per annum The Principal Sudder Ameen, therefore, considering that agreement a *bond fide* one, decreed to plaintiff damages to that amount for 5½ years, in all 6,600 rupees, *minus* 600 rupees expenses incurred by plaintiff on account of the factory, with costs and interest.

Defendants now appeal specially, urging, *1st*, that the agreement which has formed the basis of the Principal Sudder Ameen's calculation included the rents of certain chur lands which are not included in the plaintiff's decree, and, as they had never dispossessed plaintiff of them, the amount of rent payable under the agreement in question on their account should be deducted; and, *2nd*, that the amount expended by them in repairing the factory should have been deducted from the sum which is determined to represent the damage done to plaintiff by their act.

The Principal Sudder Ameen acted, we think, quite rightly in taking the *bond fide* agreement entered into between plaintiff and her lessees, showing the amount of rent which she would have received yearly but for the illegal act of the defendant, as the basis of his calculation. The indigo land was an appurtenance to the factory. By ousting plaintiff from the factory, all benefit derivable from chur lands fit only for indigo was lost by her, and the sum which represents that loss has been rightly included within the calculation of damages to which plaintiff is entitled.

As to the objection that the Principal Sudder Ameen should have allowed them the full expense incurred by them in repairing the factory, we observe that the Principal Sudder Ameen has allowed them Rs. 600 on that account, and we see no ground for interfering with that order. Under this view of the defendants' appeal, we dismiss it with costs.

As to the cross-appeal preferred by the plaintiff claiming damages for the second half-year's rent of 1271, we see no ground for admitting it, seeing that plaintiff obtained possession of the factory in Bhadoon 1271, and the October sowing takes place after this date. We, therefore, reject it.

The 6th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Ferry (Recovery of possession).

Case No. 3228 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dinagepore, dated the 25th August 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 21st March 1864.

Brojo Kishoree Chowdhrain and others (Defendants), *Appellants,*

versus

Bilash Monee Chowdhrain and others (Plaintiffs), *Respondents.*

Mr. G. C. Paul and *Baboo Onoocool Chunder Mookerjee* for Appellants.

Baboos Dwarkanath Mitter, Gopal Loll Mitter, and *Kalee Kishen Sein* for Respondents.

A may recover possession of a ferry of which he has been dispossessed by *B*, though the form of his action may have been for obtaining possession of a ghaut.

The right to ply the ferry may include also a right at certain seasons of the year to land upon or start from *B's* side of the river.

THE Lower Appellate Court has now found after remand that the five beegahs of lands from which or upon which (according to the present arguments of the special appellant, throughout the year except in the rainy season, and by the report of the Ameen, throughout the year except for a few days in the rainy season) the ferry in dispute starts or lands on the side of the river on which the property of the special appellant stands, were made over to the plaintiff, together with the ferry, by the special appellant, under the terms of a *solehnamah*, and that since that time the plaintiff had possession of the ferry for several years up to the time that he was dispossessed by the special appellant.

The special appellant argues before us that the plaintiff had not claimed to obtain possession of any ferry, but only of a ghaut upon the five beegahs of the lands made over to him by the *solehnamah*, and that he is

not entitled to any declaration to ply the ferry at a time when, on the special appellant's side, owing to the submerging of the plaintiff's aforesaid five beegahs lying on the banks of the river on that side, the plaintiff may have to start from or land upon the lands of the special appellant. We find, however, that it is too late and also ineffectual for the special appellant to raise the first plea, as in our opinion, on the whole record, it is quite clear that the case of the plaintiff was really for the ferry, and was understood by all who had to do with the case up to the present time when the special appellant took this new objection.

If the plaintiff is entitled to ply the ferry decreed to him, there can be no doubt that his right would be to ply it even when, owing to the effects of season and increase of water, he may have occasion to start from or land on the side of the special appellant, that is, upon the lands of the special appellant.

The five beegahs on the river banks were taken by the plaintiff on the side of the special appellant, merely for obtaining lands for the plaintiff's ferry on that side; and if at any time of the year these lands are submerged, the ferry so made over to him, and enjoyed by him for several years after the *solehnamah*, cannot, in our opinion, be justly stopped, even when there may, at one time or another, be occasion to land upon or start from the lands of the special appellant on his side of the river. This right of passage the special appellant cannot deny to the passengers of the plaintiff's ferry.

Seeing no reason to interfere with the decree for the ferry as given to the plaintiff, we reject the special appeal with costs.

The 6th April 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Putnee (Sale of)—Special Appeal—Review—Admission.

Case No. 3600 of 1865.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 20th September 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 27th February 1865.

Bykuntnath Goopto (one of the Defendants), *Appellant,*

versus

Prosunno Moyee Dabia (Plaintiff) and others (Defendant), *Respondents.*

Baboo Turucknath Dutt for Appellant.

Baboos Kishen Succa Mookerjee and *Gopal Lal Mitter* for Respondents.

Where a Judge states as a fact that an admission was made before him by one of the parties to the suit, the High Court cannot, in special appeal, enquire whether the Judge was right or not in making that statement.

THE Lower Appellate Court says: "In appeal the defendant admits that the sale of "the putnee in the district of Nuddea was "illegal under the rules of Act VI. of 1853, "because the whole of the putnee-tenure is "within the Collectorate of the 24-Pergun-"nahs." In special appeal, it is contended that the defendant never made any such admission, and that the proceedings of the Lower Court are defective, inasmuch as the point supposed to have been admitted ought to have been tried and decided by the Court.

The Judge states as a fact that the admission was made: and in special appeal we have no power to enquire whether he was right or not in making that statement. If he was wrong, the defendant's remedy was by review of judgment in the Court below, not by special appeal to this Court. If the Judge erred in supposing the alleged admission to have been made, the defendant's proper course clearly was at once to bring the error to the notice of the Judge, and to apply for a review of his judgment. This the defendant has not done; and we cannot assist him in special appeal.

Supposing the admission to have been made, the judgment of the Lower Court appears to us to be right. We, therefore, dismiss the appeal with costs.

The 7th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Variation of title—Special Appeal.

Case No. 3351 of 1865.

Special Appeal from a decision passed by Mr. C. P. Hobhouse, Judge of Midnapore, dated the 1st September 1865, affirming a decision passed by Baboo Nobeen Kishen Paleet, Principal Sudder Ameen of that District, dated the 29th June 1865.

Hemanginee Dassee and others (Plaintiffs), *Appellants,*

versus

Pitamber Dey and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Huree Narain Roy* for Appellants.

Baboo Mohendro Lol Shome for Respondents.

A Court cannot allow a plaintiff to vary his title. Thus, in a suit to set aside a summary order declaring the plaintiff's brother as having rights and interests in certain property, and to have it declared that that was plaintiff's own self-acquired property, the plaintiff having failed to prove that the property was his self-acquired—HELD that he could not in special appeal ask for a declaration of his title to a moiety of the property as a member of a joint Hindoo family.

ON this case coming up for hearing, the pleader for special appellant requested permission to add a 5th ground to his special appeal-petition (omitting the four points), to the effect that, as the first and second Courts have found that the property in dispute is joint and undivided, plaintiff, special appellant, is entitled to have a declaration in this suit as to his right to an 8-annas share of the said property, although he has been unsuccessful in establishing his title to the said property as his own or self-acquired property.

We allowed permission to petitioner's vakeel to argue this ground, but are unable to accede to the argument.

The plaintiff sues to set aside a summary order declaring his brother Sreenath to have rights and interests in certain property, and to have it declared that that property is his own self-acquired. He was unable to prove that the property was his self-acquired, but he asks the Court now, in special appeal, to declare that he is entitled to 8 annas of it as a member of a joint Hindoo family. This the Court cannot do. He chose to sue on a particular title; he has failed to establish that, and he cannot ask, with reason, the Court to give him a decree on a title which he, looking to the character in which he brought his suit, repudiates. It is true that the Court, as remarked, can give to a party proving his title any relief that it may think necessary, though it be not what the plaintiff seeks; but for the Court to vary the relief given to a party who has proved his title, and to allow a plaintiff himself to vary his title, are very different matters; and though the one is allowable, the other certainly is not so. We reject this application, therefore, with costs.

The 7th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Joint Hindoo Family—Sale by trustees—Bona fide purchasers—Near relatives.

Case No. 3235 of 1865.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th August 1865, affirming a decision passed by the Moonsiff of that District, dated the 29th March 1864.

Dhun Kristo Roy and others (Plaintiffs), *Appellants,*

versus

Huro Chunder Roy and others (Defendants), *Respondents.*

Baboos Jugodanund Mookerjee and *Kalee Kishen Sein* for Appellants.

Baboos Kishen Succa Mookerjee, Banee Madhub Banerjee, and *Oopendur Chunder Bose* for Respondents.

Where three brothers of a joint Hindoo family sue to set aside a sale made without legal necessity by their elder brothers, who were trustees of the joint family, and the defendants set up a simple plea of self-acquired on the part of their vendors, if the defendant's sole plea is rejected, and the plaintiffs' contention proved, the plaintiffs are entitled to possession of what they demand.

Where a near relative purchases family-property, and sets up a simple plea of self-acquired on the part of his vendors which he cannot substantiate, he cannot be considered a *bonâ fide* purchaser.

THIS suit was instituted by three brothers to set aside a sale of certain property which had been made by their elder brothers, who were simply trustees for the joint family, and therefore had no power to sell without legal necessity.

The defendants, who are first cousins of the plaintiffs, plead that the property purchased by them was the self-acquired property of their vendors, and that, therefore, they were at liberty to sell it to them.

The Lower Courts both found that the property was not the self-acquired but the joint property of the plaintiffs and the defendants' vendors; nevertheless, as vendees were *bonâ fide* purchasers, and as plaintiffs have delayed so long to bring the present suit, they only gave plaintiffs a decree against the defendants' vendors for the share of the purchase-money corresponding with the right held by them in the property.

Plaintiffs now appeal specially, urging that, as defendants simply rely on the fact that the property was their vendors', and as it has been proved not to be the self-acquired property of the vendors, but the joint property of the plaintiffs and defendants' vendors, they, plaintiffs, are clearly entitled to possession of that which they demand.

We think that the contention of the plaintiffs is sound, and that, moreover, when a near relative purchases family-property, and sets up a simple plea of self-acquired, on the part of members of the family, which he is unable to substantiate, he is in no sense a *bonâ fide* purchaser; but, even if he were so, as the defendants' sole plea has been rejected, and plaintiffs' contention proved, they are entitled to possession of what they demanded in the suit. Ordered accordingly. Decree of the Lower Court reversed, and costs of special appellants to be borne by the special respondents.

The 9th April 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Mahomedan Law of Wills—Death-bed gifts—Sale.

Cases Nos. 303 and 304 of 1865.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Purneah, dated the 19th June 1865.

Kumuroonissa Begum (Defendant), *Appellant,*

versus

Mirza Syfoollah Khan and another (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne, G. C. Paul, and *C. Gregory* for Appellant.

Messrs. R. T. Allan, R. E. Twidale, and *Moonshee Ameer Ali Khan Bahadoor* for Respondents.

Suit laid at Rupees 27,694-4-3.

Case of a death-bed deed of gift by a Mahomedan lady which was ineffectually attempted to be set up as having being executed as a deed of sale in order to defeat the operation of the Mahomedan Law of Wills, by which a testator is precluded from giving more than one-third of his property by will.

No. 303.

THIS is an appeal from the decision of the Principal Sudder Ameen of Purneah.

The plaintiffs' claim as the heirs of Ranee Khyroonissa Begum against the defendant, who obtained possession in a proceeding under Act XIX. of 1841, as a purchaser under an alleged bill of sale, dated the 3rd of Kartick 1270 B. S., or 19th of October 1863 A. D.

The Principal Sudder Ameen found that the defendant through her husband fabricated the deed and a will which is the subject of a regular appeal, No. 304 of 1865. He points out the utter inadequacy of the consideration Rupees 9,653, for which it is alleged that the deceased sold property of the value of a lakh of rupees; that this consideration is wholly made up of the costs in certain suits between the deceased and the defendant. The absence of all reliable evidence of any settlement of accounts and the non-execution of any release by the defendant shows that the matter is as unlike a business-transaction as anything can well be. He shows that the Ranee was in the bed behind a purdah when the alleged bill of sale was executed, and says that the people who were behind the purdah were either creatures or partisans of Ali Reza, the husband of the defendant.

Mr. Doyne for the appellant has argued the case before us with great force and ingenuity. He says that the judgment of the Principal Sudder Ameen proceeds altogether on a mistaken foundation: that the bill of sale was not a business-transaction at all: that the motive or object of it and the inducement which led the Ranee to execute it was a desire to benefit the female appellant, the only child of her only sister by the whole blood (the plaintiffs being the children of her father by another wife); that she had brought up the female appellant from the age of three months, and had shortly before the execution of the bill of sale expressed to a witness to whom the Principal Sudder Ameen gives credit as being a respectable man, a mahajun named

Nuckched Lal, a desire that the defendant should receive a portion as a child.

We have gone through the evidence with great care, and its effect has been discussed at great length. But, allowing that there is a foundation for Mr. Doyne's argument, we see no reason to think that the conclusion arrived at by the Principal Sudder Ameen is otherwise than perfectly correct.

The Ranee died from the effects of a carbuncle in her side on the 30th October 1863, eleven days after the date of the alleged deed. There is conflicting evidence as to the state of her mind during the month preceding her death—the plaintiff and his witnesses alleging that she was insensible for a month or at any rate a considerable period before her death: the defendant's witnesses alleging that she was in the full possession of her faculties to the last. On this point, we cannot say that the evidence on either side is entirely satisfactory. It appears clear that the bursting of the carbuncle had left extensive and very deep wounds in her side, extending, according to some of the witnesses, from her hip to the waist; 2½ inches deep according to the doctor, Abdool Luteef; according to another witness, so large that a man's hand could be put into it; according to another, Sufdur Ali (a near relative of all the parties, who was in the habit of seeing the deceased daily, and on whose testimony the Principal Sudder Ameen places great reliance), such that, if she had lived a few days longer, the right leg would have been separated from the waist. It is not necessary to accept the account of this witness literally. It probably describes truly enough the impression produced in his mind by the sight of the terrible suppurating wound of which Khyroonissa was dying. The evidence shows that she had fever daily, and it appears to us at least not improbable that the fever and wound would have produced a state of unconsciousness such as is described by some of the witnesses. It certainly does appear highly improbable that she should have remained in the full possession of her faculties, and have been capable of understanding and transacting business up to within a few hours of her death, which is the appellants' story.

Now, in order to see whether the bill of sale is proved, it is necessary carefully to consider its character and the mode in which it was intended to operate. The Principal Sudder Ameen has shown conclusively that it was not an ordinary business-transaction, and the appellant has not for one moment attempted to support it upon that ground.

Mr. Doyne says it was intended as a gift, but was put in the form of a deed of sale in order to defeat the operation of Mahomedan Law by which a testator is precluded from giving more than one-third of his property by will. He says, in effect, that, for the purpose of trying whether it is a genuine instrument or not, we must look, not to the consideration expressed on the face of the deed, but must consider the instrument as testamentary.

But, if we uphold the instrument on that ground, we must be satisfied that the deceased had any such object or intent. Nothing of the sort is proved to our satisfaction. Nuckched Lal, who is said by the Principal Sudder Ameen to be a respectable witness, who is certainly a mahajun and sharer in one of the zemindaries which belonged to the deceased, speaks of having heard a conversation behind a purdah some days before the execution of the deed in which the deceased Khyroonissa expressed through her servant a desire that Kumuroonissa should be treated as her child, and an intention of giving her some but not all of the zemindaries comprised in the bill of sale. The voice speaking was admittedly, not that of Khyroonissa, but of a servant. But it is admitted on all hands by both appellants and respondents that the practice of Khyroonissa in communicating with strangers from behind the purdah was to whisper to a servant who spoke for her. Syfoollah Khan is stated to have been present when this conversation took place; and, if it were true that he was so, he would have known whether it was his sister who was making the communication. But he states that he was not present; that he was not on terms with Syud Reza Ali; and we believe him.

The deed was executed behind a purdah, a number of persons being present before the purdah, many, if not most, of whom undoubtedly believed that the transaction was *bonâ fide*. The Mohurir of the Ranee wrote her name below her seal. He did not write the deed which was prepared, not by any servant of the Ranee, but by a Mookhtear of Reza Ali. He says he wrote the Ranee's name under pressure. It is clear, not only from his own testimony, but from that of the witnesses who describe his demeanour at the time, that he was very far from being satisfied that all was right. If the alleged conversation with Nuckched Lal had been followed up by the execution of a will in

favor of Kumuroonissa disposing of the properties mentioned in her favor, we might have been disposed to trust to evidence such as has been adduced by the appellants. But there is nothing to lead to the inference that the Ranee ever contemplated the execution of a deed of sale; that she directed or knew anything of its preparation or of its effect. It is certainly not proved to our satisfaction that she was in any condition to form or understand an elaborate contrivance to defeat the operation of the Mahomedan Law of Wills.

The evidence of the respondents goes to support the deed as a business-transaction; and for the purpose of supporting it as a sale so as to defeat the Law of Wills, it was gravely argued before us as a principle of Mahomedan Law that inadequacy of the consideration will not defeat a sale.

We think that the Principal Sudder Ameen has shown that the transaction was not a sale; and, as we think it is not proved that the Ranee ever executed this deed by way of Mohabat, even if she was actually present in the bed behind the purdah, and not absolutely insensible when her seal was affixed, we dismiss the appeal with costs and interest.

Note (a). As to this see Hedaya, Book 52, Chapters 2, 3, translation by Hamilton, Volume IV., pages 482-507.

The witnesses in support of an unattested will and of a nuncupative will by the deceased Ranee in this case are chiefly the same as those called by the appellants in support of the bill of sale. As we have intimated our opinion that we cannot rely on their evidence in the case of the bill of sale, Mr. Doyne for the appellants admits that he cannot hope to succeed in this case.

No. 304.

We therefore dismiss the appeal with costs and interest.

The 10th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Interest—Usufructuary Mortgage.

Special Appeals from a decision passed by the Principal Sudder Ameen of Cuttack, dated the 18th August 1865, modifying a decision passed by the Moonsiff of that District, dated the 9th May 1865.

Case No. 3060 of 1865.

Mohunt Chutoorbhooj Doss (Plaintiff), *Appellant,*

versus

Doorga Churn Paharee and others (Defendants), *Respondents.*

Baboo Motee Lol Mookerjee for Appellant.

Baboo Tarucknath Sein for Respondents.

Case No. 3411 of 1865.

Doorga Churn Paharee (Defendant), *Appellant,*

versus

Mohunt Chutoorbhooj Doss (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Motee Lol Mookerjee for Respondent.

Principle of calculating interest on the principal sum borrowed in the case of an usufructuary mortgage.

PLAINTIFF has now appealed in these cases specially, urging that the Principal Sudder Ameen has not calculated the interest on the principal sum borrowed on a right principle, and that, had he done so, it would have appeared that the whole sum borrowed with interest had already been collected from the usufruct of the property.

On reverting to the accounts, which have been most carefully prepared by the Principal Sudder Ameen, we find that the calculations as to interest are quite correct. The gross collections are given each year, the necessary payments on account of revenue, expense of collection, and zemindar's maintenance, are then deducted, and the remaining sum goes to reduce, either in whole or partly, the interest; and, if there be any sum over, it is carried to reduce the principal. In every instance, simple interest alone is charged. Under this view, we dismiss the special appeal with costs.

Special respondent urges that, as the sum of 3,013 rupees, according to the finding of the Principal Sudder Ameen, still remains due to them, the plaintiff's suit should have been dismissed, and no conditional order passed to the effect that the plaintiff would be entitled to possession on paying that sum within one month from the date of the decision.

There is much to be said in favor of special respondent's contention. As, however, it appears that the conditional order has not been taken advantage of by the plaintiff, it is unnecessary to pursue the matter further.

The 10th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Sale of Putnee for arrears—Suit for damages by Dur-putneedar.

Case No. 2 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 17th August 1865.

Madhub Anund Moittro and others (Plaintiffs), *Appellants,*

versus

Mussumat Joy Koomaree Bibee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Onoocool Chunder Mookerjee* for Appellants.

Baboo Dwarkanath Mitter for Respondents.

Suit laid at Rupees 19,350-2-13.

The default of a dur-putneedar in the payment of his rents due for Kartick over and above the half-year ending with the last day of Aswin does not bar his suit for damages against the putneedar, for having allowed his putnee to be sold by the zemindar for arrears of putnee rent for the first six months of the year.

THIS is a suit for damages caused to the plaintiff by the conduct of the defendant, who, being a putneedar, defaulted, allowed his putnee to be sold by the zemindar, and thereby lost or annihilated the plaintiff's durputnee, which, under the law, was swept away in the sale.

The facts are not much in dispute, and the Principal Sudder Ameen has dismissed the case, holding that, although the conduct of the defendant was bad in not paying his own rent to the zemindar, and although the plaintiff had complied with the strict requirements of the putnee law, Regulation VIII. of 1819, Section 17, Clause 6, and had not failed in the payment of any portion of the sum necessary to make up his total, the plaintiff had yet defaulted in the rents due for Kartick over and above the half-year ending with the last day of Aswin. In this view, and on this point alone, the Lower Court held that the plaintiff could not succeed under Regulation VIII. of 1819, as he had not complied himself with the strict provisions of the same. We hold the Principal Sudder Ameen wrong on the latter point, and we set aside his decision.

With regard to one part of the decision, a cross-appeal is taken by the defendant, *viz.*, as to whether the plaintiff had really paid up all the rents due for the first six months of the year, and whether interest is not part of the rent. But on this point we think the ruling of the Lower Court correct. The plaintiff had paid to the defendant, as durputnee rent, the sum of Rs. 2,982. Of this, 2,900 was principal, and 82 was interest; but the defendant contends that the sum due as interest was not Rs. 82, but Rs. 86-12, and that the plaintiff has therefore fallen short of the full sum by just 4 rupees 12 annas. We, as already said, do not concur in this argument. The whole of the actual rent had been paid up within the meaning of the law, and it was evidently ample to have enabled the defendant to pay up his dues as putneedar to the zemindar.

As regards the other point on which the Principal Sudder Ameen has dismissed the case, we find that the failure of the Kartick instalment was never pleaded by the defendant until the actual close of the case, when the defendant started it. The Court would not allow the point to be pleaded, as "it "might alter the pleadings and the issues, "and induce the necessity of calling for fresh "evidence;" and then, strange to say, the Court took up the point itself as one of law, and held that the instalment for Kartick was really due on the 1st of Agran, and, as the plaintiff had admittedly not paid the same, he thereby became a defaulter.

If the Court thought the point pleaded at so late a stage deserving of notice, it should have adjourned the case for fresh evidence, inasmuch as the plaintiff contends that he could have shown that the instalment of Kartick was assigned over, by the direction of the defendant, to some third party. But the truth is, that the Lower Court is wrong in law. The sale of the putnee, which carried the durputnee with it, was for the first six months of the year. The day of sale, owing to the intervention of some holidays, was put off from the 1st to the 3rd of Agran; but, whether it took place on the 1st or on the 3rd, it could not be termed a sale for the instalment of Kartick, and we cannot endorse the argument of the defendant, to the effect that the liability of the defendant to the zemindar had no connection with the instalments demandable by the defendant from the plaintiff. With Section 17 of Regulation VIII. must be read Section 13, Clause 3, which shows that the rent due from the inferior talookdar to the holder of the advertised tenure is to be lodged and carried to account. This rent had really been paid to the putneedar. The Lower Court was quite wrong in bringing the

instalment of Kartick into consideration at all. This, then, being struck out of the case, and the Lower Court being correct in its finding that all the rent up to the end of Aswin had been paid, it follows naturally that the plaintiff is entitled to a decree, and we hereby declare him to be so entitled.

As, however, the evidence is, admittedly, not sufficient to enable us to decide to what damages the plaintiff is entitled, we remand the case to the Lower Court under Section 354 of the Civil Court, retaining it on our own files.

The Principal Sudder Ameen will take evidence from the plaintiff to the amount of damages, and will allow the defendant to rebut the same if she wishes it. The Principal Sudder Ameen will then record a finding on this issue, and will return the record to us with as little delay as practicable.

The 11th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Endowed lands—Decree against Shevait—Interpretation of decree (Modification or reversal of).

Case No. 2938 of 1865.

Special Appeal from a decision passed by the Judge of Jessore, dated the 19th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 28th April 1864.

Ranee Shibeshuree Debia (one of the Defendants), *Appellant,*

versus

Mothooranath Acharjee (Plaintiff), *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Mr. T. Barrow and *Baboo Banee Madhub Banerjee* for Respondent.

A decree for lands with wasilat (the lands having been held and claimed by the defendant as shevait of an endowment, and the profits of the lands having wrongly gone into the treasury of the shevait) is not a decree against the defendant personally, but against the defendant as shevait.

The interpretation put by a Judge in execution of a decree on its terms is final until it is modified or reversed on review. A new suit will not lie to obtain a different interpretation.

CERTAIN plaintiffs sued Kistomonee Debia for possession of certain fisheries and alluvial lands, of which they had been dispossessed by her, belonging to their estate of Erinda.

Kistomonee denied the dispossession, and pleaded that they belong to her estate Tetoolberiah, which was endowed for the service of a particular idol, and that they had always been in her possession as *shevait.*

The Lower Appellate Court in that case gave plaintiff a decree against Kistomonee with *wasilat.* In execution, certain properties were attached with a view to bringing them to sale to realize the *wasilat,* but the Judge held that the decree against Kistomonee was a personal one, and only her own property could be sold; that, even were she *shevait,* endowed property could not be sold in execution: he therefore released the property.

Plaintiff then brought the present action, with a view of reversing the Judge's summary order passed in execution, and of obtaining an order for the sale of the endowed property of Tetoolberiah for the realization of the *wasilat* decreed to them.

The Judge gave plaintiff a decree, and a special appeal has been preferred against that order; but it is unnecessary for us to enter on a consideration of the point raised in special appeal, for it appears to us that the present suit is altogether inadmissible.

The plaintiff in the first suit obtained a decree against Kistomonee Debia for certain lands with *wasilat;* those lands she had held and claimed as *shevait* of Tetoolberiah, and the profits of those lands had wrongly gone into the treasury of the *shevait* of the idol. The decree was therefore not against Kistomonee personally, but against her as the *shevait* of the idol to whose benefit Tetoolberiah was endowed. If this be so, the order in execution was clearly wrong. But, as that order interpreted the decree passed by the Judge in the case before it, it was not competent to the plaintiff in a new suit to obtain a different interpretation; that interpretation is final until it be modified or reversed on review.

We are, therefore, compelled to reverse the judgment passed by the Judge in the present case, and to dismiss plaintiff's suit, each party bearing its own costs in both Courts. But, as it is clear that the order in execution is wrong, we give plaintiff three months from this date within which to file a review of it. If plaintiff, the special respondent before us, files a petition of review of judgment within that time, the Judge will review the order in execution, making Kistomonee, as the *shevait* of

Tetoolberiah, liable for the *wasilat;* but, as the property is endowed, it cannot be sold in execution; the rents can only be sequestered to meet the claim of the plaintiff in that suit. The costs of this special appeal will be borne by the parties respectively.

The 11th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mahomedan Law of Pre-emption—Preliminary declarations.

Case No. 3322 of 1865.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Bhaugalpore, dated the 14th September 1865, reversing a decision passed by the Moonsiff of Kishengunge, dated the 12th December 1864.

Mona Singh and others (Plaintiffs), *Appellants,*

versus

Mosrad Singh and others (Defendants), *Respondents.*

Baboo Anund Gopal Paleet for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

According to the Mahomedan Law of Pre-emption, the claimant for pre-emption must first make the preliminary declarations. Going into his house to get the money, before making the preliminary declaration, is not a compliance with the law.

We think it is quite clear in this case that it is found as a fact that the claimant for pre-emption did not *at first* make the preliminary *declarations*, but went inside his house and got the money.

The Mahomedan Law requires that the making the *preliminary* declarations shall be the *first* thing to be done. Here these declarations were not first done. Where a law, such as the Mahomedan Law of Pre-emption, lays down rules in derogation of ordinary civil rights, we think its legal formalities should be strictly adhered to. The case of the 11th January 1855 admits time for reflection and for a party to become collected. But if a man is calm enough to bring out of his house two bags containing 1,150 rupees, he would probably be previously calm enough to make the preliminary declarations.

Thus, considering the decision wrong, we reverse it, and decree this special appeal with costs.

The 11th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Onus Probandi (Receipt of consideration in a Bond-suit).

Case No. 8 of 1866.

Regular Appeal from a decision passed by the Officiating Principal Sudder Ameen of Bhaugulpore, dated the 25th October 1865.

Mussamut Jhaloo (Defendant), *Appellant,*

versus

Shaikh Furzund Ali (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Moonshee Ameer Ali Khan Bahadoor and *Baboo Onoocool Chunder Mookerjee* for Respondent.

Suit laid at Rupees 5,807-8.

Where a defendant in a bond-suit denies receipt of the consideration *in toto*, the *onus* of proving the receipt thereof is on the plaintiff. Where the defendant denies receipt of the consideration in part, the *onus* is on the plaintiff to prove payment of the consideration to the extent of the sum not admitted by the defendant.

This was a suit to recover Rupees 5,807-8, principal with interest alleged to be due on two bonds, dated respectively the 7th October 1860, and the 8th Bysack 1269. The first instrument is registered; the other is not.

The defendant admits the execution of the first-named bond, but avers that out of the sum covered by it she received only Rs. 500. She wholly repudiates the other deed.

The Principal Sudder Ameen, remarking that, as the defendant admits the execution of the first-named bond, the "onus" of proving non-receipt of the whole amount of the consideration-money was upon her, found, on review of the evidence, that she had failed to prove her allegations.

With reference to the second bond, the Lower Court found that the execution was proved. The suit was decreed.

There was some contest before us as to the party upon whom the "onus" lay. We are of opinion that, whether the defendant in a bond-suit denies receipt of the consideration *in toto* or in part, the *onus* of proving the receipt thereof is equally on the plaintiff. *See* a decision of this Bench, Weekly Reporter, Volume III. for 1865, page 111.

The plaintiff is relieved from the burthen of proving the payment of the consideration-money to the extent of the sum, the receipt of which is admitted by the defendant, but nothing further.

On turning to the evidence in this case, the whole of which has been read to us, we find that it was not taken before the Principal Sudder Ameen, who decided the case, but before another officer. The Lower Court was therefore not in a better position to judge of the value of this evidence than this Court is. We also observe that the language in which the evidence is recorded is not that which would be used by witnesses in the low position of life of those who have been examined in this suit. Persian terms are used, which show that the evidence was not taken down in the language in ordinary use in the district, but in the language of the presiding officer, Moulvee Moheeooddeen.

The writer of the two bonds, Gordyal, though a relation of the defendant, was the mooktear of the plaintiff when the alleged bonds were executed. He distinctly deposes that the defendant received only 500 rupees of the consideration-money of the first bond. This party was known to be the nephew of the defendant when the deeds were executed, and was selected by the plaintiff to write them. The witness Jowahur Pasban confirms the statement of Gordyal. The remaining witness, Molai Khan, proves too much, and we have no hesitation in rejecting his testimony as quite untrustworthy.

The second bond was not registered, and appears to us to have been fabricated to fall back upon in case the Court should hold that the whole of the consideration-money of the first bond had not been received by the defendant.

We decree this appeal, and amend the decision of the Principal Sudder Ameen. The plaintiff, respondent, will recover Rupees 500, the sum the receipt of which the defendant admits with interest, with costs of both Courts in proportion to be paid by the defendant; excess costs of both Courts to be paid by the plaintiff, respondent. The remainder of his claim is dismissed with costs of both Courts.

The 11th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Limitation—Minors—Special and General Pleas.

Case No. 74 of 1866.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 15th September 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 21st January 1865.

Hurish Chunder Nag (one of the Defendants), *Appellant,*

versus

Abbas Ali and another (Plaintiffs), *Respondents.*

Mr. J. S. Rochfort and *Baboo Kalee Mohun Doss* for Appellant.

Baboos Issur Chunder Chuckerbutty and *Luleet Chunder Sein* for Respondents.

A minor is not bound to sue within three years after the attainment of his majority, but may sue within twelve years from the cause of action, if such time has not expired.

Notwithstanding the failure of the defendant on his special plea of limitation (*i.e.*, that the plaintiff should have sued within three years after the attainment of his majority), he is entitled to a decision on his plea of the general law of limitation (*i.e.*, that the plaintiff had not been in possession for twelve years before the suit).

THERE is no force in the special plea of limitation taken by the special appellant, to the effect that the plaintiffs should have sued within three years after the attainment of their majority. The plaintiffs were not bound to sue within 3 years, but were competent to avail themselves of the general law of limitation of 12 years from the cause of action. This has been clearly ruled in the case reported at page 305 of the Weekly Report, 4th May 1865, Volume II.

But there is force in the plea that the Judge has recorded no finding on the general law of limitation also clearly pleaded by the defendant. The rejection of the title of Aruz Bibee would not necessarily prove the title and the possession of the plaintiff. And, as the defendant, in reply to the plaintiff's allegation of dispossession, clearly pleaded that the plaintiff had not been in possession for 12 years before suit, he is entitled to a decision on the point from the Judge.

We remand the case to the Judge accordingly.

The 12th April 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Priority of title (of purchaser at sale for arrears of rent, over prior purchaser at sale in execution of decree of Civil Court)—Damages.

Case No. 2334 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 27th May 1865, modifying a decision passed by the Moonsiff of that District, dated the 26th November 1864.

Gopal Mundul (Defendant), *Appellant,*

versus

Soobhudra Boistobee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Woopendur Chunder Bose for Respondent.

A *bonâ fide* purchaser at a sale for arrears of rent has a preferential title over a purchaser at a prior sale in execution of a decree of the Civil Court. But damages may be recovered by the latter from the zemindar and the defaulting tenant on proof of collusion and fraud.

THE special appellant, Gopal Mundul, claims a tenure sold under a decree for arrears of rent from 1267 to 1269 under Section 105 of Act X. of 1859. The respondent, Soobhudra Boistobee, claims and has obtained a decree for a moiety of the tenure as purchaser at a sale under a decree of the Civil Court against her husband, the farmer of the tenure.

If the case rested there, the special appellant, as purchaser of the tenure under Act X., would have a good title as against the respondent. But the respondent alleges that the decree for rent and the sale under Section 105 were fraudulent and collusive for the purpose of defeating her claim against the estate of her husband.

The first Court found on the evidence that the rents of 1267 to 1269 had been paid, and that the subsequent suit for rent was collusive. Now, if the special appellant, Gopal Mundul, was a party to the fraud, or colluding with the zemindar and the husband of the respondent, in order to defeat her claim, she will be entitled to a declaration that her title is unaffected by such fraudulent sale.

If it turns out that the sale as between the zemindar and the husband of the respondent is collusive and fraudulent, but that Gopal Mundul purchased honestly and paid the price of the tenure *bonâ fide*, with no other intent than to buy as an honest man might, the suit must be dismissed as against him with costs.

But, in that case, we think that a decree may be made against the zemindar and the plaintiff's husband for damages to an amount equal to the full value of the moiety of the tenure of which the special respondent, Soobhudra Boistobee, has been deprived by their acts, together with an additional amount to cover all costs which she will have reasonably incurred, and which will not be awarded to her in this suit, such as the costs which in that Court she may be compelled to pay to the special appellant, Gopal Mundul.

With this observation, we remand the case to the Lower Appellate Court for a fresh trial.

The 13th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Registration (Act XIX. of 1843)—Pottahs.

Case No. 3325 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 30th August 1865, reversing a decision passed by the Moonsiff of that District, dated the 30th January 1865.

Anund Chunder Chowdhry and others (Defendants), *Appellants,*

versus

Chundernath Roy and others (Plaintiffs), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboos Chunder Madhub Ghose and *Pearee Lal Roy* for Respondent.

Act XIX. of 1843 does not apply to pottahs. Consequently, a subsequently-registered pottah cannot prevail over a prior unregistered pottah.

THIS was a suit to recover possession of land by reversing a decree passed under Act X. of 1859.

The plaintiff's allegation was that he held the land under a dowl from the zemindar,

dated Poos 1267 B. S., which was duly registered, until the defendant, who likewise held a dowl from the zemindar, dated in Phalgoon 1267, got a decree for rent against one of the ryots. Plaintiff intervened in that suit, but his objections, taken under Section 77 of Act X., were overruled, and the effect of the decree then passed was to declare the defendant, the party in possession of the land under the dowl of Phalgoon 1267. The plaintiff now sues to establish his title to the land.

The defence was rightful possession under the landlord's dowl, and an allegation that the lease propounded by the plaintiff was collusive.

The Court of first instance held the defendant's lease to be good, and dismissed the suit.

But the Principal Sudder Ameen, on appeal, considered that the two dowls covered different plots of land, and that the plaintiff had been in possession of what he claimed under his lease from the date of his grant, and was entitled to recover.

It is now urged in special appeal that the Principal Sudder Ameen has tried an issue which in no way arose from the pleadings, and concerning which there has never been any dispute, and has altogether ignored the strong evidence of possession produced by the defendant.

With regard to the first objection, we have no doubt that the Lower Appellate Court was wrong. There never was any question as to the identity of the land claimed by either party. It was admitted throughout; and the very fact of there having been an intervention under Section 77 of Act X. of 1859 shows that the dispute was for one and the same piece of land for which the zemindar was alleged to have given two separate leases. The Court Ameen's report also discloses the same state of things, and we do not understand why the Principal Sudder Ameen should have gone out of his way to consider objections which had never been raised at any stage of the proceedings.

But it is contended for the special respondent that, admitting the Lower Court's error in this respect, this Court must still uphold its decision, because the Principal Sudder Ameen has found clearly that the special respondent is in possession under a registered pottah, and has collected rents since the time of getting possession.

If this were the sole ground of the Principal Sudder Ameen's order, the case might be so, and we should not be justified in supposing that the Lower Court omitted to consider the evidence adduced by the special appellant, merely because there was no specific mention made of it in its judgment. But in the present case that judgment appears to have proceeded altogether on the mistaken idea that the two dowls covered different plots of land; and with this idea present to his mind, and finding *primâ facie* evidence of the special respondent's possession of his plot, it is only a fair deduction, from the absence of all mention of the special appellant's proofs of possession, that the Principal Sudder Ameen did not take those proofs into consideration Indeed, if he were convinced that the land claimed by the special appellant was different from that of the special respondent, it was unnecessary for him to do so.

Now, keeping in mind that the contention in this case is regarding one and the same land, and that the question is whether the special respondent's pottah (which is subsequent in date) is to prevail over the special appellant's pottah (which is prior in date), we think that the Principal Sudder Ameen should have gone most particularly into evidence as to the fact of either the special respondent's or the special appellant's *bonâ fide* possession by payment of rent to the zemindar. The mere fact of one pottah being registered, and the other not, although it is relied on by the Principal Sudder Ameen as conclusive against the special appellant, has in reality nothing to do with the question, there being no law giving precedence to a registered pottah. Act XIX. of 1843 refers to deeds of sale or gifts and to mortgages, and not to pottahs.

Now, there is, we observe, a considerable quantity of evidence to prove the special appellant's possession and payment of rent, in the shape of a decree for rent obtained by the zemindar against him for the *kists* of Aghun, Poos, and Magh, two of which refer to periods during which the special respondent is said to have held possession under his registered pottah. There is also the evidence of witnesses. The special appellant has an undoubted right to have this evidence examined; and, for the reasons above given, we are of opinion that the Principal Sudder Ameen passed it over without enquiry, and that his judgment is defective in consequence.

We think also that, in order to come to a satisfactory decision as to the payment of rent, the zemindar himself should be summoned as a witness and examined.

Costs will follow the result.

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The 13th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Limitation—Amended plaint.

Cases Nos. 79 and 87 of 1866.

Special Appeals from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 30th October 1865, reversing a decision passed by the Moonsiff of that District, dated the 7th April 1864.

Ram Coomar Shaha and others (Defendants), *Appellants,*

versus

Dwarkanath Hazra (Plaintiff), *Respondent.*

Baboos Nil Madhub Bose and *Kalee Kishen Sein* for Appellants.

Baboos Banee Madhub Banerjee and *Mohesh Chunder Chowdhry* for Respondent.

A suit must be considered to have commenced on the day when the original plaint was filed, and not on the day when the plaint was returned after amendment.

In case No. 79, the application of the present law of limitation, as contended for by the special appellant, would be incorrect. Following the ruling laid down at page 314 of Hay's Reports, 9th of March 1863, we hold that the suit was commenced on the 31st of December 1861, when the original plaint was filed, and not on the 2nd of January 1862, when the plaint was returned after amendment. In this view, the case is governed by the old law of limitation, and the point raised before us has no force whatever.

In case No. 87, the special appellant, who has bought the rights and interests of Bhujo Hutee, one of the four surviving brothers in a preceding generation, on his own showing, is not entitled to more than 4 annas. Whether the widows of the other brothers did or did not give up their shares to the plaintiff, the share of the defendant, special appellant, would remain unaltered.

The objection to the decree of 8 annas to the plaintiff by the Appellate Court is, consequently, without any force at all.

Both appeals are dismissed with costs.

The 13th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Second Lease of land—Remedy.

Case No. 90 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 26th October 1865, reversing a decision passed by the Moonsiff of Kooshtea, dated the 20th July 1865.

Jeeaoollah Mundul (Plaintiff), *Appellant,*

versus

Rajah Indoo Bhoosun Deb Roy and another (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

No one for Respondents.

A cannot question a prior pottah granted by an ijaradar to *B*, which was ratified by the zemindar subsequently to his grant of a new pottah in respect of the same land to *A*. *A* must seek his remedy in a suit against the zemindar.

The zemindar having ratified the pottah granted by the ijaradar, it cannot be questioned by the special appellant, who must seek his remedy in a suit against the zemindar, if the latter has leased lands to him already leased out, and which have been admittedly for a long period in the occupancy of the special respondent. But there is an omission in the Lower Court's proceedings to decide whether the whole of the land claimed is covered by the defendant, special respondent's pottah. It is contended that some of the land claimed is not within the precincts of defendant's pottah, and this point must be decided.

The case is remanded for that purpose, the appeal being decreed to that extent. Costs of appeal payable by the appellant, as he has failed on the main ground of appeal, and as he took no steps to move the Lower Court to review or amend its judgment.

The 14th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Partition—Erection—Rights of neighbours—Right of light and air.

Case No. 3298 of 1865.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 3rd August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 26th January 1864.

Sreenath Dutt and others (Plaintiffs), *Appellants,*

versus

Nand Kishore Bose and others (Defendants), *Respondents.*

Baboos Otool Chunder Mookerjee and *Dwarkanath Mitter* for Appellants.

Baboos Gopeenath Mookerjee and *Gopal Lal Mitter* for Respondents.

Co-partners may, on partition, retain possession severally of such joint lands as they may have taken separate possession of with the consent of all or at least of a majority of the co-partners.

A person cannot be allowed to maintain a wall to the injury of his neighbour.

A built an upper-story to his house overlooking the inner apartments of *B*, who thereupon built a wall which *A* complained deprived him of light and air. HELD that, as *A* was the first and greater wrong-doer, he was entitled to no relief even if it were shown that *B's* wall had deprived him of light and air after long enjoyment of the same.

WE are satisfied that the special appellant is entitled to have all the ancestral property divided in proper shares, *viz.*, those held joint as well as those held separately by the different shareholders. Each shareholder, however, will be entitled to retain, as a part of his share, all those lands he may have separately held upon which he may have erected buildings or planted fruit-trees, or at his own expense dug a tank, or which in course of his separate possession he may have substantially improved. But those who by this mode of division may be found to hold more than would belong rightly to their legal shares shall make up the difference to those who thus hold less, from their shares in other lands held jointly, or by paying compensation in money, or by giving over other lands, or agreeing to pay rents for their thus larger sharers. The equitable rules of Regulation XIX. of 1814, and the principles adopted by our Civil Courts in such cases, are to be adopted for the partition in this case.

We are satisfied that the plaintiff had claimed the lands upon which the wall in dispute in this case stands as attached to his dwelling-house, and we find that the special appellant is right when he says before us that the two witnesses examined by him sufficiently prove the fact of the plaintiff's having so had use and occupation of that land. The opinion of the Judge, both before and after remand, was against the plaintiff on this point; but plaintiff does not press this part of his claim, provided all the property be divided as directed above. We think, then, that, under these circumstances, it will suffice that the Lower Appellate Court should consider the lands in question to be claimed by the plaintiff as attached to his house. It was in respect to these lands that the plaintiff all along objected to the defendant's erecting the wall thereupon, and that the Lower Appellate Court should reconsider the legal effect of the evidence of the plaintiff's witnesses with regard to plaintiff's previous possession of this land, which evidence the Lower Appellate Court seems to us to have misconstrued.

We would further notice to the Lower Appellate Court that the co-partners may, on partition, be allowed to retain possession each of such joint lands as they may have taken separate possession of with the express or implied consent of all or at least of a majority of the co-partners. Now, this principle will have to be applied to the defendant's case in respect to the wall which he built under the circumstances noticed above. Thus, defendant will have no title to retain the lands upon which he built the wall, unless he can show the consent of all or at least of the majority of his co-partners.

We further find that the Lower Appellate Court has not taken any notice of the prayer

of the special appellant that the wall should be removed, as it is so built that it injures the wall of the dwelling-house of the special appellant. Should it be proved, as is alleged by the special appellant, that the rain-water, falling within a confined space between the two walls of the plaintiff and the defendant, and having no outlet, sinks into and undermines the building of the special appellant, the defendant must not be allowed to maintain the wall to the injury of his neighbour.

The fact of the said confined water also acting to the prejudice of the wall erected by the defendant does not deprive the plaintiff of his right to remove what is mischievous to his part of the building.

We further notice that the plaintiff is said to have built an upper-story to his house, overlooking the inner apartments of the defendant. Defendant, on this, built the wall which, it is said, deprived plaintiff of light and air. Even if it were shown that light and air had long been enjoyed by the plaintiff, and have now been cut off by defendant's wall, still, as plaintiff had no right to build an upper-story, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant's family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer.

Lastly, we have to observe that plaintiff, special appellant, complains that the evidence of several co-partners examined in this case goes to show that the upper-story built by him does not in any wise injure the privacy of any part of the inner apartments of the defendant; and, as it would appear that this wall is built by the defendant at a distance from his house, apart from its eastern wall, and as the case is already to be remanded on other grounds, we think the evidence of the co-partners alluded to by the special appellant should be considered with a view to a question whether there be an overlooking so as to encroach upon the privacy of defendant's family.

Of the three pleaders of that defendant who built the wall, one is absent owing to sickness, and the other two, on being called upon by the Court to support the judgment of the Lower Appellate Court, stated that they were not prepared to argue the case, as they had not been supplied with any papers or instructions.

We accordingly remand the case to the Lower Appellate Court to re-try it with reference to the above remarks.

The 17th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Admission—Estoppel—Evidence.

Case No. 409 of 1865.

Regular Appeal from a decision passed by Moulvie Nazirooddeen Khan Bahadoor, Principal Sudder Ameen of Hooghly, dated the 27th November 1865.

Chunder Kant Chuckerbutty Christian (Plaintiff), *Appellant,*

versus

Pearee Mohun Dutt and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboos Dwarkanath Mitter* and *Onoocool Chunder Mookerjee* for Appellant.

Messrs. R. V. Doyne and *R. T. Allan* and *Baboos Unnoda Pershad Banerjee, Banee Madhub Banerjee,* and *Ombika Churn Banerjee* for Respondents.

Suit laid at Rupees 10,000-0-0.

An admission made by a party in other cases may be taken as evidence against him, but cannot operate against him as an estoppel in a case in which his opponents are persons to whom or to any one else concerned the admission was not made, and who are not proved to have ever heard of it, or to have been in any way misled by it, or to have acted in reliance upon it.

THIS was a suit to recover possession of a 5 annas 6-2-2 share of Lot Gulimee by reversal of a sale in execution of decree. The plaintiff's allegation was that he purchased a dur-mokururee right in the property in question in the year 1267 B. S. for Rupees 10,000, but that afterwards (in 1269 B. S., that is), being pressed for money, he mortgaged it to his mother, Bromomoyee Debia (a *pro formâ* defendant), for an advance of Rupees 2,000 under a deed of conditional sale; that, in little more than a year (22nd Phalgoon 1270), he cleared off the advance by the usufruct and payments in cash, and re-entered on his property, of which he held possession for some three or four months before ouster. He adds that the defendant Ram Lal Mookerjee, who held a decree for costs in a resumption-suit amounting to Rupees 132-7-4 against his mother, took out execution, and, in satisfaction of his decree,

caused the property in suit to be sold as belonging to his (plaintiff's) mother Bromomoyee Debia, and purchased it *benamee* in the name of the defendant Pearee Mohun Dutt. Plaintiff was ousted from his property in consequence of this purchase, and, his application in the Miscellaneous Department under Section 269, Act VIII. of 1859, having been rejected, now sues to recover possession by regular suit.

The defendant Pearee Mohun Dutt alleged that the lands in question had been sold absolutely to Bromomoyee by her son, and had afterwards been purchased by him (defendant) in good faith at the execution-sale. He denied that he acted "benamee" for Ram Lall Mookerjee, and urged that the plaintiff's own admissions in cases before the Courts proved that his mother was the real owner of the estate.

The Principal Sudder Ameen held that there was no proof of the mortgage to Bromomoyee, but that the latter was in possession at the time of sale as absolute owner of the property. He, therefore, dismissed the plaintiff's suit, considering him bound by his own admissions in other cases, and estopped from setting up any claim opposed to them.

It is urged in appeal—

(1) That the admissions of the plaintiff cannot act as an estoppel against him in this suit;

(2) That there is sufficient proof of the mortgage and of the subsequent re-entry; and

(3) That the admissions of the plaintiff in the Fouzdaree and Revenue Courts are not irreconcilable with the facts alleged by him in this case.

On the first issue, we agree with the appellant that the admissions in question cannot act as an estoppel. It was never at any time pleaded that they had been made to the purchaser or to any one else concerned, and there is no proof that these parties ever heard of them, or were in any way misled by them, or had made the present purchase in reliance upon them. They may be taken as evidence of course against the maker, but cannot estop him in the present case from having his claim enquired into.

With regard to the mortgage, we think the proof altogether insufficient and unsatisfactory. In order to clear up this part of the case, we summoned and examined the plaintiff Chunder Kant himself, but his evidence has in no way dispelled our doubts; on the contrary, it has increased them. He is altogether unable to show us how his mother, a poor woman supported by an allowance from her sons, was able to collect together such a large sum as 2,000 rupees. The mortgage-deed itself is not produced. Bromomoyee, who was examined, could not produce any collection-papers or any document showing that the land had ever been in her possession. The receipts for rent are all in the plaintiff's name, and the Zemindaree Serishtah contains no memorandum of the conveyance, but bears, and has always borne, the plaintiff's name as owner of the land.

Then as to the plaintiff's own admissions. It appears from the record that Bromomoyee brought two suits against Tara Chand Gope and Kartick Chunder Neogy for rent, basing her right to sue on purchase from the plaintiff, and the plaintiff acted as her mooktear in these cases, and signed her name *per* procuration. His explanation of this circumstance is not credible.

In another case (22nd July 1863) before the Sessions Court, plaintiff averred that his mother was the owner of the property, and that he himself was only a tenant. It appears that one Koilas had complained against plaintiff on a charge of extortion and illegal confinement, and the defence (which was successful) was that he, plaintiff, being merely a tenant, could not have been guilty of the offence charged. The result of the case was that Koilas was charged at the Sessions with perjury and convicted, mainly, of course, on the plaintiff's allegation that he had nothing to do with the estate in which Koilas was a ryot, but that his mother was the malik.

Now, had the mortgage been proved, it might be said that these statements were not absolutely irreconcilable with the plaintiff's present allegations, for Bromomoyee, being mortgagee in possession, might have been called the legal owner; but, as the mortgage has not been proved, we must take these admissions of the plaintiff in their plainest and most unequivocal meaning; and there can be no doubt that they have, as between Chunder Kant and Bromomoyee, the effect of proving the mother to be the owner of the property now sued for.

It may be that the special appellant made these admissions with some fraudulent purpose, but, if that be so, he must bear the penalty attaching to his own act.

For these reasons, we confirm the decree of the Lower Court, and dismiss this appeal with costs.

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The 17th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Jurisdiction—Award of competent authority under Section 14, Act VIII. of 1859—Splitting or abandonment of claim—Alluvial land.

Case No. 361 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 31st July 1865.

Baboo Meghbarun Singh and others (Defendants), *Appellants,*

versus

Maharajah Mohessur Buksh Singh Bahadoor (Plaintiff), *Respondent.*

Mr. A T. T. Peterson, and *Baboos Unnoda Pershad Banerjee* and *Onoocool Chunder Mookerjee* for Appellants.

Mr. R. V. Doyne, Moonshee Ameer Ali Khan Bahadoor, and *Baboo Dwarkanath Mitter* for Respondent.

Suit laid at Rupees 2,17,687.

The proceedings of two Deputy Collectors, ending in a mere opinion as to what should be the boundary of the two Presidencies of Bengal and the N.-W. Provinces, is not an award of "competent authority" as to jurisdiction within the meaning of Section 14, Act VIII. of 1859.

The plea of splitting or abandonment of claim maintained in a suit for alluvial land.

THIS was a suit to obtain beegahs 3,042 and 5 cottahs of alluvial land appertaining to certain mouzahs in Pergunnah Bhojpore, in the district of Shahabad, together with a very large sum as mense-profits.

A previous suit by the same plaintiff against the same defendant for 2967 beegahs 10 cottahs in the same locality had been decreed by a Bench of the High Court (Justices Steer and Kemp) on the 29th of April 1864.

The plaintiff's present case was that the lands which had accreted to his estate had been wrongfully usurped by the defendants at various periods, commencing from the month of Koar or Assin 1269. The defendants set up various pleas in bar, as well as on the merits, of which, however, in this appeal it will only be necessary to notice two pleas. The Principal Sudder Ameen, in a very long judgment, overruled the whole of the pleas, and gave the plaintiff a decree for beegahs 2061, with mesne-profits in proportion, to be calculated in execution.

The appeal has been fully argued by Mr. Peterson for the defendants and by Mr. Doyne for the plaintiff, but the contention of Mr. Peterson really resolves itself into two points—*1st,* a plea of want of jurisdiction in the Civil Court of Shahabad under Section 14 of Act VIII.; *2nd,* a plea of splitting or abandonment of claim under Section 7 of the same Act.

Both these points were taken up by the Lower Court, and the Principal Sudder Ameen found that there had been some enquiry by certain Deputy Collectors, and that these officers had found the lands to be, not within the district of Shahabad appertaining to Behar and the Lower Provinces, but in that of Ghazeepore appertaining to the North-Western Provinces. The Lower Court finds, however, that the above is merely an opinion, and that it has not been endorsed by the higher Revenue Authorities. The learned Council, Mr. Peterson, is unable to shew us that this finding of the Lower Court is wrong in fact. Indeed, he admits that the Governments of the North-Western Provinces and of Bengal are even now at issue on the question of the boundary of the two Presidencies at this very place, and that no final decision has been arrived at. We think, in this state of things, that the proceedings of the two Deputy Collectors ending in a mere opinion as to what should be the boundary, can never be taken to be the award of "competent authority" contemplated in Section 14 of Act VIII.

We cannot, further, endorse Mr. Peterson's contention on this point, to the effect that, although the proceedings in question are no "competent award" as to jurisdiction, they still are evidence showing the lands to be actually within Ghazeepore. *Primâ facie,* the lands, being on the south side of the Ganges, would belong to Shahabad; and the decision of the High Court, to which advertence has already been made, has ruled that lands, to which the lands now sued for actually adjoin, are within Shahabad.

For the practical purposes of litigation we must, therefore, consider the Lower Court, on all the facts and admissions, to have rightly exercised its jurisdiction.

On the second point, it is contended that the decision of the Principal Sudder Ameen is not in conformity with the plaint, and is at direct variance with the evidence. The plaint in the former suit was filed on the 30th of December 1861, or about the middle of the month of Posh 1269, and the dis-

possession in that case was alleged to have taken place on the 13th of March 1860, or about the middle of the Fuslee year 1267. But the plaint in the present suit distinctly states that the cause of action arose in the month of Koar 1269, or about September 1861, "from the date when the earth formed "and when the defendants usurped possession." It is true that to this distinct statement is appended another to the effect that, "besides the lands in dispute in the former "suit, the lands now in contest, as they "appeared and became fit for cultivation, "were occupied wrongfully by the defendants, and the proceeds usurped after the "first suit." But the meaning of this is, clearly, from the schedule of the plaint, as well as from the whole evidence, that the first encroachment on the lands now sued for took place in Koar 1269, and that subsequent encroachments followed in the years 1270 and 1271 as lands accreted, and were left bare by the receding waters, and became fit for cultivation.

Now, Koar 1269 is, beyond all question, at least three months anterior to the date of the presentation of the plaint in the last suit.

But more explicit than the plaint is the testimony of the witnesses. The witnesses for the plaintiff, who deposed before the Principal Sudder Ameen, are unanimous in deposing that the lands reformed from Koar 1269 to 1271. Many of the witnesses distinctly mention the month of Koar of 1269, and some again state that no less than 950 beegahs were actually reformed in that month and year; other reformations or accretions, to the extent of 800 and 1100 beegahs, taking place in the subsequent years 1270 and 1271. The evidence taken by the Ameen who went to the spot is much to the same effect.

It is also clear to us that the accretions would take place in each year in September or October, as the stream of the Ganges fell or receded; and we should be warranted in holding that the lands newly formed would be eagerly occupied by one or other of the contending parties as soon as the stream left them, even if the plaintiff's evidence did not assert this to have been the case.

Mr. Doyne urges, on the other hand, that in the last suit the boundary was clearly stated as the Ganges on the north and east, and that the plaintiff evidently wanted to carry his claim as far as the river, and even then to include all the lands which had at that time appeared above water; that the expressions in the plaints are mere verbal inaccuracies of statement by which the plaintiff should not be debarred from having his suit tried on the merits; and that the Lower Court has clearly so treated this part of the case.

But we are of opinion that, although it may be very well, in some cases, not to hold the plaintiffs too strictly to the letter of their plaint, when it is obvious that clerical errors have been introduced into either the plaint or into the written statement, the plaintiff has no claim to any such indulgence in this instance. His statement is clear and precise that the first accretion and usurpation took place in Koar 1269, or September 1861, before the last suit was brought, and at a time when his vigilance had been fully aroused to an assertion of what he considered his rights. His witnesses, in the most positive terms, support this statement. The various acts of alleged usurpation are made the ground for claims of mesne-profits to an enormous extent, corresponding to the successive years of 1269, 1270, and 1271, for each of which the amount of damage done is estimated with the completest details. It is wholly impossible for us to hold that a plaint so precise and a claim so obviously dictated by a desire to oppress an adversary by the weight of unprecedented damages can have been based on a mere oversight or error. We must hold that the plaintiff has admitted the existence of 950 beegahs of the land sued for, and the knowledge of the existence of such lands, at the very time when he brought his first action; and that, consequently, he is fairly brought by the defendants within the provision of the Section quoted, Section 7 of Act VIII. The case referred to by Mr. Doyne at page 286 of Marshall's Reports is not in point, for there the Court found fraud on the part of a trustee, and the cause of action, where splitting of claims had been alleged by the defendant, was found to be different.

The decision of the Lower Court is, in fact, against the plaint and against the weight of the evidence.

As regards lands which accreted in subsequent years, or in 1270 and 1271, we find by the maps, which the parties admit to be correct, that such accretions must have been made to the 950 beegahs which reformed and were taken possession of in 1269. If the defendant was then, as the plaintiff now shows, allowed to take possession of the above 950 beegahs, it naturally follows that all the additions of the two subsequent

years were legitimate additions to what the defendant, with the full knowledge of the plaintiff, had been allowed to retain, and that they ought to have been included in the suit filed in December 1861, if they were ever to become the subject of judicial controversy and judicial decision.

Our conclusion, therefore, must be that, whatever may be the fate of the separate and previous suit now pending in the Privy Council, into the consideration of which we have not in the least entered, this separate suit, on the plaintiff's own case and evidence, should have been dismissed with all costs.

We, accordingly, under Section 7 of the Code of Civil Procedure, decree the appeal with all costs in both Courts payable by the respondent, including the costs payable by the 5 *pro-formâ* defendants who were absolved by the Lower Court, and whose costs were, for some unexplained reason, made chargeable to the defendants.

The 18th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Pottah (Production of—without possession).

Case No. 3516 of 1865.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Purnea, dated the 8th September 1865, reversing a decision passed by the Moonsiff of that District, dated the 27th April 1865.

Shaikh Luckhee (Plaintiff), *Appellant,*

versus

Shaikh Babur and others (Defendants), *Respondents.*

Baboo Romanath Bose for Appellant.

Mr. C. Gregory for Respondents.

The mere production of a pottah, without proof of possession under it, cannot avail.

THIS was a suit by one ryot against another to recover possession of 19 beegahs 12 cottahs of land in Mouzah Kharie. The plaintiff (who is the special appellant before us) alleges that he got a pottah from the farmer in 1270 and took possession of the jote under it.

The defence was that the land had been in special respondent's possession from 1259 to 1267 B. S., when it was diluviated; that, on reformation in 1270, defendant re-entered and has kept possession ever since. He added that, under such circumstances, the farmer had no right to give a pottah to a third party.

The first Court held that, as the defendant had no right of occupancy, the plaintiff was entitled to the land under the pottah.

But the Principal Sudder Ameen decreed for the defendant, considering that he had been in possession ever since the reformation, that the pottah was collusive, and that the defendant could only be ejected by the Mostajir in due course of law under Section 25, Act X. of 1859.

We see no reason to interfere. The special appellant sued to recover possession on the ground that he had taken possession of the land under his pottah and had been dispossessed by the special respondent, but the Principal Sudder Ameen has found on the evidence that the special appellant was *never in possession* of the land at all; and, this being so, it is immaterial to consider whether the Mostajir's admission of the genuineness of special appellant's pottah is sufficient to prove that document, inasmuch as the pottah, without proof of possession under it, would not assist the special appellant's case. It having been proved, therefore, that the special appellant had no possession, but that the land had been held ever since its reformation by the special respondent, we think that the former's suit was rightly dismissed, and that this special appeal should be rejected with costs. The special appellant can, if he be so advised, bring his suit in a different form, on his title to the land under the pottah; but the present case must, for the reasons given above, undoubtedly fail.

The 18th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Limitation—Suit by unsuccessful claimant to attached property.

Case No. 125 of 1866.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 31st May 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 17th November 1864.

Shaik Khoda Buksh (one of the Defendants), *Appellant*,

versus

Purmonund Dutt and others (Plaintiffs), *Respondents*.

Baboos Ashootosh Dhur and *Upprokash Chunder Mookerjee* for Appellant.

No one for Respondents.

Section 246, Act VIII. of 1859, makes no distinction in favor of cases not decided on the merits, but makes it imperative on the party whose claim to attached property has been rejected, under any circumstances, to sue within one year.

ONLY one point is urged on us, which is, that the Judge is wholly mistaken in his interpretation of Section 246 of Act VIII., and in his ruling that, because the plaintiff's claim in the execution-case was not decided on its merits, the plaintiff was not bound to sue within one year.

The order under Section 246 was to the effect that, six months having elapsed, and the plaintiff not having adduced his proofs, his claim was rejected. But whether it had been rejected because the plaintiff failed to adduce proofs, or for any other reason, the words of the law are clear and precise. "The party against whom the order may be given" shall be at liberty to sue within one year. The plaintiff did not sue, it is admitted, within the prescribed period; and consequently, without drawing a distinction for which the Section affords no warrant, the Judge should have put the plaintiff at once out of Court. No person appears to support the decision of the Judge, but the point raised is so clear that we decree the appeal, and, restoring the decision of the first Court which dismissed the suit, we decree the special appeal with costs.

The 18th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Onus probandi (Plea of partition in joint Hindoo Family)—Evidence (of separation in estate).

Case No. 114 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 23rd October 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 26th September 1864.

Treelochun Roy (one of the Defendants), *Appellant*,

versus

Rajkishen Roy and others (Plaintiffs), *Respondents*.

Baboos Greeja Sunkur Mojoomdar for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where a party admits that a family was joint, but sets up a partition, the *onus probandi* is on him.

The mere fact of one of several co-sharers alienating his share of the property is no proof of separation in estate.

WE think that the Lower Court threw the *onus* on the right party. The special appellant admits that the family was joint, but sets up a partition; the *onus* was on him. It may be that the alleged partition took place so long ago that it would be difficult for the special appellant, although he pleaded a deed, to produce it; but the *onus* is still on him to prove the special plea by other reliable evidence, and he has not done so. The mere fact of one of a body of co-sharers alienating his share of the property is no proof of *separation* in estate.

The other plea, that some of the properties were the separate acquisition of the special appellant's grandfather, was not proved; and, although the Principal Sudder Ameen does not enter into this point very minutely, he endorses the opinion of the Court of first instance. It would be useless to remand the case on this point, as the *taidad* filed by the special appellant in support of his plea does not show the name of his grandfather, or prove that the properties covered by it were not acquired with the joint funds of an admittedly joint Hindoo family.

Appeal dismissed with costs and interest.

The 18th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Hindoo Law of Inheritance—Sister.

Case No. 128 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 17th November 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 20th February 1865.

Anund Chunder Mookerjee (one of the Defendants), *Appellant*,

versus

Teetooram Chatterjee and others (Plaintiffs), *Respondents*.

Baboo Motee Lal Mookerjee for Appellant.

No one for Respondents.

According to Hindoo Law, a sister cannot succeed to the property of her brother.

THERE is only one exception taken to the judgment of the Principal Sudder Ameen, but it is valid. There has been no proper enquiry as to how Bishessuree, the daughter of Kumul Lochun and the sister of Ram Brahma, can succeed against the defendants. The Principal Sudder Ameen merely says that Bishessuree succeeded to her brother on his death. But it does not appear how the sister, under Hindoo law, could succeed to the property left by the brother, and Bishessuree, it is further stated, is a childless widow.

The decision of the Principal Sudder Ameen seems wrong on this point. There is no one before us to support the decision of the Appellate Court, but, on the face of the judgment itself, we have no hesitation in remanding the case for a fresh decision on this point, indicating at the same time to the Lower Court that, under any circumstances, we do not understand how Bishessuree could be the heir of her brother.

The Principal Sudder Ameen will pass a fresh decision on this part of the case only.

The 18th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Special Appeal—Damages for inadequate sale of decree—Purchaser of decree—Section 11, Act XXIII. of 1861.

Case No. 98 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 25th October 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 9th January 1865.

Kristo Monee Thakoor (Defendant), *Appellant*,

versus

Bishambhur Doss (Plaintiff), *Respondent*.

Baboo Motee Lal Mookerjee for Appellant.

Mr. R. E. Twidale for Respondent.

No special appeal will lie under Section 27, Act XXIII. of 1861, for damages for inadequate sale of a decree.

The purchaser of a decree is not a party to the suit within the meaning of Section 11.

THE special respondent takes a preliminary objection to the hearing of the appeal to the effect that, under Section 27, Act XXIII. of 1861, no special appeal will lie. The objection is valid. The suit was clearly one for damages, because the plaintiff had suffered a loss from a judgment-debtor having sold the plaintiff's decree for a very trifling amount, there being, it appears, cross-decrees existing at the time between the parties.

No special appeal will lie in such cases of damages, and there is no force in the special appellant's reply to this plea in bar, to the effect that the question had been already settled by the Courts which executed the decree, and that, under Section 11 of the Act above quoted, separate suits would not lie to reverse or test such orders.

The special appellant is a purchaser of the decree, and is, therefore, not a party to the suit within the meaning of Section 11.

The special appeal is dismissed as barred with all costs.

The 19th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges*.

Ghatwals of Beerbhoom—Power of—to grant permanent leases for performance of Police-duties.

Cases No. 394 of 1865, and Nos. 28, 32, and 34 of 1866.

Regular Appeals from a decision passed by the Officiating Judge of Beerbhoom, dated the 13th September 1865.

Mukurbhano Deo and others (Defendants), *Appellants*,

versus

Kostoora Koonwaree and others (Plaintiffs), *Respondents*.

Baboos Dwarkanath Mitter, *Onoocool Chunder Mookerjee*, and *Sreenath Doss* for Appellants.

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee* for Respondents.

Permanent leases granted by the ghatwals of Beerbhoom prior to the Decennial Settlement, for the due performance of the police-duties for which the lands

were originally granted to the ghatwals, and have been held from generation to generation, cannot be set aside at the instance of the present sirdar ghatwals. The creation of such under-tenures is not beyond the powers of the ghatwals.

THESE appeals arise out of four suits instituted by the Court of Wards on behalf of a minor ghatwal in Beerbhoom to dispossess the appellants from lands which they say they and their ancestors have held for upwards of 250 years, on payment of small rents, with condition of service under the sirdar ghatwals. The appellants cannot produce any lease or title-deeds, or shew that their names have ever been entered as ghatwals in the records of the Magistrate from the commencement of the British Administration.

The appellants in No. 394 of 1865 have, however, shewn, by a decision of the Zillah Court, dated 30th June 1825, upheld by the Provincial Court, that an ancestor of some of these appellants being sued by an ancestor of the present plaintiff for enhancement of the rents of lands now forming a portion of the land in dispute in this first case, it was proved that the ancestors of the appellants of the case No. 394 were members of the same family to which the ancestors of the present plaintiff belonged; that out of the ghatwalee property held by the common ancestor of both the parties, an ancestor of these appellants had obtained the 25 villages now in dispute in that case, on a lease with nominal rents by way of maintenance, with conditions of serving under and assisting the heads of the family who might remain in possession of the whole ghatwalee property as sirdar ghatwals; that the heirs of this ancestor had so remained in possession from generation after generation up to the time of the institution of the former suit; that these arrangements were admitted on behalf of the plaintiff not to have been disputed by the said plaintiff's father or his grandfather; that the defendant in the suit had held his own share of the lease for 28 years since the death of his father; that the said father had so held, and that the plaintiff was not, with reference to the lapse of time, able to say anything regarding the time of the possession of the father, grandfather, and other preceding ancestors of the said defendant. The genealogical table filed by the defendant (in that case), shewing the names of the appellants of the case No. 394 of 1865, was admitted by the plaintiff to be correct.

The appellants in the number first mentioned above have further examined witnesses to prove that they and their ancestors have held the 25 villages from a time anterior to the Decennial Settlement.

Now, though the villages disputed in the other three cases are different from those 25 referred to above, still it is clear that the Courts below, as well as the High Court, in all the former stages of this litigation, and the Court below in the first instance, without any remonstrance from the present plaintiff, all along treated the appellants of all the four suits as one and the same.

On the present occasion, when the appellants in the other three cases wanted below to examine witnesses to prove their long possession, and to fix the period up to which it goes backwards, the Court below refused to examine these witnesses on the ground that it was an admitted fact that all these four cases were of the same kind, and that the evidence in one, as regards possession and the nature of the tenure, was to be considered as evidence in all the other cases. We further find that the appellants in these three remaining cases have produced old dakhilahs going beyond 1790, which were produced also in the former litigation, and which do not appear to be denied by the plaintiff. The plaintiff does not appear to make it any part of his case that the tenures now disputed were created subsequent to 1790, but simply relies upon their invalidity with reference to the want of power in the ghatwals to create them.

On these grounds, we have no reason to think that the case of any one of the present appellants of all the four suits is different from that of the others.

The decision of the Zillah Court of Beerbhoom, dated 1825, carries the possession and the fact of the existence of the tenures now in dispute to a period far beyond the Decennial Settlement, if not beyond the acquisition of the Dewanny.

It is a fact, not capable of being denied, that all the ghatwalee mehals of Beerbhoom, and so the ghatwalee estate of the present plaintiff, was a part of the estate of the former Rajah of Beerbhoom, that it was settled with him as such, and that subsequently, on grounds of policy connected with the better management of the police-duties of the district, it was thought proper by the Government to detach these ghatwalee lands from the estate of the Rajah. To the Rajah, besides a deduction of the revenue payable by him for these ghatwalee mehals, Government allowed a malikanah.

Government then made separate settlements of these ghatwalee lands direct with

the ghatwals at a rather reduced rate, with reference to the service expected to be performed by them.

The result of these arrangements is found recorded in Regulation XXIX. of 1814, which admits that no express law was passed before regarding these ghatwalee lands.

The ghatwals were found, and so were recognised by that law, to have a right to hold ghatwalee lands from generation to generation as long as they pay their revenue, though this right of property was burdened with certain duties and other special restrictions regarding the manner of succession. The holders of these estates were neither found nor pronounced by that law to be debarred from the right of creating under-tenures like the zemindars of malgoozaree estates.

The Government had not also by that law claimed a right to dispossess any incumbent on the ground of his personal incapacity to fulfil the police duties required from him, because these conditions of service. as far as they could be required by the British Government, were, in cases of persons disqualified, considered to be capable of being discharged by a substitute.

The pleader of the appellant refers to certain decisions and opinions to the effect that no ghatwalee estate can be divided, under the ordinary law of inheritance, among all the heirs of a ghatwal deceased, and that its proceeds cannot be attached for the personal debts of the ghatwals in possession. These rulings do not settle the question which is at issue in this case, *viz.*, whether the ghatwal can create an under-tenure of a permanent kind binding upon his successor, or at least to create as above such tenures as are now pleaded by the appellants in favor of junior members of his own family, or any other person, for assisting him in police duties, or whether, though these tenures be illegal when created, still having been created and maintained from a time preceding the Decennial Settlement, they can now be allowed to be disturbed, and that too at the suit of the heirs of the persons who had created them for good consideration. Even if Government had passed a law in 1793 or afterwards, prohibiting the ghatwals from creating any permanent tenures, or even such a tenure as is pleaded by the appellants to be held by them, and even if that law had stated that the original rights acquired by the ghatwals were clearly proved to be so limited as not to admit of a right to create such tenures, it is clear that, notwithstanding all this, such a law, unless expressly worded to have a *retrospective* effect, could not by itself prejudice any substantial pre-existing rights held by others from a time before the Decennial Settlement, enjoyed for several years, unquestioned by several generations of ghatwals. An action on the ground of such a breach of such a law, or even irrespective of such a law, simply on the ground of the invalidity of such creations on the ground of the terms of these tenures being opposed to the original powers of the ghatwals, could be brought only by the Government, and no Court of Justice could allow the heirs of those who had created the tenure to sue to set it aside, unless a special power had been given to the heir of the lessee by a special enactment to do so, as was given to zemindars by Section 10 of Regulation XIX. of 1793 with regard to rent-free grants created after 1790.

The pleader for the plaintiff quotes Act V. of 1859, with a view to shew that the said law proceeds upon an assumption that previously the ghatwals of Beerbhoom had no right to alienate any portion of their lands; but the fact of such a record in the preamble of this law would not disprove stern facts and prejudice pre-existing rights like those disclosed in these four cases. Further, that law was passed for enabling the ghatwals in Beerbhoom to make alienations of a class which might have been rightly thought, before the passing of that Act, to have been beyond the powers of the ghatwals, and which alienations were quite different from the tenure pleaded by the appellants. The alienations which by that law the ghatwals are now empowered to make are alienations from the ghatwalee property without any reference to the purposes of the police or other public duties for which originally the lands were conveyed to the ghatwals, and which alienations are not, however, claimed by these appellants to have been, before the passing of the law, within the powers of the ghatwals. The leases made in favor of the appellants are alienations made for enabling the ghatwals to carry on their public duties efficiently, as they could not fulfil them without the assistance of other persons.

The capacity of the plaintiff and of his ancestors to perform duly the police duties required from the ghatwals do not seem to have any way deteriorated for the last 60 to 70 years, owing to the existence of those tenures pleaded by the appellants, and, ac-

cordingly, cannot be said to be anyhow against the policy of the rules under which the ghatwalee tenures were originally made over to or under which the ghatwals are recognized by the Government to hold their lands. The Lower Court states much against the claim of the appellants to the ghatwalee rights supposed to be set up by them by their calling themselves Shikmee ghatwals, and by their referring to laws applicable to ghatwals, but these uncalled-for proceedings on their part cannot alter the nature of the rights acquired by them under leases from the ghatwals with conditions of certain services, or alter the actual *status* acquired by them. The appellants are mere lease-holders, and have obtained and held possession as such.

We, accordingly, decree the appeals of all the appellants with costs, and dismiss the claim of the plaintiff with costs in all the four suits brought by him.

The 20th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Suit for possession—Onus probandi.

Case No. 182 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 26th October 1865, affirming a decision passed by the Moonsiff of Naraingunge, dated the 8th May 1865.

Bungo Chunder Bose (Plaintiff), *Appellant,*

versus

Kashee Chunder Bose and others (Defendants, *Respondents.*

Baboos Romesh Chunder Mitter, Chunder Madhub Ghose, and *Sreenath Banerjee* for Appellant.

No one for Respondents.

In a suit to recover possession, the *onus* is on the plaintiff to prove his title.

We are unable to see any reason why the plaintiff should be exempted from the ordinary rule which would force him, being, as he admits, out of possession, to prove his title. It is no argument to say that some of his witnesses speak to his having been in possession before the defendants dispossessed him, and that the above evidence was not actually discredited by the first Court. The possession is now with the defendants by the plaintiff's own showing, and it can only be disturbed by a superior title. The plaintiff should have given evidence that the tree and the land really fell within his boundary and share.

We see no reason to interfere with the decision, and we dismiss the appeal, the respondents never having appeared.

The 20th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Joint Hindoo Family—Claim of stranger to share in Dwelling-house and to land.

Case No. 201 of 1866.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 15th September 1865, reversing a decision passed by the Moonsiff of Amtah, dated the 18th February 1865.

Buddun Chunder Maduck (Plaintiff), *Appellant,*

versus

Chunder Coomar Shaha (Defendant), *Respondent.*

Baboo Nil Madhub Bose for Appellant.

Baboo Ombika Churn Banerjee for Respondent.

Suit by purchaser of a decree for the debtor's share in a family dwelling-house with gardens and tanks. HELD that, as the suit was for chambers and ground, however worthless the land might appear without the residence, or however inconvenient might be the intrusion of a stranger into the family dwelling-house, the plaintiff was entitled to an adjudication of his claim to the land.

THIS is a peculiar case, in which the plaintiff purchased from a decree-holder part of his decree against one Raj Kisto Shaha, his debtor, and many years afterwards sued to recover the same. The property which passed to the plaintiff by the sale-certificate appears to have consisted of the debtor's 2½ annas share in a family dwelling-house with gardens and tanks. The finding of the Principal Sudder Ameen is quite conclusive as to the plaintiff

having no right to the chambers in the family dwelling-house, the materials of which he has been held to have carried off long ago.

On this point, then, *viz.*, the claim to the *kootrees* or chambers, there is no ground of appeal.

But the suit was clearly brought for the ground as well as for the chambers, and however worthless the land may appear without the residence, or however inconvenient may be the intrusion of a stranger, the plaintiff has clearly a right to have his claim to the small piece of land adjudicated. We therefore remand the case, then, solely for the determination of the plaintiff's right to the land as the share of the debtor which he purchased.

The 21st April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Limitation—Minority—Mesne-profits.

Special Appeals from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 24th July 1865, reversing a decision passed by the Moonsiff of that District, dated the 21st March 1865.

Case No. 3486 of 1865.

Luchmun Singh and others (Plaintiffs), *Appellants,*

versus

Mussamut Bibee Miriam and others (Defendants), *Respondents.*

Baboo Goopeenauth Banerjee for Appellants.

Baboo Anund Gopal Paleet for Respondents.

Case No. 3487 of 1865.

Luchmun Singh and another (Defendants), *Appellants,*

versus

Kazim Ali Khan and another (Plaintiffs), *Respondents.*

Baboo Goopeenauth Banerjee for Appellants.

Baboo Anund Gopal Paleet for Respondents.

The mere fact of a plaintiff not suing within 3 years of his attaining majority will not, in cases where Act XIV. of 1859 allows a general limitation of 12 years, bar his suit if brought within 12 years of the time when his cause of action accrued.

Persons who purchase from one who they know has no legal right to sell, with full notice that the vendor was only a trustee for her minor sons, are liable to pay mesne-profits.

According to Clause 16, Section 1, Act XIV. of 1859, no more than six years' mesne-profits can be recovered.

No. 3487.—This was a suit by the special respondents to cancel a deed of conditional sale illegally executed by their mother, Miriam Bibee, in favor of the defendant, on the 5th February 1855. The plaintiffs were minors at the time of execution.

The defendants contend that the mother, as guardian of her minor sons, and being pressed for means to support them, alienated, and had a right to alienate the property in question. They also pleaded that the plaintiffs had not brought their suit within three years of attaining majority, and were therefore barred.

The Court of first instance dismissed the suit of Kazim Ali, the eldest son, as barred by the three years' limitation, and decreed the share of Yad Ali, the younger son, but without wasilat.

The Principal Sudder Ameen considered that both plaintiffs were in time, and decreed the entire claim with wasilat.

Two objections are taken in special appeal — (1) That the suit is barred, and (2) That the mortgagees, special appellants, being innocent purchasers for value, should not have been made to pay wasilat.

We are clearly of opinion that the three years' limit cannot bar this suit. The law (Act XIV. of 1859) was not intended to act unfavorably to minors or to place them under any special disability, but, on the contrary, to assist them with exceptional privileges; and the mere fact of a plaintiff not suing within three years of his attaining majority will not, in cases where there is a general limitation of 12 years, bar his suit if brought within 12 years of the time at which his cause of action accrued.

The point has, we observe, been more than once decided by this Court (*vide* Bishambhur Sircar and others, Appellants, 3 Weekly Reporter, page 21; and Kalee Doss Chat-

terjee, Appellant, 4th May 1865). On this issue, therefore, we agree with the Principal Sudder Ameen.

Neither can we see any reason why the special appellants should be excused from making good the wasilat. They were by no means in the position of innocent purchasers, but, on the contrary, bought from one who they knew had no right under the law to sell, with full notice that she was only a trustee for her minor sons. In one point, however, the Lower Court's judgment must be amended. The Principal Sudder Ameen has decreed wasilat for 10 years; but it has been ruled by the Court that Clause 16, Section 1, Act XIV. of 1859, makes it impossible to recover more than six years' balance of mesne-profits, and, following this ruling, the order below must be amended accordingly.

Special Appeal No. 3486 was a cross-suit brought by the mortgagees for confirmation of their possession by foreclosure after notice, and admittedly is governed by the order in this case.

Both of these special appeals, therefore, are dismissed with costs, except as regards the four years' wasilat given in excess of what is allowed by law in No. 3487. To this extent special appellant's appeal is decreed, and he will get costs.

The 21st April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Evidence—Survey-award without possession.

Case No. 3159 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 13th June 1865, reversing a decision passed by the Moonsiff of that District, dated the 31st March 1864.

Ali Ashruf (one of the Plaintiffs), *Appellant,*

versus

Chonga Gobind Roy and others (Defendants) and others (Plaintiffs), *Respondents.*

Baboo Ashootosh Dhur for Appellant.

No one for Respondents.

The mere fact of a survey-award being given in favor of a party, without any proof that he got possession under it or was in possession before it, cannot be conclusive against all other testimony.

THIS was a suit to recover possession of certain lands situate in Mouzah Suleenah, on the ground that they were the chur lands of plaintiff's talook.

The defendant pleaded that the land belonged to his talook No. 5195, and that the plaintiff had never been in possession.

The Lower Appellate Court held that the plaintiff was barred by limitation, he not having been able to prove possession within 12 years. The Principal Sudder Ameen also went into the merits of the case, as the first Court had thrown out the plea of limitation, and decided on them also in favor of the defendant.

It is urged in special appeal that, in disposing of the question of limitation, the Principal Sudder Ameen ought to have given proper weight to the award of the survey-authorities, dated 26th August 1859, declaring the possession of the disputed lands to be with the special appellant.

It would have been better, no doubt, if the Principal Sudder Ameen had stated his opinion more directly as regards this survey-award when he was considering the question of limitation, instead of only noticing it when trying the question of title; but the omission does not benefit the special appellant's case, for the Principal Sudder Ameen has, after a very full review of all the evidence, declared the special appellant to have neither title nor possession of the land in dispute; and the mere fact of a survey-award being given in special appellant's favor without any proof that he got possession under it, or was in possession before it, cannot be held conclusive against all other testimony. And, as the Principal Sudder Ameen has very distinctly given his opinion that the special appellant never held possession of the land in suit, it would be a useless waste of time to remand the case to him for a mere formal judgment in respect of this survey-award on the issue of limitation.

We, therefore, reject this special appeal, but without costs, as no one has appeared for the special respondent.

The 23rd April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Mahomedan Law of Inheritance—Share of widow and daughters.

Case No. 205 of 1866.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Bhaugulpore, dated the 15th September 1865, affirming a decision passed by the Moonsiff of that District, dated the 14th September 1864.

Mahomed Ruhwan Khan and others (Defendants), *Appellants,*

versus

Mussamut Khajah Buksh and others (Plaintiffs), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

According to Mahomedan Law, a widow and two daughters are entitled between them to 19-24ths of the property of a deceased father and husband, in the proportion of one-eighth and two-thirds.

THE position of the family being explained to us by the pleader for the appellants, we are enabled to understand the decision of the Principal Sudder Ameen. The Lower Court appears to us to have found on sufficient evidence that Khajah Buksh was really married to Zoolfekar, and that the latter, being in possession up to the time of his death, left alive Khajah Buksh and two daughters, Saheb Jan and Sakeena, as his heirs. This finding appears to us to get over all the pleas raised that the possession of Zoolfekar had not been found, nor the marriage proved.

But we think that, on the above facts and conclusions, there must be still some enquiry as to the exact shares which the widow and daughters of Zoolfekar can claim. The plaintiff's case, we understand, is that Shumshere, the son, predeceased his father. Now, a widow and two daughters would appear to be entitled between them to 19-24ths of the property of a deceased father and husband in the proportion of one-eighth and two-thirds. (*See* Macnaghten, page 113, Precedents of Inheritance, and page 4, Section 2, as to rights of sharers under the Mahomedan Law.)

This point, though it has not been yet enquired into, fairly arises in the case. We remand the case on this point only to the Lower Court, *viz.*, the facts as to marriage and inheritance being proved, the Lower Appellate Court must still find, with advertence to the Mahomedan Law as above intimated, to what share exactly out of the 24 *sehams* the plaintiffs are entitled.

The Court will pass a fresh decision on this point only.

Each party may pay their own costs in this special appeal. Costs in the Lower Court should follow the ultimate result.

The 23rd April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Hindoo Law—Sale by adult member of joint family—Suit by guardian of minor members.

Case No. 207 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 4th December 1865, affirming a decision passed by the Moonsiff of that District, dated the 31st March 1865.

Sheo Pershad Jha and others (Plaintiffs), *Appellants,*

versus

Gunga Ram Jha and others (Defendants), *Respondents.*

Baboos Luckhee Churn Bose and *Rajendur Nath Bose* for Appellants.

No one for Respondents.

A suit by the guardian of minors to set aside an alleged alienation made by the adult member of a joint Hindoo family in collusion with the purchaser, and without the consent of his wards, is not premature.

According to the Mithila Law, such a sale is void for want of the consent of the whole of the heirs and in the absence of proof that the sale was made for a legal necessity or for the benefit of the minors.

THIS suit is not premature, as contended by the pleader of the special appellant. The guardian of the minors sues to set aside an alleged alienation made by the adult member of a joint Hindoo family in collusion with the purchaser and without the consent of his wards. Such suit, in the discharge of his trust as guardian, can by no means be termed premature.

Whether the special appellant is entitled to a refund of his purchase-money from the adult members of the family is a point which we are not called upon to decide in this appeal.

The Principal Sudder Ameen did not, as contended, refuse to consider the evidence, on the ground that there was no recital of a legal necessity in the deed of conveyance. The Principal Sudder Ameen did consider the evidence, and observe that it was rendered suspicious by the absence of any recital in the bill of sale. It is admitted that the sale is void under the Mithila Law for want of consent of the whole of the heirs; and there is no proof that the sale was made for a legal necessity or for the benefit of the minors.

The appeal is dismissed with costs and interest.

This decision governs No. 208, which is also dismissed with costs and interest.

The 24th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Jurisdiction (of Civil Courts)—Religious Endowment—Joint Hindoo family—Suit for share of fees obtained by joint members as Purohits.

Case No. 2762 of 1865.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 25th July 1865, affirming a decision passed by Moulvie Moheeooddeen Khan, Sudder Ameen of that District, dated the 28th September 1864.

Khedroo Ojha and another (Defendants), *Appellants,*

versus

Mussamat Deo Ranee Koomar (Plaintiff), *Respondent.*

Baboos Nilmadhub Sein and *Rajendur Nath Bose* for Appellants.

Baboo Anund Gopal Paulit for Respondent.

A suit brought by the widow of one of the members, for her share of the fees obtained by the joint members of a family as Purohits, is cognizable in the Civil Courts.

THERE are no grounds for this special appeal. The suit was not as between Jugman and Purohit, but for a share of the fees obtained by the joint members of the family as Purohits. It is admitted that the other co-sharers are joint in estate, and it is shown that the plaintiff is the widow of one of these members. Her suit is, therefore, cognizable in the Civil Court. The facts found by the Judge are that the plaintiff was not a stranger, and that she is entitled to a share in the offerings. These cannot be questioned in special appeal. Appeal dismissed with costs and interest.

The 24th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Witnesses (Issue of warrant for apprehension of)—Application to enforce attendance—Procedure.

Case No. 2695 of 1865.

Special Appeal from a decision passed by Mr. G. G. Balfour, Judge of Chittagong, dated the 20th July 1865, affirming a decision passed by Baboo Hur Gouree Bose, Principal Sudder Ameen of that District, dated the 30th December 1864.

Nilmoney Chowdhry (Plaintiff), *Appellant,*

versus

Hossein Ally and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Onooool Chunder Mookerjeee* for Appellant.

Moulvie Murhummut Hossein and *Baboo Greeja Sunkur Mozoomdar* for Respondents.

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A Court is not bound, on the mere statement of a party that he has more witnesses, to issue a warrant for their apprehension.

It is the duty of the Court, when an application is made to enforce the attendance of witnesses on whom summons has been served, to pass some definite order on the application, and not to content itself with an order to the effect that the petition be filed with the record.

THE suit was based on two deeds of conveyance, dated respectively the 22nd Phalgoon 1221 and 24th Bysack 1222 Mughee. Both the Courts found that the two deeds were not genuine. In special appeal it is contended that the Principal Sudder Ameen should have examined the remaining attesting witnesses, and that the Judge, though this point was taken in appeal, paid no attention to it.

We are of opinion that the Courts are not bound, on a mere statement of a party that he has more witnesses, to issue a warrant for their apprehension. The case brought to our notice reported in Vol. 2 of Moore's Reports, p. 424, is not in point, for in that case the witnesses were present, and the Courts refused to examine them because a large number of witnesses had already been examined. It is the duty of the Court below, when an application is made to the effect that summons has been issued and served upon certain witnesses who have not appeared, and for whose attendance the party making the application asks the Court to take action, to pass some definite order, and not to content itself with an order to the effect that the petition be filed with the record. In this case both the Principal Sudder Ameen and the Judge omitted to pass any order on the application, and the two deeds of conveyance have been pronounced to be not proved because one was attested by only one witness, though others subscribed to it, and their attendance was asked for.

We remand the case. The Judge will give the plaintiff an opportunity of producing his witnesses, and pass a fresh decision.

It has been urged before us that the vendor of the kubala of 1221 was a minor at the time of execution, and that the property covered by the second kubala was under attachment at the time of sale. We find that the evidence relied upon to shew that she was a minor is not conclusive, or that the whole of the property covered by the second kubala belonged to Hyder Ali. These points must receive the consideration of the Judge.

The 25th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Suit by assignee of decree passed in 1857.

Case No. 2985 of 1865.

Special Appeal from a decision passed by Baboo Anund Chander Banerjee, Judge of the Small Cause Court of Rajshahye, and exercising the powers of a Principal Sudder Ameen, dated the 18th September 1865, modifying a decision passed by Baboo Doorgapershad, Moonsiff of Belmaria, dated the 13th June 1865.

Ramchunder Chuckerbutty (one of the Defendants), *Appellant,*

versus

Kurreem Bux Meah (Plaintiff), Respondent.

Mr. J. S. Rochfort for Appellant.

No one for Respondent.

Where the assignee of a decree passed in 1857 sues out execution within 3 years from the passing of Act XIV. of 1859, he is in time, and limitation cannot be applied.

THE only point taken by the pleader for the special appellant is the issue in bar. It is admitted that Ramgopal obtained a decree for a 2-annas share in the ancestral property in a suit to which the special appellant's alleged donors were parties. This was in April 1857. Ramgopal could have executed that decree within the period prescribed by the then Law of Limitation as subsequently modified by Act XIV. of 1859. The rights and interests of Ramgopal in the decree were sold in execution and purchased by Nilkant Sein, who was put into possession by the Court in 1270 B.S. In the same year he sold the property to the special respondent. If the assignee of Ramgopal sued out execution within three years from the passing of Act XIV. of 1859, he is in time, and limitation cannot be applied. We must presume that the special appellant's vendor, Nilkant, was put into formal possession by the Court. It was the duty of the Court to put him in possession, and we have the receipt of the peon that possession was given; and the Principal Sudder Ameen finds that there is oral evidence of the fact of possession. As the suit is clearly not barred, we dismiss the appeal.

The 25th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Objection to execution of decree under Section 230, Act VIII. of 1859—Possession.

Case No. 2992 of 1865.

Special Appeal from a decision passed by Mr. W. Tucker, Judge of West Burdwan, dated the 9th August 1865, reversing a decision passed by Baboo Hur Chunder Chatterjee, Principal Sudder Ameen of that District, dated the 21st July 1864.

Sheero Koomaree Debia (Defendant), *Appellant,*

versus

Kissub Chunder Bose and others (Plaintiffs and third parties), *Respondents.*

Mr. G. C. Paul and *Baboos Juggadanund Mookerjee* and *Toolsee Doss Seal* for Appellant.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Respondents.

When an objection is preferred, and takes the shape of a suit under Section 230, Act VIII. of 1859, the question for determination is whether the objector has a better right to the possession of the property in dispute than the decree-holder who is executing his decree.

The objector may be entitled to hold as dur-putneedar, and yet may not be entitled to *khas* possession of the property.

We regret very much to find ourselves under the necessity of again remanding this suit to the Lower Appellate Court. It appears to us that the Judge has not rightly conceived the points which it was incumbent on him to try under the previous order of remand. When an objection is preferred and takes the shape of a suit under Section 230 of the Code of Civil Procedure, the question to be tried really is, whether the objector has a better right to the possession of the property in dispute than the decree-holder who is executing his decree.

In the present case the decree-holder has substantiated his right against the alleged dur-mokurrureedar to hold the disputed property by way of mokurruree. The objector, calling himself dur-putneedar of the same property, maintains that he was entitled to have *khas* possession of the property. Now, it is quite possible that the objector should be entitled to hold as dur-putneedar, and yet that he should not be entitled to *khas* possession. The Judge, therefore, was bound to see whether the decree-holder was not entitled as mokurrureedar to *khas* possession notwithstanding any right which the dur-putneedar might have as *locum tenens* of the putneedar.

It has been alleged that the dur-putneedar and the persons whose title as dur-mokurrureedars has just been set aside are members of a joint family, and are, in fact, identical in interests; and there certainly is evidence upon the record which strongly raises a presumption that they are so. If this were so, it is quite clear that it would be extremely difficult for the Court below to separate the possession of the objector as dur-putneedar from the admitted former possession of the dur-putneedars, *i. e.*, the possession which the decree-holders admitted the dur-mokurrureedars to have held to their prejudice. The Judge ought, therefore, to enquire whether the possession now set up on the part of the dur-putneedar was really the possession formerly claimed and enjoined by the defeated dur-mokurrureedars, or was a separate possession by the dur-putneedar as dur-putneedar. If he should find that the possession of the dur-putneedar and of the dur-mokurrureedar is really one and the same, there can be little question that the suit or objection of the dur-putneedar under Section 230 ought to be dismissed. But, in order finally to terminate all dispute upon this point, the putneedar and the zemindars should be made parties to the suit, and a final determination arrived at in their presence.

The 25th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Custom to pay Murjada—Suit by Shebait to enforce payment.

Special Appeals from a decision passed by Baboo Koonj Lall Banerjee, Officiating 2nd Principal Sudder Ameen of the 24-Pergunnahs, dated the 8th September 1865, modifying a decision passed by Baboo Mohendronath Bose, Additional Moonsiff of Alipore, dated the 6th February 1865.

Case No. 3248 of 1865.

Madhub Chunder Mundul (Plaintiff), *Appellant,*

versus

Nobeen Chunder Dutt and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Gopal Lall Mitter* for Appellant.

Mr. G. C. Paul and *Baboos Chunder Madhub Ghose* and *Mohesh Chunder Chowdry* for Respondents.

Case No. 3511 of 1865.

Nobeen Chunder Dutt (Defendant), *Appellant,*

versus

Madhub Chunder Mundul (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Chunder Madhub Ghose* and *Mohesh Chunder Chowdry* for Appellant.

Baboos Kishen Succa Mookerjee and *Gopal Lall Mitter* for Respondent.

Suit by the assignee of a Shebait to enforce payment of a sum of money as *murjada* (respect-money), under colour of an alleged custom by which persons of the Kassary caste having marriage ceremonies or *shrads* performed in their houses were bound to pay such *murjada* to members of the community, and the right to receive the same had become vested in a Sheeb Thakoor. HELD that such a suit would not lie.

WE think this case a very clear one. The claim, viewing it as a claim to enforce a payment to the Shebait under colour of a custom according to which persons of the Kassary caste having marriage ceremonies or *shrads* performed in their houses are bound to contribute "Murjada" to the Sheeb Thakoors as representing the Kassary community in general, is a perfectly monstrous claim, and ought to have been dismissed, as it properly was by the Moonsiff.

The Principal Sudder Ameen considered that a part of the claim was payble by the defendant; and it is now suggested that the bridegroom's father having deposited this money with the defendant who was father of the bride, on an express trust that it should be paid over to the Shebait, the plaintiff was entitled to recover.

But we do not find that the plaintiff based his claim upon this ground. He did not prove, on the evidence of the bridegroom's father, that the money had been so deposited; nor did he, in his appeal to the Lower Appellate Court, state this as a material issue to be decided.

We think that the judgment of the Principal Sudder Ameen, so far as it decreed a portion of the claim, ought to be reversed, and the defendant's appeal decreed, and the plaintiff's appeal dismissed, with costs.

The 28th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Hindoo Law—Maintenance of daughter-in-law.

Case No. 3395 of 1865.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 26th October 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 23rd March 1865.

Ruttan Chand Shooree (Defendant), *Appellant,*

versus

Sreemuttee Huree Monee (Plaintiff), *Respondent.*

Baboo Kishen Dyal Roy for Appellant.

No one for Respondent.

The obligation of a Hindoo to maintain his daughter-in-law depends on his ability to do so.

THIS was a suit for maintenance on the part of the special respondent, the daughter-in-law of the defendant, and also to recover from her father-in-law the value of certain ornaments of hers alleged to have been appropriated by him.

The defendant denied having taken the ornaments, and for the rest pleaded that he was not bound by law to maintain his daughter-in-law, and, further, that he was not in a position to do so.

The first Court dismissed the plaintiff's case on the law point. But the Additional Judge, holding, on the authority of a precedent of this Court, dated 27th January 1865 (Kedar Monee Dossee *versus* Tara Chand, 2 Weekly Reporter, page 134), that the defendant is bound to maintain his daughter-in-law, ordered maintenance to be given to her at the rate of 3 rupees a month.

It is now urged, in special appeal, that the Judge has taken no notice of the objection that special appellant was a poor old man, with no means of supporting his daughter-in-law, or even of maintaining himself.

We think that this objection must be allowed. Granting that the special appellant was bound by law to maintain his son's widow wherever she might elect to live, so long as she led a chaste and virtuous life, that law could only take effect on the supposition that he had the means to do so; and it was manifestly improper in the Judge to decree the comparatively large sum of 3

rupees a month without first making enquiry as to the special appellant's power to carry out the Court's order.

The Judge will, therefore, take up the case again at this point, and, after considering the evidence in support of special appellant's claim to exemption, pass such orders regarding the amount of maintenance (if the special appellant be able to give any) as may appear to him just and proper.

The 28th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Review of judgment—Compromise—Reversal of predecessor's judgment on personal grounds.

Case No. 3629 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 22nd August 1865, affirming a decision passed by the Moonsiff of that District, dated the 22nd April 1864.

Baboo Purmessuree Narain Singh (Plaintiff), *Appellant,*

versus

Syud Romeezooddeen Ahmed Cazee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Moulvee Syud Murhumut Hossein and *Baboo Roopnath Banerjee* for Respondents.

No review can be admitted of a judgment passed on a compromise.

A Moonsiff can not grant a review of, and reverse, his predecessor's judgment on personal grounds and after 8 months' delay.

THIS suit, which was to recover possession of 2 beegahs of land, was originally settled by compromise between the parties, and the Moonsiff passed a decree in terms of the compromise on the 5th of October 1861.

Eight months after, on the 27th April 1862, that is, after the Moonsiff who had tried the case had left the station, the defendant applied for a review of judgment on the ground that he had been coerced into agreeing to the compromise by threats and other pressure on the part of the officer who decided the case.

The new Moonsiff on this application went into evidence, and, considering the charge against his predecessor established, admitted a review of judgment, and eventually decided the suit in favor of the plaintiff.

The Principal Sudder Ameen before whom the case went on appeal by the defendant declined to interfere on the ground that the Moonsiff had by law the power of reviewing his judgment.

It is urged in special appeal that no review of judgment can be admitted from a decision passed on a compromise.

As a general principle, we have no doubt that this is correct, and that parties who have had every opportunity of considering their own rights and chances of success in a suit should, if they elect to settle their differences by compromise and to take the Court's judgment in the terms of that compromise, be bound by it, and should not be allowed to re-open the question, as they cannot be "legally aggrieved by a decree" which they themselves asked the Court to pass.

And in the present case, we are of opinion that the Moonsiff was not justified in granting a review of his predecessor's judgment, because the question to be tried was one personal to the former Moonsiff and turned upon the truth or falsehood of certain charges, which, if established, would have rendered the person accused incapable of remaining in the service of Government, and the less so as the applicant had allowed more than eight months to elapse before bringing his alleged grievance to notice.

To allow one Moonsiff to reverse the decree of his predecessor on personal grounds and after eight months' delay, is, in our opinion, altogether opposed to the spirit of the law. The proper course for the petitioner to have taken, would have been to appeal to the Judge on the ground that the compromise had been extorted from him by undue pressure on the part of the presiding Moonsiff.

As, however, the present applicant should not be made to suffer for an illegal act of the Court, we grant him one month's grace to bring the original order of the Moonsiff in appeal before the Judge of the district, who can make such enquiry as appears to be necessary, and pass whatever order may seem to him just and proper.

The 28th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Abatement of suit—Possession with Mesne-profits—Diluvion.

Cases Nos. 137 and 180 of 1866.

Special Appeals from a decision passed by the Judge of Dacca, dated the 27th October 1865, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 30th March 1865.

Unno Poorna Debia and others (Plaintiffs), *Appellants,*

versus

Ram Lochun Ghose and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Bama Churn Banerjee* for Appellants.

Baboos Kishen Kishore Ghose and *Chunder Madhub Ghose* for Respondents.

A suit for possession of certain lands with mesne-profits does not abate by reason of the lands having since been washed away.

THE Lower Appellate Court dismissed the appeals of both the appellants on the ground that the lands sued for in these two suits have, since the decision of the Court of first instance, been washed away.

The special appellants urge that, as they had sued for possession with mesne-profits, the washing away of the lands did not abate their suits; that their claim to *mesne-profits* might be decreed; and that, in order to decree the same, it might be necessary to *decide the right* of the plaintiffs to the lands of which they cannot now obtain possession.

The defendants plead that the right upon which the plaintiffs claimed the lands was that of the formation of the lands in dispute on the site of the old lands of the plaintiffs; and this is no title for a decree in their favor according to the recent ruling of the Full Bench.

We have simply to decide whether the Lower Appellate Court is right in dismissing, without hearing, the appeal and the suits of the plaintiffs because the lands in dispute were washed away after the dismissal of the suits and pending appeals; and if the plaintiffs have sued upon a declaration which cannot give them a title, it is for the Lower Appellate Court to take that into consideration, which it has not in any way yet done.

Nor have we here at present to decide what proof or what kind of proof can or will be produced by the plaintiffs to prove the amount of mesne-profits, or whether the fact of the lands being washed away will create any and what difficulty in the way of ascertaining the mesne-profits.

We have simply to decide whether the decision of the Lower Appellate Court, holding that the suits of the special appellants abated merely on the lands claimed in them being washed away, is right or not, and we hold that the decision of that Court is wrong in not hearing the cases on that ground.

We remand the cases to the Lower Appellate Court to try the appeals pending before it on the merits.

The 1st May 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Res Judicata.

Case No. 3187 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 31st August 1865, reversing a decision passed by the Moonsiff of that District, dated the 21st September 1864.

Buksh Ali (one of the Defendants), *Appellant,*

versus

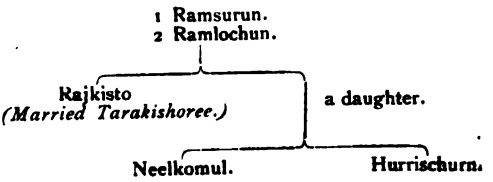
Nittyanund Doss (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Mohesh Chunder Bose for Respondents.

In a former suit by *A* and *B* against *C* and *D* (*C's* vendee), in which *E* intervened, and was made a defendant, a decree was passed in favor of *A* and *B* with a reservation of *E's* rights. HELD that that decree was not a *res judicata* in the present suit by *F* as purchaser from *E* against *D*, the reservation of *E's* rights being a mere *obiter dictum.*

THE following genealogical table will assist the consideration of this case:—



The plaintiff sues as purchaser from Obhoychurn, a distant relative (cousin's son) of Ramlochun, one of the original proprietors, to recover possession of certain lands to

which his vendor succeeded by inheritance. The defendant, who claims as vendee of Tarakishoree, the widow of Rajkisto, denies that any part of the property went to Obhoychurn, but that it descended on the death of Ramlochun (Ramsurun having previously died childless) to Rajkisto, from whom it went to his widow.

The Court of first instance dismissed the plaintiff's case, but the Principal Sudder Ameen on appeal decreed it, on the ground that a former decision of the Civil Court, to which the defendant's vendor and Obhoychurn, as well as the natural heirs of Rajkisto, were parties, had decided that Obhoychurn was entitled to half of the land, and that this decision, not having been reversed, was final as regards the present claim, and made the plaintiff's right as purchaser from Obhoychurn as *res judicata* which could not be disturbed.

We are of opinion that Section 2, Act VIII. of 1859, does not apply to this case. It appears that Neelkomul and Hurrischurn brought a suit against Tarakishoree and the present special appellant to recover possession of the whole of the property left by Rajkisto. Obhoychurn intervened on the ground that half the property came to him on Rajkisto's death, and he was made a defendant in the case.

The Moonsiff's decree was to the effect that Neelkomul and Hurrischurn should recover possession of one-half of the property on Tarakishoree's death. There is no mention of Obhoychurn's right to the other half in the decretal order, nor is any judgment passed upon it. In the body of the decision there is mention made of Obhoychurn's rights as being reserved, but there is no distinct finding as to what those rights are, and no decree was made regarding them.

The case was eventually compromised on appeal as between the present special appellant and Neelkomul and Hurrischurn, Obhoychurn not appearing, although made a respondent, and the appeal was struck off in the terms of the compromise.

It appears to us quite clear that no decision was come to by the Civil Courts in regard to Obhoychurn's claim, and that the so-called reservation of Obhoychurn's rights in the body of the Moonsiff's judgment was a mere *obiter dictum*, and not binding upon any other Court. We, therefore, remand the case to the Principal Sudder Ameen, with directions to try the rights of Obhoychurn on its merits, as has been done by the Court of first instance. Costs will follow the result.

The 1st May 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit for possession and mesne-profits—Allegation of title—Proof of plaintiff's possession and dispossession.

Case No. 2935 of 1865.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th September 1865, reversing a decision passed by the Moonsiff of that District, dated the 26th June 1865.

Mahomed Khossal and others (Plaintiffs), *Appellants,*

versus

Lal Chand Doss and others (Defendants), *Respondents.*

Baboo Greesh Chunder Ghose for Appellants.

No one for Respondents.

In a suit for possession and mesne-profits, in which the defendants did not allege possession for 12 years or more so as to bar the plaintiff, but stood upon their title, the Judge was held to have been wrong in dismissing the suit on the ground that the plaintiff's possession and dispossession had not been specifically shown, even if it did not appear from his own judgment that they had been sufficiently proved.

We think the Judge's decision in appeal was erroneous. The plaintiff sued for possession and *wasilat*. Defendants answered that the land belonged to their talook, and the main issue, therefore, was title. The witnesses for the plaintiff deposed to the fact of his previous possession, and one of them deposed to the fact of dispossession; but this was really not material. The defendants did not allege possession for 12 years and more, so as to bar the plaintiff, but they stood upon their title. The Judge was, therefore, wrong in dismissing the suit on the ground that possession and dispossession had not been specifically shown, even if it had not appeared from his own judgment that these matters had been sufficiently proved. We, therefore, set aside the decision of the Lower Appellate Court and restore the decree of the Moonsiff with costs.

The 1st May 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Jurisdiction—Splitting of cause of action—Special appeal.

Case No. 2963 of 1865.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 18th July 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 23rd February 1865.

Kader Buksh and others (Defendants), *Appellants,*

versus

Kootuboodeen Ahmed and others (Plaintiffs), *Respondents.*

Baboo Tarucknath Dutt for Appellants.

Baboos Kalee Prosunno Dutt and *Kalee Kishen Sein* for Respondents.

Two suits upon two separate bonds were brought in the Sudder Ameen's Court, which, if made the subject of one suit, would have been cognizable by the Principal Sudder Ameen instead of the Sudder Ameen. But, as the appeal would equally have lain to the Judge whether the case was originally tried by the Sudder Ameen or Principal Sudder Ameen, it was held that, if the Judge was wrong in not deciding in favor of the appellant (defendant) on the ground of jurisdiction, the error was not one which affected the decision of the case upon its merits, and, therefore, not a ground of special appeal.

THIS case and No. 2962 are appeals by the same parties against the same respondents. They arise out of suits brought by the respondents to recover sums of money spent by them, at the request of the special appellants and for their benefit, in conducting a certain law-suit. The amount appears to have been raised upon two separate bonds executed by the plaintiff, and in respect of these two bonds he brought his separate suits in the Court of the Sudder Ameen.

The defendants objected, among other things, to the jurisdiction of the Court, urging that the cause of action being one could not be split; but this objection was overruled, and decrees were passed against him, which, in appeal, were confirmed by the Zillah Judge.

In special appeal he contends—*First*, That he was entitled to a trial in the Court of the Principal Sudder Ameen instead of that of the Sudder Ameen; and the Lower Appellate Court, in overruling this objection, has erred in law. *Secondly*, That, if the first suit was entertained for a portion of the amount due, the second suit for the remainder of the same amount could not be maintained under Section 7 of the Civil Procedure Code.

We think that neither of these pleas can be admitted in special appeal. The case comes to this Court from the Court of the Zillah Judge, where the first appeal would equally have been brought, whether the case was originally tried by the Sudder Ameen or Principal Sudder Ameen; and, if the Judge was wrong in not deciding in the appellant's favor on the ground of jurisdiction, we think that the error was not one which has affected the decision of the case in his Court upon its merits, and, therefore, not a ground of special appeal.

A third ground is that the Judge has failed to notice his complaint that the Sudder Ameen refused to examine the witnesses whom he named to show that he had a claim of set-off. On reference to the judgment of the Lower Appellate Court and to the grounds of appeal in that Court, we find that he there alleged that the witnesses in question had been named for the purpose of showing that the defendant had paid his proper share of the costs incurred in the litigation, and was not, therefore, liable to pay more. This is quite a different matter from set-off, and, as the Judge remarks, it was not alleged in the written statement, and he was not, therefore, entitled at a later stage of the case to claim that such witnesses should be examined. This objection, therefore, is invalid.

Fourthly, it is urged that the decree made against the special appellants is not in conformity with their proper share of the liability. But we find that no appeal was made to the Judge on this point.

Overruling, therefore, all the objections taken by the special appellant, we affirm the judgment of the Court below, and dismiss the special appeal with costs.

The 2nd May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Mortgage—Wilful default by mortgagor in possession—Sale for arrears of Revenue—Benamee purchase by mortgagor—Criminal Misappropriation.

Case No. 202 of 1865.

Regular Appeal from a decision passed by Baboo Koylas Chunder Deb, Principal Sudder Ameen of Dacca, dated the 10th November 1864.

Ram Manick Shaha and others (Defendants), *Appellants,*

versus

Brindabun Chunder Potdar and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee, Kalee Mohun Doss, and *Romesh Chunder Mitter* for Appellants.

Baboos Onoocool Chunder Mookerjee, Chunder Madhub Ghose, and *Tarucknath Dutt* for Respondents.

If a mortgagor in possession, who is entrusted with the dominion over the mortgaged property by the mortgagee in whom the property is in a mortgage in the English form, wilfully defaults, and causes the property to be sold for arrears of Government revenue for the purpose of defrauding the mortgagee, and purchases it *benamee,* he is liable to be punished for criminal misappropriation under Section 405 of the Penal Code.

Norman, J.— * * * *

It is very clear to us that a very gross and scandalous fraud has been attempted, though of the exact guilt of the several parties we should probably not be able to judge, even if we went through the evidence for that purpose ourselves, so well as the Principal Sudder Ameen. But such a fraud must not go unpunished, and we remand the case to the Principal Sudder Ameen, who will enquire whether, as against the Shahas, a charge might not be framed under Section 405 of the Indian Penal Code. We are disposed to think that, the mortgage being in an English form, and the property being in point of law in the mortgagee, and the mortgagors, and particularly Ram Manick, being in possession, he was entrusted by the mortgagee with "the dominion over property," and that, in having wilfully defaulted, and caused the same to be sold at a revenue-sale, for the purpose of defrauding the mortgagee, and having purchased it *benamee,* he "dishonestly misappropriated the same, and converted it to his own use, in violation of the direction of the law prescribing the mode in which such trust is to be discharged, and of the legal contract, express or implied, which has been made touching the discharge of such trust," and is, therefore, liable to be punished under Section 405.

The Principal Sudder Ameen will take up the case as against this defendant and any others against whom the evidence is clear that they had actual knowledge of and aided in the fraud, and consider whether a charge ought not to be preferred before the Magistrate, or whether he ought not to commit him or them for trial to the Judge himself.

As regards the other defendants, Ram Subbuk and the alleged purchasers, he will enquire whether or not there is good ground for sending them to take their trial for abetting the offence, if any, committed by the first-named defendant.

Campbell, J.—I entirely concur. I hope that the Court below will efficiently investigate the criminal matter. It is very important that effect should be given to the Penal Code, and that judgments declaring parties to have acted fraudulently should not be passed over without the action which the opinion of the Court would seem to involve.

The 3rd May 1866.

Present:

The Hon'ble F. B. Kemp and G. Campbell. *Judges.*

Assignment—Acceptance—Failure to pay—Notice.

Case No. 2508 of 1865.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 24th June 1865, affirming a decision passed by the Principal Deputy Commissioner of that District, dated the 23rd November 1864.

Huro Lal Roy (Plaintiff), *Appellant,*

versus

Maharajah Shumbhoonath Singh Bahadoor and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

The defendant, in satisfaction of his debt, gave the plaintiff bills on his ryots in the nature of assignment of the rents due by them to him, and the ryots accepted the bills. HELD that, on the failure of the ryots to pay, the plaintiff was bound to give the defendant notice of such non payment within a reasonable time, instead of bringing his suit 11 years after the money was borrowed and 8 years after the acceptors of the bills failed to pay.

WE are of opinion that the Courts below have decided this case rightly. The plaintiff accepted the Rajah's *borats* or bills on his tenants in payment of his debt: the debts were to be satisfied within 3 years. The plaintiff, on the failure of the parties who accepted the bills to pay, was bound to give the Rajah notice of such non-payment within a reasonable time. Instead of doing so, he brings his suit eleven years after the money was borrowed, and eight years after the acceptors of the bills failed to pay.

The acceptors were the ryots of the Rajah, and satisfaction of his debt was to be made by assignment on the rents due by the acceptors to the Rajah. Had the plaintiff given timely notice of the failure of the acceptors to pay, the Rajah might have recovered the rent assigned from them: as it is, any action on his part against them would be barred under the Rent Law. Appeal dismissed with costs and interest.

The 3rd May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Minors—Joint Hindoo Family—Debts—Sales.

No. 3544 of 1865 and Nos. 131 and 198 of 1866.

Special Appeals from a decision passed by the Judge of Tirhoot, dated the 29th August 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 30th August 1864.

Sunker Singh and others (Defendants), *Appellants,*

versus

Bishen Dyal Suhae (Plaintiff), *Respondent.*

Baboo Greeja Sunker Mojoomdar and *Moulvee Syud Murhumut Hossein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Kishen Succa Mookerjee* for Respondent.

A deed of authority, given by the father of a minor and the other members of a joint Hindoo family to borrow money, cannot bind the minor after his father's death with regard to debts incurred after the father's death, in the absence of proof of the money having been borrowed for the use of the minor.

The mere finding of a Court that a minor was a member of a joint family at the time of the execution of the sales in dispute would not necessarily make the sales good against him without proof of the proceeds having benefited him or his father's estate.

THE decree-holder in this case obtained a decree against Sookhun Lal and others, in execution of which he sold the property, plaintiff's own share of which is claimed by him in this suit as not passed by the sale, he, the plaintiff, being no party to the suit. Reading the whole of the decree and the grounds upon which it was passed, and looking to the fact that it was not expressly decided in that case that the money borrowed by Sookhun Lal had gone to benefit the plaintiff, then a minor, we agree with the Lower Appellate Court that the decree was not against the plaintiff. We further find that the deed of authority given by the father of the plaintiff and the other members of the family to Sookhun Lal to borrow money could not bind plaintiff after the death of his father with regard to debts incurred after the said father's death, in the absence of any proof of the money having been borrowed for the use of the plaintiff. The mother of the plaintiff, who was then a minor, intervening on his behalf, it was pronounced that the decree was not intended to affect the rights of the plaintiff. The mere fact of Sookhun having executed a deed for himself and also as guardian for the plaintiff, and the fact of the plaintiff being sued as a minor under the guardianship of Sookhun Lal, cannot lead us to hold that the decree was intended to bind the plaintiff.

So far we see no reason to allow the special appeals of the decree-holder and the purchaser, *viz.*, Nos. 3544 of 1865 and 131 of 1866, and dismiss these two appeals with costs.

The Court of first instance decided that the plaintiff had failed to prove that his father and his uncle had separated in 1253 Fuslee, and this finding of fact is confirmed by the Lower Appellate Court.

The Court of first instance had decided that the plaintiff was liable as a debtor under the decree, and the Lower Appellate Court

found that he was not; and we have already, as stated above, agreed with the latter Court.

The plaintiff had also sued for setting aside, to the extent of his own share, certain sales made by Sookhun Lal of property belonging to all, and the Court of first instance had decided that, upon certain grounds, the plaintiff is not entitled to recover these shares.

The Lower Appellate Court has, however, taken no notice of this part of the plaintiff's case, though he had gone up expressly upon that point, and though it was ultimately connected with the other parts of the appeal. If the Lower Appellate Court had, in course of its decision of other parts of the case, expressed an opinion to the effect that it thinks that the proceeds of the sales in dispute had been applied to the legal necessities of the plaintiff, we might have hesitated to remand.

The Lower Appellate Court's simple finding that the plaintiff was a member of a joint family at the time of the execution of the sales in dispute would not necessarily make these sales good against the plaintiff, without proof of the proceeds having benefited him or his father's estate.

We accordingly remand the appeal No. 198 of 1866 of the plaintiff to the Lower Appellate Court, with directions to try the objections of the plaintiff with reference to private sales disputed by him.

The 4th May 1866.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Putnee (Sale of—not in existence)—Refund of bonus.

Case No. 3579 of 1865.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Rajshahye, dated the 18th September 1865, affirming a decision passed by the Moonsiff of Shahzadpore, dated the 30th June 1865.

Kristo Lal Moitro (Plaintiff), *Appellant,*

versus

Nobbo Coomar Roy (Defendant), *Respondent.*

Baboos Ashootosh Dhur, Tarucknath Sein, and *Tarucknath Dutt* for Appellant.

No one for Respondent.

Where a bonus is paid for a putnee talook not in existence, there is an entire failure of consideration, and the person paying the bonus is entitled to a refund of it. The principle of *caveat emptor* is not applicable to such a case.

THIS was a suit to recover a sum of Rupees 39 paid as a bonus for a putnee talook, and for stamp fees, &c., in addition. The plaintiff avers that, at the time the defendant entered into the contract, he knew that the talook was not in existence, and that he was induced, by the defendant's guarantee of the existence and assets of the estate, to pay the above consideration.

The Principal Sudder Ameen finds that, whether the defendant was aware of the non-existence of the putnee or not, he is not liable to refund the bonus, as the plaintiff took the putnee, to use the words of the Lower Court, "of his own accord." A decision of the late Sudder Court in the case of Dost Mahomed, November 1855, is quoted in support of the Principal Sudder Ameen's finding.

We are of opinion that, if the putnee was not in existence when the defendant leased it to the plaintiff, who, on the guarantee of its existence, paid the bonus, there has been an entire failure of consideration, and that the plaintiff is entitled to recover. The case quoted by the Principal Sudder Ameen applies to purchasers at auction in execution of decrees. They purchase the rights and interests of the debtor, and nothing more is guaranteed to them. The principle of *caveat emptor* may apply to such purchasers, but it is wholly inapplicable to the present case.

The suit is remanded for enquiry whether the putnee talook is in existence or not, according to the instructions of this Court.

The 4th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Onus probandi—Attachment and sale of tenure in execution of decree.

Case No. 253 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore in Dacca, dated the 22nd November 1865, reversing a decision passed by the

Moonsiff of that District, dated the 17th May 1865.

Aluck Monee Dassia (Plaintiff), *Appellant,*

versus

Chundra Kant Mookerjee and others (Defendants), *Respondents.*

Baboos Sreenath Dass, Kalee Mohun Dass, and *Bungshee Dhur Sein* for Appellant.

Baboo Motee Lal Mookerjee for Respondents.

After that the zemindar has made out a *primâ facie* case, the *onus* is on the judgment-creditor, who attaches a tenure as liable for his debt, and who desires the same to be sold in execution, to prove the liability of the tenure to satisfy that decree.

THERE is only one point pleaded in this case, but it is valid. The Moonsiff placed the *onus* on the defendant, while the Principal Sudder Ameen placed it on the plaintiff. The Principal Sudder Ameen is wrong, and the Moonsiff was right. The plaintiff is, admittedly, the zemindar. The defendant is a judgment-creditor of the wife of Futtik, who was a ryot of the proprietor; and the first Court found that Futtik's widow had deserted the homestead, and that plaintiff had been in possession of the tenure. It was then for the defendant, the judgment-creditor, who attaches the property as liable for his debt, and who desires the same to be sold in execution, to prove the liability of the tenure to satisfy that debt. The plaintiff zemindar is not bound to do more than to make out a *primâ facie* case, and he is not to be expected to prove that the tenure is not liable for sale. It is the attaching creditor who must show that it is.

We reverse the decision of the Principal Sudder Ameen, and remand the same to be tried by him on the principles by which it was tried in the first Court. The Lower Appellate Court will call on the creditor to show how he claims to put up the property to sale.

The 5th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Onus probandi—Possession.

Cases Nos. 3304 to 3308 of 1865.

Special Appeals from a decision passed by the Principal Sudder Ameen of Behar, dated the 13th September 1865, affirming a decision passed by the Moonsiff of that District, dated the 31st March 1865.

Lalla Ram Suhae Singh (Defendant), *Appellant,*

versus

Lalla Ojoodhya Pershad (Plaintiff) and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Kalee Prosunno Dutt* for Appellant.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondents.

In a suit by *A* for confirmation of possession and declaration of title, in which *B* intervened and claimed the property on the allegation of being in possession of it (which possession *B* did not show), and in which *B's* vendors were the principal defendants, and admitted *A's* title and possession—HELD that *B*, as intervenor, could not question *A's* proved possession and title until at least *B* could show possession.

THESE five cases will (it is admitted by the pleaders before us) be governed by one and the same decision in special appeal.

The special appellant is an intervenor, who, under the provisions of Act VIII., was made a defendant, and so a party to the suit. He claimed the property upon the allegation of being in possession under a title derived from his uncle, one Bulub, but added that *this* Bulub also derived title from having purchased the property then held by Pitamber (admittedly one of plaintiff's vendor's family).

Plaintiff's suit is for confirmation of possession, and declaration of title, and mutation of names. Plaintiff alleges possession under purchases made by him from Ram Pershad and Ram Buksh and their two widows (who represented their husbands in this suit), and states their vendors to be great-grandsons of *another* Bulub, the original proprietor.

The Lower Courts find as a fact, on the evidence of an Ameen and other evidence, that plaintiff has proved possession and title, and that Bulub was plaintiff's vendors' great-grandfather. The widows, who are the only parties originally sued as defendants, admit plaintiff's title. No proof of defendant special appellant's allegation of possession is found by the Lower Courts, who, therefore, consider that he has no further *locus standi* in Court, as he does not show that he has been in possession within twelve years of suit. The plaintiff's suit was accordingly decreed below.

The defendant (intervenor) appeals specially, urging that the burden of proof has been wrongly put on him; that the Courts should have made plaintiff prove otherwise than by an Ameen that Bulub was plaintiff's vendors' great-grandfather; and,

lastly, that his (defendant special appellant's) proofs have not been considered.

We think all these pleas utterly untenable. Special appellant, defendant, could have no further right to question plaintiff's proved possession and title till at least he (special appellant) could show possession. He utterly failed in this; and the *onus* was on him when plaintiff was found to be in possession, and plaintiff's alleged title to be good. Further, we are not shown that the Lower Courts failed to consider defendant special appellant's proofs, such as he had to adduce.

On the whole, then, seeing no reason to interfere with the decision of the Lower Appellate Court, we dismiss these five special appeals with costs.

The 7th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Plaint—Rejection—Amendment.

Case No. 33 of 1866.

Regular Appeal from a decision Passed by the Principal Sudder Ameen of Sarun, dated the 2nd September 1865.

Amur Narain *alias* Nerput Suhaye, *Pauper* (Plaintiff), *Appellant,*

versus

Musst. Rughoobunsee Koonwur and others (Defendants), *Respondents.*

Baboos Kalee Kishen Sein and *Tarucknath Sein* for Appellant.

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 20,631-2 annas.

A plaint that is bad on the face of it ought not to be admitted; nor ought it to be amended after the issues have been fixed.

THIS appeal is dismissed with costs. The Lower Court was perfectly right in refusing to allow the plaint to be amended as proposed, after the issues had been fixed. The plaint is bad on the face of it, and shows that the plaintiff is not entitled to what he prays for. It is to be regretted that the plaint was not rejected in the first instance by the Court; certainly, the plaintiff ought not to have been admitted to sue as a pauper, when, on reading the plaint, it might have been seen that he had no good cause of action.

The 7th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence.

Case No. 249 of 1866.

Special Appeal from a decision passed by the Judge of Patna, dated the 20th November 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st February 1865.

Munnoo Singh and others (Plaintiffs), *Appellants,*

versus

Amrut Lal and others (Defendants). *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Onookool Chunder Bose and *Mohesh Chunder Bose* for Respondents.

The defendant having stated his readiness to rest his case on the evidence of two witnesses, who, when called, gave testimony unfavorable to him—HELD that the Court was not bound to adopt or act upon their evidence, which was inconclusive and chiefly hearsay.

THE ground of special appeal urged before us is, that the defendant having stated in the Court of first instance his readiness to rest his case on the evidence of two witnesses whom he named, and those witnesses having, when called, given testimony unfavorable to the defendant, the Lower Appellate Court was bound to have treated that testimony as conclusive against him, and should have dismissed his appeal. The Lower Court, notwithstanding the evidence of these witnesses, allowed the defendant's appeal, and reversed the decision of the first Court.

We think the Lower Court was right in not considering itself bound by the statements of the witnesses in question, because their evidence really does not prove anything, and is, in truth, as the Judge says, more an expression of opinion than a deposition as to absolute facts. The one witness knows nothing about the matter save what he has heard from others; the other deposes unfavorably to the defendant, but speaks only so far as he knows, and not with such personal knowledge of the facts as alone could make what he says conclusive.

In deciding thus, we are not in conflict with the decision recently passed by a Division Bench in the Case 2096 of 1865

(November 25th, 1865). In that case, the defendant summoned the plaintiff, and agreed to be bound by his evidence on a certain point. The plaintiff appeared and swore distinctly and expressly to the facts which were in dispute; and under those circumstances it was that the Court held that the defendant was bound by his agreement, and concluded by the evidence of the plaintiff.

We dismiss this appeal with costs.

The 7th May 1866.

Present:

The Hon'ble F. B. Kemp and G. Campbell, *Judges.*

Native converts to Christianity—Restitution of conjugal society—Custody of children.

Case No. 3067 of 1865.

Special Appeal from a decision passed by Mr. R. Alexander, Judge of Cuttack, dated the 28th July 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 27th March 1863.

Muchoo and others (Defendants), *Appellants,*

versus

Arzoon Sahoo and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboo Romanath Bose* for Appellant.

Mr. Beeby and *Baboo Hem Chunder Banerjee* for Respondent.

A suit cannot be maintained for the restitution of conjugal society by a Hindoo husband, who has been repudiated by his wife on his conversion to Christianity.

A Hindoo father is not deprived of his right to the custody of his children merely by reason of his conversion to Christianity.

Campbell, J.—THIS is a suit brought by a father to recover possession of his wife and three children who are in her custody, all the children being admittedly minors. The answer of the wife was that the father, having been a Hindoo, had become a Christian, and that she was, therefore, not bound to live with him, or deliver the children to his custody.

The Principal Sudder Ameen and Judge both concurred in dismissing the claim to the wife, but decreeing the claim to the custody of the children, with the provision that one child being under 4 years of age should not be delivered up until it had attained that age.

A special appeal is now preferred by the mother against that part of the Judge's order decreeing to the father the custody of the children.

The pleader for the special appellant at first argued that in such a matter the law of the defendant must govern the case, and that by Hindoo Law the plaintiff, by his conversion, sacrificed his right to the custody of the children. This contention is altogether erroneous. A certain Regulation applicable to the Benares Courts was enacted in 1795, which did indeed provide that in cases where the plaintiff's religion was different from that of the defendant, the decision should be regulated by the law of the defendant. But Regulation VII. of 1832 expressly repealed the former provision, and enacted for the whole of the Bengal Presidency a uniform law coinciding with one which came into operation in Bengal Proper in 1793. Under the provisions of Regulation VII. of 1832 it is enacted that, in certain suits regarding succession, inheritance, marriage, caste, and all religious usages and institutions between parties of the Hindoo and Mahomedan religions respectively, the law of their respective religions is to be administered; but in respect of all other suits between any parties, and all suits of every kind in which both parties are not of the same persuasion, the only law is that of justice, equity, and good conscience. Upon this provision of the law, the pleader for the appellant seeks to argue that, on principles of justice, equity, and good conscience, the custody of the children should remain with the wife, and not with the husband, because, he says, at the time of the marriage it was understood, and as it were impliedly contracted, that the parties should remain Hindoos, and therefore one of the parties having abandoned the Hindoo religion should not be permitted to claim the children, the fruit of the marriage, to the exclusion of the party who continues in the religion which they both professed at the time of the contract of *connubium.*

This contention may possibly admit of reasonable argument. I cannot, however, think that, even if there were no further provision of law, this equitable claim on behalf of the mother would prevail to such an extent as to override the very strongest natural right of the father—the right to the custody of his own children. But, be that as it may, I think that we are relieved of all questions regarding the construction of the old Regulations by the express provisions of Act XXI. of 1850, which so far extends

the principle of Regulation VII. of 1832 that, whereas the last-mentioned Regulation contained an express provision to the effect only that, where one or more of the parties to a suit should not be of the Hindoo or Mahomedan persuasion, the law of the religion should not be permitted to operate to deprive either of any "*property*" to which he may be entitled, Act XXI. of 1850 so far extends that provision as to enact that no law or usage hitherto in force shall inflict on any person who renounces his or her religion any forfeiture of "*right* or property;" the word "right" being superadded. It seems to me clear that the right to the custody of children is a right within the meaning of Act XXI. of 1850.

The pleader for the appellant further argued that no one can be permitted so to use his right as to deprive any other person or persons of *their* rights. For instance, he says a husband who becomes a Christian will not be permitted to claim the person of a wife who remains a Hindoo. This is so far true; and in this case the claim to the wife was rightly dismissed, but was, I think, dismissed simply for the reason that, admitting the husband's *primâ facie* claim to the custody of the wife, that claim may be defeated by a reasonable plea. If a wife pleads that her husband beats and ill-uses her in such a way that she cannot reasonably be required to live with him, and that plea is made out, doubtless the Court will not enforce a restitution of conjugal rights. So also, if she pleads that the husband, by change of religion, has placed himself in that position that she cannot live with him without doing extreme violence to her religious opinions and the social feelings in which she has been brought up, and in the enjoyment of which she married, that plea would also be a good plea.

I have no doubt that, if the children, even though not legally majors for the purposes of property, had arrived at that age of discretion that they could plead an intelligent and distinct preference for the Hindoo religion, the Court would probably not forcibly deliver them up to the father. But that is not alleged in this case. The exact age of the two elder children is not precisely mentioned; but, as the youngest was under 4 years old, a mere infant, and as it has not been pleaded that the others are very much older, we may presume that the two elder children are of such an age that, while it is no longer necessary for them to remain with the mother for the purposes of nature, they are not capable of fully judging and acting for themselves with regard to religion.

That being so, I think that the Judge rightly ordered the two elder children to be delivered up, and rightly ordered that the third child should be delivered up when, emerging from the mere state of infancy, it reached the age of four years.

The judgments of the Principal Sudder Ameen and Judge in this case are extremely exhaustive and good, and I altogether concur with them.

The Counsel for the respondent appears to take some objection to the order of the Judge which delayed the delivery of the third child till it was 4 years of age; but, as it appears that in the meantime the child has already reached that age, it is unnecessary to go further into this point.

The appeal is dismissed with costs and interest.

Kemp, J.—The plaintiff in this case is a Native convert to Christianity; he has been repudiated on religious grounds by his wife, who refuses to cohabit with him. She further claims the right to the custody of his three sons, all admittedly minors, the youngest being considerably under seven years of age, and who, therefore, may be properly termed an infant.

The suit is for conjugal society, the custody of his three sons, and the recovery of certain household chattels of no great value, or their equivalent in money.

The Lower Courts, in very carefully considered judgments, have, in my opinion, very properly dismissed the suit of the husband in as far as his claim to restitution of conjugal society is concerned. They have decreed his claim to the immediate custody of two of the three sons, the youngest to be delivered over to the custody of the father on his attaining the age of four years, which event, we are informed, has taken place since the decision of the suit.

The husband may or may not have a remedy, in as far as the wife is concerned, under Act XXI. of 1866, which commenced and took effect from the 1st of May 1866; but with that matter we have no concern in the present appeal.

The inherent right of the father to the custody of his children, not only as guardian by nature, but by nature, is a right recognised by the English as well as the Hindoo Law (page 63, Volume I., Vyavasta Durpana). Of this right the father is not deprived, because he has become a convert

to Christianity, though he may have become "potit," degraded according to the dictates of the Hindoo Law, for Act XXI. of 1850 clearly enacts that "no person shall, by reason of his renouncing or having been excluded from the communion of any religion, forfeit his rights or property." The law which bears upon this case has been so clearly laid down by my learned colleague that I have only to express my entire concurrence in his view of the law.

There is no charge of cruelty or corruption against the father, and applications by a mother to take children out of the custody of the father, in the absence of proof of such charges, have not been successful in the English Courts.

I concur with my learned colleague in dismissing this appeal with costs and interest.

The 8th May 1866.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Pre-emption—Hindoos in Chittagong.

Cases Nos. 24 and 25 of 1865.

Applications for Review of Judgment passed by Justices Bayley and Macpherson in Regular Appeal No. 162 of 1864 and Special Appeal No. 2240 of 1863 on the 18th February 1865.

Nasirooddeen Khan, *Petitioner,*

versus

Indernarain Chowdhry, *Opposite Party.*

Mr. R. E. Twidale and *Baboos Grish Chunder Ghose* and *Gopeenath Mookerjee* for Petitioner.

Baboos Dwarkanath Mitter and *Sreenath Doss* for Opposite Party.

Quære.—Whether the Hindoos of Chittagong have adopted the Mahomedan law of pre-emption.

Bayley, J.—This is an application for a review of our order passed in review.

The particulars of this case are fully given in Sutherland's Weekly Reporter, Vol. I, p. 234, 30th November 1864.

Plaintiff, a Hindoo in Zillah Chittagong, sued for a right of pre-emption.

The first question to be decided in the regular and special appeals then before us was whether the Hindoos of Zillah Chittagong had adopted the system of pre-emption prevalent amongst Mahomedans under the laws of that class.

If we had found that they had done so, the above cases would have been governed by the Mahomedan Law, and, so far as that point was concerned, the present petition in review would have succeeded. But we held that there was no such weight of evidence in those two or three cases which were adduced before us on the hearing of the appeal, and which decisions were contradicted by others, as would suffice to show that the Hindoos in Zillah Chittagong had adopted the system of pre-emption prevalent amongst Mahomedans. We accordingly dismissed the plaintiff's suit.

On an application for a review, Mr. Justice Bayley on the 30th November 1864 held that the Sudder Court's decisions on which the application was based did not apply, and that the Zillah decisions cited were of no weight.

Another pleader, Mr. Twidale, then applied for a review of the order in review, on the ground that there were eleven decisions on the record at the hearing of the first review, eight at least of which were never cited. As, however, the question was then pending whether a review of a rejected application in review could be entertained, the decision was postponed. The Full Bench having now held that such an application may be entertained, we have admitted and duly heard the review before both parties.

It has been argued to-day that, where (as here) there are *any* conflicting decisions, it cannot be held that the Hindoos of Chittagong have adopted as a *custom* the Mahomedan system of pre-emption, inasmuch as the plea of *custom* requires its invariability to be shown. I do not, however, think that the current of decisions of this Court on this point has looked to the point for decision as one of *custom*, but simply as to whether there was a prevalence amongst the larger portion of the Hindoo population of adopting that system of pre-emption which is based on Mahomedan Law.

Looking at the various decisions placed before us by both sides, I think that there is a preponderance of decisions which, treated as evidence, show that the Hindoos in Zillah Chittagong have adopted the system of pre-emption prevalent amongst Maho-

medans. No evidence of any other character is shown or relied on by either party. I can, therefore, only base my decision on what is before us. I accordingly would decree plaintiff's suit in reversal of our former order.

Macpherson, J.—I remain of the opinion, which I expressed on the first hearing of this appeal, that conflicting decisions of the subordinate local Civil Courts cannot legally be held to prove the existence of the alleged custom, according to which it is contended that the Mahomedan Law of pre-emption is in force among, and must be applied in the case of, Hindoos in Chittagong. Here we have no evidence whatever on the subject save certain decisions of the local Courts. I admit that they are in favor of the custom in a proportion somewhat greater than 3 to 1. Nevertheless the decisions are conflicting, and, as they conflict, cannot, in my opinion, prove the custom.

I would reject the application for review, and confirm our original decision.

Final Order.—As we differ as to granting the review, it is ordered, under the 10th of the Rules of Practice of May 1st, 1863, that this application be rejected.

The 8th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Trustees—Purchasers from Trustees—Mahomedans.

Case No. 3609 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 14th September 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 22nd June 1863.

Musst. Khyroonissa and others (Defendants), *Appellants,*

versus

Salehoonissa Khatoon and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Bama Churn Banerjee* for Appellants.

Baboo Dwarkanath Mitter, Greesh Chunder Ghose, and *Sreenath Doss* for Respondents.

Only *bonâ fide* purchasers from trustees are entitled to the benefit of Section 5, Act XIV. of 1859.

Section 2 of that Act is applicable to the case of a suit against the purchaser from a trustee who is not a *bonâ fide* purchaser, although he is himself a trustee in law.

Clause 13, Section 1, applies to Mahomedan as well as Hindoo families.

THIS case was remanded by this Court on the 2nd August last.

It may be convenient for readier reference to quote the subjoined portion of that remand-order:—

"In this case plaintiff sued for possession "of a share of joint ancestral property which "she alleged that she and her father had so "held, but of which defendant had dispos-"sessed her.

"Defendant's case was that neither plaint-"iff nor her father had any such joint pro-"perty nor possession; that he, defendant, "held under a hebba from his grandmother; "and that limitation barred the suit.

"The first Court found as a fact that the "plaintiff had never had possession within "twelve years of it, *and dismissed plaint-"iff's case without any reference to how "the question of limitation might be affect-"ed by the point whether in fact the land "was held under a separate title by de-"fendant, or was joint undivided ancestral "property, in which latter case the posses-"sion of defendant might not be adverse, "but that of a trustee for plaintiff and "other co-parceners; and this limitation "would not bar plaintiff.*"

Upon this remand, the Lower Appellate Court has decided as follows:—

"It appears from the arguments of the "pleaders of the litigant parties that the "original proprietor of the property in suit "was one Shaikh Mahomed Jakee, and that "he had two sons, a few daughters, and a "wife named Aberah Bibee. The objecting "defendants cannot state how the above "property became the exclusive estate of "Aberah Bibee; they simply state that, on "the date mentioned in the hebbanamah "filed in this case, she had made a gift of "the same to her eldest son, Mahomed "Mullar. This being so, this alleged un-

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"usual gift by the said lady of the whole "of her property to her eldest son, to the "utter disappointment of her youngest son, "should have been proved by the most for-"cible evidence. But no portion of the "evidence produced by the defendants es-"tablishes the above fact, while, on the other "hand, it has been satisfactorily proved, by "the evidence detailed in the margin, that "the property in suit is a joint estate, and "that it has been held by the defendant "Mahomed Mookhtierooddeen and his "father Mahomed Mullar in the capacity "of trustees. I have already recorded my "opinion concerning the proofs filed by the "objecting defendants; and as, according to "that opinion, it is proved that the hebana-"mah which constitutes their principal docu-"ment is a forgery, I think it cannot be said "that they have been in possession of the "property in litigation under any rights con-"ferred by it. Thus, then, since there is "no *proof* that the possession of the defend-"ants *was adverse* to the plaintiff, but "*rather such possession has been proved* "*to be that of a trustee*, it is manifest that "the Statute of Limitation cannot act as a "bar to the claim of the plaintiff."

Against this view of the Lower Appellate Court, defendant objectors, purchasers from the widows of Mookhtierooddeen, the son of the party who alleges the gift, appeals specially, and the pleader, Mr. Allan, strongly urges upon us that, under Clause 13, Section 1 of Act XIV. of 1859 and Section 5 of that Act, plaintiff's suit even against a trustee is barred.

Now, Clause 13 is this: "To suits to "enforce the right to share in any property, "moveable or immoveable, on the ground "that it is joint family property, and to suits "for the recovery of maintenance where the "right to receive such maintenance is a "charge on the inheritance of any estate, "the period of twelve years from the death "of the persons from whom the property "alleged to be joint is said to have descend-"ed, or on whose estate the maintenance is "alleged to be a charge, or from the date of "the last payment to the plaintiff, or any "person through whom he claims, by the "person in the possession or management "of such property or estate on account of "such alleged share, or on account of such "maintenance as the case may be."

Section 5 runs: "In suits for the re-"covery from the purchaser, or any person "claiming under him, of any property pur-"chased *bonâ fide* and for valuable considera-"tion from a *trustee*, depositary, pawnee, or "mortgagee, the cause of action shall be "deemed to have arisen at the date of the "purchase. Provided that, in the case of "purchase from a depositary, pawnee, or "mortgagee, no such suit shall be main-"tained unless brought within the time "limited by Clause 15, Section 1."

Section 2 has also been quoted. It obviously refers to cases where there is an admitted trustee against whom the *cestui-que* trust, or some one in his interest, is proceeding. Then as to Clause 13, Section 1, it does apply to this case, which is of a Mahomedan family. The words used in the Clause are "joint family property" and "property alleged to be joint," which are the usual terms with reference to joint *Hindoo* families. But we see no exception as to Mahomedan families, or why their respective rights by inheritance should not come under limitations prescribed generally against parties not trustees as well as trustees.

As to Section 5, it is with reference to purchasers "*bonâ fide* for valuable consideration from a trustee" that the date of the causes of action is indicated. Thus, it would seem to follow that Act XIV. treats other purchasers from a trustee as falling under Section 2, and, therefore, not getting a title by any lapse of time.

In the judgment in the Weekly Reporter, page 120, Volume V., No. 9, Campbell and Phear, JJ., state:—

"The Judge seems to have arrived at "this conclusion merely on the ground that "more than twelve years had, at the com-"mencement of suit, elapsed since the execu-"tion of the respective deeds of alienation. "We think that, under the circumstances of "the case, this is not sufficient. If the defend-"ants, at the time of taking their respect-"ive interests, were cognizant of a subsisting "trust affecting the property, or if reason-"able enquiry would have made them so, "then they would have taken the property "subject to the trust, notwithstanding they "paid full value for it, and would, in all "respects, stand in the shoes of the original "trustee. They would not be *bonâ fide* "purchasers from trustees entitled to the "benefit of the Act, but actual trustees "within the scope of the Clauses of the Act "which affect such persons. The plaintiff's "appeal must, therefore, be upheld."

Now, the real questions to be decided in this case are, were the vendors of objectors,

defendants, before the sale, holding in any manner as trustees for those from whom plaintiffs claim, or were they holding adversely ?

2. If they were in any respect trustees, was the defendants' purchase made from them in good faith ?

These are matters of fact, and the conclusions on them must be come to before the law can be properly applied.

If the hebanamah were genuine, it would have gone far to establish the ouster of all but the donee, and the fact of ouster or no ouster is the important one on which the law will have to be applied, as limitation would run from its date.

We may here remark that Act XIV. of 1859 in no respect alters the law as to who is and who is not in law to be deemed a trustee, and if a purchaser from a trustee *not bonâ fide* is in law a trustee (which he is), then Section 2 will apply.

Now, as to what is *bonâ fide*, the definition in the Penal Code (Section 32) is "nothing "is said to be done or believed in good faith "which is done or believed without due care "and attention."

Thus, is the purchaser here a *bonâ fide* purchaser in this sense ?

The Principal Sudder Ameen does not seem to find this fact, one way or the other.

Now, as the correct application of the law relied on by the appellant in the first instance depends entirely on the clear finding of fact whether the plaintiff's purchase is *bonâ fide* or not, and this fact has not been clearly found by the Lower Appellate Court, that Court will now come to a finding of a fact and apply the law as above indicated.

Remand accordingly

The 8th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Case No. 38 of 1866.

Putnee—Dur-putnee—Benamee—Damages.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Santipore in Nuddea, dated the 23rd December 1865.

Dwarkanath Misser (Plaintiff), *Appellant,*

versus

Sree Gopal Paul Chowdry and others (Defendants), *Respondents.*

Mr. R. V. Doyne and *Baboos Kishen Kishore Ghose* and *Khettur Mohun Mookerjee* for Appellant.

Mr. G. C. Paul and *Baboo Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 9,975.

A took a dur-putnee lease of a village from *B*, knowing that *B* held a *benamee* putnee of the whole estate from *C*, the zemindar. *C*'s rights and interests were sold in execution of a decree, and purchased by *D*, who afterwards sold them to *E*. *E* then successfully sued to set aside *B's benamee* putnee, and took khas possession of the property, whereupon *A* took a putnee of the same village from *E*. *E's* zemindary and putnee rights subsequently came back to *C*, whom *A* now sues to recover as damages the consideration he had paid for the dur-putnee. HELD that *A's* virtual abandonment of his possession, without trying to dispute in a Court *E's* right to oust him, barred his claim to damages for such loss of possession.

Where a putnee is found to be *benamee*, a *bonâ fide* dur-putnee does not necessarily lapse.

PLAINTIFF took a dur-putnee lease of a certain village under Sreemunt Koondoo, a relative and servant of Sree Gopal Paul Chowdhry, the zemindar, from whom there was a putnee of the whole estate in the name of the said Sreemunt Koondoo.

The rights and interests of the said zemindar being afterwards sold in execution of a decree against him, they were purchased by a member of the family of the zemindar, and were afterwards purchased by Messrs. Molloy, Mackintosh, and Co. from the first purchaser.

These gentlemen brought an action to prove that the putnee in the name of Koondoo was only a benamee for the debtor Sree Gopal Paul Chowdhry, and obtained a decree, and in execution of it took khas possession of the property, the plaintiff then losing possession of the village he had held in dur-putnee for about 8 years.

The plaintiff now sues to recover as damages the consideration he had paid for the dur-putnee, and sues Sree Gopal Paul Chowdhry as the party responsible, and who received the consideration from the plaintiff.

It appears that the zemindary and putnee rights acquired by Messrs. Molloy, Mackintosh, and Co. by purchase and by the decree, have,

by some subsequent arrangement, come back to Sree Gopal Paul Chowdhry, the defendant, and that the plaintiff had, previous to this transfer, obtained from Messrs. Molloy, Mackintosh, and Co. a putnee of the village he held as dur-putnee on the same jumma that he paid before as his dur-putnee rents.

The Court below decided that the plaintiff could not successfully plead his dur-putnee lease against Messrs. Molloy, Mackintosh, and Co., and dismissed his case for damages on other grounds mentioned in its decision.

The plaintiff has appealed against this decision, and the defendant has, by way of cross-appeal, raised the former issue which was decided below against him and in favor of the plaintiff, *viz.*, whether plaintiff, having of his own accord abandoned his dur-putnee, can sue as he does for the consideration.

The present claim of the plaintiff is brought on the ground of the zemindar having led the plaintiff to believe that the putnee under him in the name of Koondoo was a *bonâ fide* lease, whereas it turned out afterwards that it was not so. The plaintiff thinks that on this ground he is entitled to recover from the ex-zemindar this damage caused to him by the said zemindar's misrepresentation. It is also alleged that, under the finding of the Court against the *bona fides* of the putnee and according to the admission of the defendant himself, the putnee consideration having reached the defendant, the plaintiff is entitled to recover the same from him, as the principal party, *viz.*, the party to whom the plaintiff's money is traced, as the beneficial putneedar.

Now, the case, as proved below by the evidence of the plaintiff and of the defendant on oath, is this: that the plaintiff was informed by the defendant of the benamee nature of the putnee transaction; that he was all along dealing with the ex-zemindar; and as the latter would not grant a lease of it on the ground of his having already created a fictitious putnee in the name of Sreemunt Koondoo, the plaintiff was induced to take a lease signed by the said Sreemunt, and, therefore, it was called a dur-putnee; that the consideration money was paid by the plaintiff to the ex-zemindar, and he acknowledges the receipt of it. These facts might have been held sufficient to dimiss the case of the plaintiff as brought by him. We did not, however, think it proper to do so, but allowed them to proceed with the case as now proved. We find that plaintiff, either on the case brought by him or on the case as now proved, could successfully plead his right to hold possession of his dur-putnee against the purchaser of the rights and interests of his lessor, and the plaintiff having virtually abandoned his possession without trying to dispute in a Court the purchaser's right to oust him, is not entitled to recover any damages for such a loss of possession.

This decision is irrespective of the fact of the plaintiff having already acquired virtually the rights he complains he has lost, and of his having taken no steps to disclose how much, if any, additional advance he was required to make to Messrs. Molloy, Mackintosh, and Co. in order to obtain the putnee he now holds. In order to avoid any complication, we have regarded the right of the plaintiff under this subsequent lease to be a right quite different from his dur-putnee rights. We, however, think that the plaintiff could have successfully pleaded his right to possession against the purchaser of the rights and interests of Joy Gopal, the ex-zemindar and putneedar, as represented by the purchasers of the decree, by urging the *priority* of *his* dur-putnee right. The plaintiff could have shown that, at the direction of the ex-proprietor and with the knowledge of the benamee nature of the putnee lease (albeit, perhaps, without full knowledge of the reason for the benamee), or being assured either by the words or the conduct of the said ex-zemindar that the putnee was a rightful one, he had paid a valuable consideration for his dur-putnee. It does not follow by any law or precedent that, because the higher tenure is found to be a benamee transaction of the debtor, the dur-putnee under-tenure of the plaintiff acquired *bonâ fide* is to be lapsed.

If the plaintiff had been so mixed up with the actual fraud of the ex-zemindar that he could not, owing to that participation, plead a *bonâ fide* dur-putnee tenure against the purchaser in execution, the same complicity would necessarily (if it did exist) be a bar against the right of the plaintiff to receive any damages in a Court of justice even as against the said ex-zemindar.

Upon this ground, we dismiss the appeal of the plaintiff with costs, and, having so decided, we find it not to be necessary to go into the other arguments or grounds urged before us by the appellants.

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The 9th May 1866.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Limitation—Survey award without possession—Estoppel—Evidence—Jumma Wasil Bakee papers.

Case No. 284 of 1865.

Regular Appeal from a decision passed by Baboo Koylash Chunder Deb Roy Bahadoor, Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th June 1865.

Allyat Chinaman (Defendant), *Appellant,*

versus

Juggut Chunder Roy (Plaintiff) and another (Defendant), *Respondents.*

Mr. J. Cochrane and *Baboos Dwarkanath Mitter* and *Sreenath Doss* for Appellant.

Baboos Unnoda Pershad Banerjee, Onoocool Chunder Mookerjee, Anund Chunder Ghosal, and *Sham Lall Mitter* for Respondents.

Suit laid at Rupees 6,980-6 annas.

An infructuous survey award not followed by possession is no answer to a plea of adverse possession for more than 12 years after the date of the award.

A purchaser is bound by a survey-award passed against the persons from whom he derived his title.

The best evidence is required to prove a document so naturally open to suspicion as a *jumma wasil bakee* paper.

THIS suit was originally brought by one Pran Kristo Roy to recover possession of 4,000 beegahs of land as appertaining to his permanently settled Mouzah of Tardoho, Pergunnah Calcutta, from which he alleged himself to have been ousted by the defendants under an award made by the Magistrate in accordance with Act IV. of 1840, in the year 1851.

The defence was that the disputed land belonged to Mouzah Tehoria, the permanently settled estate of Kaminee Dossee, from whom it came by purchase and otherwise into the hands of the defendant in possession, Allyat Chinaman; that the possession of the defendant and his predecessors had extended over at least 12 years; and that the plaintiff was, therefore, barred by the Statute of Limitation.

The circumstances of the case have already been detailed in the order in the original suit No. 308 of 1863. Judgment was then given by the Principal Sudder Ameen in favor of the defendant Allyat Chinaman, who is admitted to have purchased 3,000 beegahs of the disputed land, and to have expended large sums in clearing jungle, on the ground that the plaintiff had not been able to show possession within 12 years of the institution of the suit. On appeal to the High Court on this issue, the case was remanded (21st May 1864, Trevor and Loch, JJ.) in order that the Principal Sudder Ameen might take into consideration the effect of the survey proceedings of 1849, by which the land now alleged to be in dispute was adjudged to belong to Mouzah Tardoho. The Court added: "If the lands are covered by that proceeding, the plaintiff's suit is clearly within time. The Lower Court should ascertain whether the lands in this case are identical with those mentioned in the survey proceedings."

The Principal Sudder Ameen found that the lands were identical, and, on the merits, gave a decree in favor of the zemindar of Tardoho.

Allyat Chinaman is the only one of the defendants who appeals against this decision; and Mr. Cochrane, on his behalf, contends that the survey proceedings are not binding on him, and, therefore, no evidence against his plea of adverse possession for more than 12 years. No attempt is made to contest the propriety of the Lower Court's order on the merits.

Now, it appears from the record, and the facts are not denied by the other side, that Kaminee Dossee, the proprietor of Mouzah Tehoria, gave a lease of 6,000 beegahs of land, within which the land now in dispute is admittedly included, to Nundo Nundun Ghose, on the 24th Bhadoon 1252 B. S. (4th September 1845), and afterwards on the 24th Falgoon 1253 B. S. (11th March 1847) granted a mourosee pottah of the same land to Bhoobun Mohun.

Bhoobun Mohun sold his lease to Punchanund on the 6th of Agraun 1255 B. S. (19th November 1848), who made over one-half of it to Ram Ruttun, and the other half to Shama Churn, on whose relinquishment of the land it was sold on the 8th Magh 1266 B. S. (February 1860) to the Chinaman Allyat.

The respondent, therefore, has undoubtedly been nominally out of possession of the disputed land since the date of the first conveyance by Kaminee Dossee in 1845, whilst there is no dispute as to his having been actually out of possession since the date of the Act IV. suit in January 1851.

The survey-proceedings by which the disputed land was awarded to Mouzah Tardoho are dated the 2nd August 1849, and if they are sufficient to prove the respondent's possession at that date, the present suit, which was instituted on the 6th of May 1861, is undoubtedly within time. We understand this to be the meaning of this Court's remand order, for it is manifest that an award which is not followed by possession, and therefore infructuous, is no answer to a plea of adverse possession after the date of the award.

Now, we are not prepared to admit that these survey-proceedings cannot be taken as evidence against the respondent, because he personally was no party to them. If such an argument were to be allowed, every purchaser, after a survey-award, would be entitled to dispute that award. The purchaser in such a case would, as a matter of course, be bound by any award passed against the persons from whom he derived his title; and if the survey-authorities, in a case between the zemindars of Tardoho and Tehoria, awarded the land now held by the appellant to the former, all who derived their title from Kaminee Dossee would be bound by that award.

But, admitting that the survey-proceedings are evidence against the respondent, the question remains—Did the respondent get possession under the award?

The appellant and those from whom he derives have undoubtedly been in possession since 1851—for more than 10 years, that is, prior to the institution of this suit, and the "*onus*," therefore, of proving possession before that date is heavily on the respondent.

To support it, he has examined some eighteen witnesses, and has produced jumma wasil bakee papers, and argues that, considering the nature of the disputed land, a dense uncultivated jungle, he has done all that can be expected of him.

We have gone through this evidence, and find it eminently unsatisfactory. The witnesses are persons who profess to have rented certain portions of small streams running through the land for fishing purposes: they depose to having held from the Tardoho zemindars at certain rents, and that these zemindars exercised rights of ownership on the land by selling fallen timber.

Not one of these witnesses produces either pottah or receipt for rent paid: they depose in the vaguest manner to everything connected with the respondent's possession and to the boundaries of the estate, and give us the impression of having been brought into Court to depose to one particular state of facts, and of being unable to answer any question not directly connected with them. They are, moreover, all either dependants or servants of the respondents.

But it is contended that their allegations are corroborated by the jumma wasil bakee paper filed by the respondent, in which the names of these ryots are entered. Now, we observe that such a document, a private memorandum made for the zemindar's own use and by his own servants, must be looked upon with great suspicion; for nothing could be easier, in a case like the present, than to supplement defective oral evidence by the production of a document which could be manufactured at any time and to any required pattern. Has, then, this document been attested? We think not. Doubtless, a person calling himself a Karkoon's Mohurir has been produced to depose to Issur Chunder the Tehsildar's signature to this particular paper; but the Tehsildar himself has not been examined, and it is not pretended that the man is either dead or unable to depose. The best evidence was required to prove a document so naturally open to suspicion, and that evidence has not been given.

But, even if these jumma wasil bakee papers be looked at, they really do not help the respondent in the least, for they merely say that persons bearing the same names as the *vivâ voce* witnesses were lessees of julkur rights within the respondent's estate, without specification of locality. There is nothing in them to show that these julkur rights extended to waters within the land which is in dispute between the parties to this suit.

It would be sufficient to state our opinion that this evidence is altogether insufficient to prove the respondent's prior possession of the land, and to disturb a possession on the part of the appellant which has admittedly existed for nearly eleven years; but there is a corroborative piece of evidence in favor of the appellant's possession on the record which it may be as well to mention. Some time after Punchanund got the mourosee lease from Kaminee Dossee, a dispute arose between him and Nundo Nundun, the original ijaradar, as to the right of possession, and the matter was fought out, first in the Criminal and afterwards in the Civil Courts, commencing in the year 1848, and not ending till the year 1851. The respondent appeared when the case was taken up in

appeal to the Sudder Court, having been silent all the time the suits were being carried on below; but the judgment was in favor of Nundo Nundun, who was confirmed in possession. Now, it can hardly be supposed that Punchanund and Nundo Nundun were expending large sums in litigation and fighting their case up to the Sudder Court for a period of 3 years to obtain a decree for possession of what, if the respondent is to be believed, another person *was already* and *had always been in possession!* or that Punchanund, after the decree against him, compromised the dispute by a private settlement of the amount due as wasilat, for nothing! It is admitted on all hands that the land in dispute between Nundo Nundun and Punchanund in the cases above referred to is identical with that now in suit, and the inference is very strong that, rightly or wrongly, the possession of the land was not with the respondent in 1848.

The mere fact of a survey-award will not prove possession, and there is no sufficient evidence to prove that anything ever came of that award, the fact in all probability being that the land awarded was then, to a great extent, covered with dense jungle and valueless. Now that the appellant has expended large sums in clearing the jungle and rendering the land culturable, the respondent has awoke to the value of an award which, at the time it was passed, was altogether nominal, and under cover of it would deprive an innocent purchaser of his property.

We are of opinion, therefore, on a review of all the evidence, that the survey-proceedings of 1849 do not prove that the respondent got possession of the disputed land at that time, and that the other evidence to prove respondent's possession before ouster under the Act IV. award is altogether insufficient.

The respondent's Advocate urgently pressed us with the fact that the land in question was of such a character, covered by jungle and morass, as to admit of but few acts of user on the part of its owner, and he argued that the respondent, by giving evidence of julkur lettings and sale of fallen timbers, had shown that up to 1851 he had enjoyed as much possession of the land as it was capable of. We have already said that the evidence so given was far too vague to establish the acts of user (to which it referred) within the land in dispute. But we further think that at least during the two years preceding the Act IV. award of 1851 the land was not altogether in the condition contended for. The overt act of the defendants, which, according to the plaintiff's Advocate, brought about the making of that award, was the construction of bunds; and it is obvious that, before that act took place, much time must have been consumed in clearing the land and in producing a partial state of cultivation. While such proceedings were going on, the possession of the waste-land which manifested no greater trusts than indefinite julkur rents, or the sale of a few fallen trees for 16 rupees, was in truth ousted. It is absurd for a plaintiff to say that his right of action had not accrued, because he was exercising the fullest rights of possession, considering the condition of the land, while all that time a stranger was making better and more advantageous use of the same ground.

We think that, if the plaintiff was ever owner of the land in suit, he was deprived of possession of it by a stranger more than 12 years before the institution of the suit, and has been adversely kept out of possession ever since. This suit is, therefore, barred by the Limitation Act, and, accordingly, we decree the appeal, so far as regards the party appealing, and reverse the Principal Sudder Ameen's decision with costs on the respondent.

Regular Appeal No. 285, in which Allyat Chinaman was the plaintiff, appellant, is stated to us by Mr. Cochrane, the appellant's Counsel, to be abandoned. This appeal is, therefore, dismissed with costs.

The 9th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence—Hindoo Law—Sale by mother and grandmother—Proof of legal necessity.

Case No. 3581 of 1865.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 30th August 1865, affirming a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Fureedpore, dated the 21st February 1865.

b

Obhoy Churn Doss and others (Plaintiffs), *Appellants*,

versus

Meer Saheb Ali and others (Defendants), *Respondents*.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

The recital of necessity in a lease is not *per se* legal proof of the existence of the necessity which, under Hindoo Law, may justify an alienation by a mother or grandmother.

In this case, plaintiff sued for possession from the defendant as holding without title. In the written statement of plaintiff, it was added that the mother and grandmother of plaintiff could give no permanent lease, as they had done.

The first Court decided in favor of defendant.

In appeal, the plaintiff urged before the Lower Appellate Court that there was no power in the lessors (mother and grandmother) to lease to defendant in perpetuity, as the estate yielded sufficient of itself to render the transfer unnecessary.

The Judge has held that, as the lease is proved to be genuine, and recites the necessity of transfer to have arisen in order to provide for maintenance and funeral expenses, the defendants were entitled to a verdict.

In special appeal, it is urged that such recital is not sufficient; that, as the special appellants, plaintiffs, in their written statement, had denied the legal power of both mother and grandmother to give a perpetual lease; and as they had set forth in their grounds of appeal that the estate was free of incumbrance and capable of giving a profit, the Judge was bound to adjudicate on the plea. We think this objection valid. Plaintiff's written statement sufficiently raised the plea below, and the Judge had it clearly in appeal before him. The recital in the lease is not of itself and alone, as here, legal proof of the existence of the necessity which, under Hindoo law, may justify a mother or grandmother making such an alienation as there was in this case.

We, accordingly, remand the case to be re-tried with reference to the above remarks.

The 9th May 1866.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges*.

Onus probandi—Possession.

Case No. 2989 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 27th June 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 31st December 1863.

Haradhun Dutt (one of the Defendants), *Appellant*,

versus

Koonjo Beharee Lall Singh Baboo (Plaintiff) and others (Defendants), *Respondents*.

The Appellant in person.

Baboo Woopendur Chunder Bose for Respondents.

Where a plaintiff claims certain tanks on the allegation that they are his Khamar property, and have been in his own possession, and that the defendant has wrongfully seized them, and sold the produce, the *onus probandi* is on the plaintiff.

We think that the Lower Appellate Court has wrongly ruled that the *onus* of proof lies on defendant. Plaintiff alleges that the disputed tanks are his Khamar property, and have been in his own possession, that defendant has wrongfully seized them, and sold the produce. Upon such a declaration, we think that it lay on plaintiff to prove his case. The *onus* having thus been as matter of law misplaced, we remand the case for re-trial. If the Lower Appellate Court is not satisfied with the finding of the first Court, he should call on plaintiff for his proofs, summon him into Court with his papers, and, if he proves that the disputed tanks really were in his khas possession, then, and then only, he should have a decree. Remand accordingly.

The 9th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Onus probandi—Possession.

Case No. 343 of 1866.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 6th December 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 24th June 1865.

Chunder Monee Chowdhrain (one of the Defendants), *Appellant,*

versus

Raj Kishore Shaha (Plaintiff) and others (Defendants), *Respondents.*

Baboos Mohendro Lal Shome and *Bhugobutty Churn Ghose* for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

A plaintiff suing for possession of lands must rely on the strength of his own title.

THE question being whether the plaintiff had a good title to certain land by virtue of his having purchased it at a sale in execution of a decree of a Civil Court, the Sudder Ameen found that his title was not good, because the land was not included in the sale at which the plaintiff purchased. The Sudder Ameen, therefore, dismissed the suit.

On appeal, this decision was reversed by the Judge. The Lower Appellate Court recites that the Court of first instance had found as a fact that the land in dispute was not included in the plaintiff's purchase, but the Court expresses no opinion as to the correctness or otherwise of this finding. The Lower Appellate Court has in truth not declared distinctly that the plaintiff has any title to the land, but decrees possession on the ground that, whatever the plaintiff's rights may be, the defendants can have no title. The fact that the heir of the judgment-debtor, whose property was sold, admits that the plaintiff purchased this land, and the fact that the plaintiff has made a settlement with the zemindar for this land, seem to have been considered by the Judge to prove that the land was included in the sale. If the Judge was of that opinion, he should have said so distinctly. The plaintiff seeks to eject the defendants, and he must prove his title strictly before the defendants are called upon to prove theirs. The plaintiff can get a decree only on the strength of his own title, not on the weakness of that of the defendants. The decision of the Court of first instance was careful and apparently good; and the Appellate Court ought not to have reversed it without showing clearly the grounds on which it acted.

The case is remanded to be re-tried by the Lower Appellate Court with reference to the above observations.

The 10th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Assignment of property by Hindoo woman without consideration and without proper advice.

Case No. 50 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 15th August 1865.

Soondur Koomaree Debia and others (Defendants), *Appellants,*

versus

Kishoree Lal Sein (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Bama Churn Banerjee* for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

Suit laid at Rupees 7,000.

A Hindoo woman signed a deed giving away her whole property which was considerable. There was no consideration for the deed, and it was executed by the woman when surrounded by the friends of the person in whose favor the gift was made, and without her having any proper or independent advice. She subsequently refused

to carry out her gift. The Court declined to enforce the deed, and set it aside as improperly obtained.

Seton-Karr, J.—THIS is a case in which the plaintiff sued to recover possession of certain properties which the female defendant Soondur Koomaree had made over to him by a deed of Arpunnamah or assignment. His case was that, in return for his attendance on her as a physician, she had executed this deed, and had actually made over the properties, when, owing to the bad advice and interference of her brother, she repented of her gift, and the brother Muddun Mohun dispossessed the plaintiff.

The Principal Sudder Ameen has given the plaintiff a decree, holding that the Arpunnamah is well proved; that a will set up by the co-defendant Muddun Mohun is not proved; and that, although the plaintiff is a Soodra, there is nothing to prevent him delegating to others the duties of Deb Sheba or worship, imposed on the incumbent of the property.

In appeal, a considerable deal of valuable time has been wasted in an attempt on the part of the appellant to shake the evidence for the execution of the Arpunnamah. As the Lower Court remarks, it is seldom that such an array of really respectable, and we may add, trustworthy witnesses, is produced to prove the execution of such a deed, and one of a very recent date. There cannot be the slightest doubt that the deed was executed by Soondur Koomaree at the time and place and in the manner so clearly described. The deed, moreover, was registered.

But, for all this, the plaintiff cannot be permitted to retain his decree, or to hold the valuable properties of which he alleges himself to have been dispossessed.

Our Courts are Courts of equity; and, in this character, they look with particular jealousy on any proceedings, however plausible, by which persons incapable of judging of their own interests, or of acting for themselves, such as widows and minors, are deprived of the management and enjoyment of their properties.

No consideration is assigned in the Arpunnamah, and none is spoken of by the witnesses attesting the deed. The deed is very cunningly drawn up in the style and language most favorable to the plaintiff. The co-defendant, with whom the plaintiff was then at issue, but with whom she is now reconciled, is therein spoken of as irreligious and a man of bad character; and the main reason for the assignment of the property by the widow is that she had been cured of divers grievous illnesses by the plaintiff.

Almost immediately after the execution of the deed, the widow repented of her assignment, and was reconciled to her brother Muddun Poorohit. The plaintiff, though he asserts his possession of, and dispossession from, the property, has not shown us by any evidence that he ever exercised any act of dominion over the estate; and we certainly shall not permit a person, who takes advantage of a temporary quarrel in a family, and who entraps a widow, deprived of the advice and countenance of her natural protector, into signing such a deed, to profit by a document hastily extorted, and soon recalled.

We ought to set aside the Arpunnamah on the ground of the exercise of undue and improper influence by the plaintiff, and we should decree the appeal of the widow Soondur Koomaree with all costs.

Muddun Poorohit may pay his own costs throughout.

Macpherson, J.—I concur. The deed of gift under which the plaintiff claims, assigns to him Soondur Koomaree's whole property, valued at about 7,000 Rupees, and leaves her absolutely dependent upon the plaintiff even for her maintenance. The transaction was purely one of gift, being wholly without consideration. The deed was executed by the appellant Soondur Koomaree at a time when she had just quarrelled with her brother-in-law, who appears to be her nearest male connexion. It was executed by her at a time when she had not a single friend or adviser of her own near her, and when she was surrounded by the friends of the plaintiff. There is nothing to show that the consequences of what she was doing were ever placed before her mind, or that she in fact at all considered what she was about. She herself disputed the deed a few days after she signed it. She never acted on it, and the plaintiff never had possession under it, and, therefore, never was dispossessed by either Soondur Koomaree or her brother,—the statements in the plaint as to possession and dispossession not being supported by any evidence whatever.

Such a deed of gift, executed by a Hindoo widow under such circumstances, is not a document to which the Courts will give effect. The gift is one obtained, if not by undue influence, certainly without Soondur Koomaree being duly cautioned or having any proper or independent advice; and it cannot be supported by any Court of equity.

The 10th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Local Investigation—Refusal to order.

Case No. 3368 of 1865.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 24th August 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 13th December 1864.

Raj Kishen Mookerjee (Plaintiff), *Appellant,*

versus

Huro Mohun Mookerjee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Baboos Mohendro Lall Shome and *Pearee Mohun Mookerjee* for Respondents.

The ordering of a local investigation is purely a matter of judicial discretion. The refusal to order a local investigation is not a defect in law.

As a general rule, it is purely a matter in the discretion of the Court below whether an Ameen shall be sent to make a local investigation, and that being the only question raised by the Vakeel for the special appellant, it might be enough to say that the refusal to order a local investigation was not a defect in law.

* * * *

The appeal is dismissed with costs and interest.

The 11th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Non-delivery of bill of sale by vendor.

Case No. 362 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 16th November 1865, modifying a decision passed by the Sudder Ameen of that District, dated the 24th April 1865.

Lalla Judurjeet Lal Gujadhur *alias* Pershad (Plaintiff), *Appellant,*

versus

Musst. Jumoona and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Mr. R. E Twidale and *Baboo Kalee Kishen Sein* for Respondents.

A bill of sale, though signed and registered, was never delivered by the vendor. The plaintiff's case was that he had paid a part only of the purchase-money. HELD that no question could arise as to *onus* of proving payment of the consideration-money, and that, the Lower Court having found as a fact that no part of the purchase-money had been paid, the vendor could not be compelled to complete the transfer.

Seton-Karr, J.—THE question of who is to prove the non-receipt of the consideration-money does not arise in this case. There appear to be conflicting decisions on this point, but, as we have said, the point of the *onus* does not arise.

Neither can this case have any analogy to the case reported at page 601 of the Sudder Decisions for 1858. In that case, the deed of sale had been delivered to the plaintiff, who sued for possession and registration of his name. In this case, there has been, admittedly, no delivery of the title deed or deed of sale to the plaintiff. He cannot, therefore, claim any benefit from his plea that he has paid part of the purchase-money.

He is simply left without a title; and the Lower Appellate Court was quite justified in dismissing his case, and in upholding another and a subsequent sale of the same property.

The special appeal is dismissed with costs.

Macpherson, J.—The bill of sale in this case, though signed and registered, never was delivered by the vendor. The plaintiff states that he paid only part of the consideration-money, and the Lower Court finds as a fact that he did not pay any part of it. No question can arise, under the circumstance, as to *onus* of proof; nor can the appellant now, in my opinion, force the vendor to complete the transfer on being paid the purchase-money.

The appeal will be dismissed with costs.

The 11th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Hindoo Law—Re-union—Succession.

Case No. 237 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 8th November 1865, affirming a decision passed by the Moonsiff of that District, dated the 27th May 1864.

Tara Chand Ghose (one of the Defendants), *Appellant,*

versus

Pudum Lochun Ghose and others (Plaintiffs), *Respondents.*

Baboos Uprokash Chunder Mookerjee and *Anund Chunder Ghosal* for Appellant.

Baboo Bungsheedhur Sein for Respondents.

In a Hindoo family, where re-union has taken place among certain members after partition, the members of the re-united family and their descendants succeed to each other to the exclusion of the members of the unassociated or not re-united branch.

The question in this case is as to the right of inheritance in a Hindoo family, when, after a partition has taken place, certain members of the family have been re-united. Four brothers—Baboo Ram, Radha Kant, Ram Ram, and Goluck Chunder—made a partition of their property, and became separate from each other in all respects. The plaintiffs are the sons of Ram Ram, and the defendant (who is the appellant in this Court) is the son of Baboo Ram. The point in dispute is as to the right of succession to the estate of Mothoornath, the son of Sreenath, the son of Radha Kant. Mothoornath left a widow, Goluck Monee, who was his heiress. She is now dead, and the plaintiffs contend that they, as the two sons of Ram Ram, and the appellant, as the son of Baboo Ram, are the next heirs of Mothoornath, and entitled to inherit his estate equally, each taking a one-third share of it. The appellant admits that the plaintiffs stand in exactly the same position as himself with reference to Mothoornath, so far as mere blood-relationship is concerned. But he claims the whole inheritance for himself, to the exclusion of the plaintiffs, on the ground that his father and Mothoornath's grandfather (that is to say, the brothers Baboo Ram and Radha Kant) became re-united, and that they and their sons and representatives have ever since lived as a joint family. The appellant contends that, according to Hindoo Law, when the parties claiming stand in the same degree of blood-relationship, he who is of the associated or re united family takes, to the exclusion of the unassociated branch who remain wholly separate.

In both the Lower Courts, the issues raised have been—*first*, as to the question of law; and, *second*, as to the question of fact, *viz.*, as to whether any re-union, properly so called, ever took place as alleged. The Lower Appellate Court decided the question of law against the defendant, but did not decide the other issue, considering it unnecessary to do so—which, no doubt, it was, if the Court was right in the opinion that, even if a re-union had taken place, the defendant was not entitled to the exclusion of the plaintiffs.

The appellant urges, in special appeal, that the Lower Court was wrong in the view it took of the law as to the effect of re-union; and, therefore, that it was wrong also in not enquiring into the issue of fact as to the re-union.

It appears to us that this appeal must be allowed, and that the case must be remanded in order that the Lower Appellate Court may decide whether or not any re-union (in the sense in which the word is used in Hindoo Law) ever in fact occurred, and whether Mothoornath, at the time of his death, was a member of a re-united and associated family, of which Tara Chand, the appellant, was also a member, but in which the plaintiffs were not included.

Re-union does not seem to take place frequently among Hindoos in the present day, if we may judge from the scarcity of reported cases in the Courts which have any bearing upon the subject. Nevertheless, there is no doubt that re-union has always been recognized by the Hindoo Law, and that the right of succession is affected by it. Indeed, if re-union be recognized at all, we certainly should expect to find that it affected the law of inheritance, when we consider the general principles on which that law is founded, and when we bear in mind the extent to which joint tenancy among members of the same family is favored by the Hindoo Law. Sir Francis Macnaghten, in his "Considerations on Hindoo Law," page 107—admitting that he knew of no instance of re-union after partition, and that the Pundits had not been able to inform him of any such case—makes some attempt to lay down the law as to re-union and its effects: practically, however, he does nothing

beyond placing together a series of contradictory texts, and calling attention to the endless confusion which exists on the subject. We are far from saying that the law is clearly or satisfactorily laid down in the books of those writers who are deemed authorities on Hindoo Law. The texts are in many respects obscure, inconsistent, and confused. But however unfrequently cases of re-union may be met with, still, when a case of it does occur, the ancient Hindoo Law, if it can be discovered, must be applied to it. The conclusion at which we have arrived on the present occasion is the result of a general consideration of all the authorities, and of the principles on which re-union, and the few rules as to inheritance in re-united families which are distinctly given, are based.

In the Dyabhaga, Chapter XI., Section 6, para. 39, we find it declared: "If there be "competition between claimants of equal "degree, whether brothers of the whole-"blood or brothers of the half-blood, or "sons of such brothers, or uncles, or the "like, the *re-united parcener shall take the* "*heritage;* for the text does not specify the "particular relation, and all these relations "were premised in the preceding text, and "a question arises regarding all of them: "therefore the text must be considered as "not relating exclusively to brothers."

This paragraph is directly in favor of the appellant, and there is nothing to alter its effect in the preceding paras. 26-38, which all have, more or less, bearing on the question. For the respondents, it is argued that it is only as between the persons actually named in these texts, *i.e.*, brothers, uncles, &c., that re-union causes any change in the rule of inheritance. But it appears to us that, though the texts may limit the classes of persons to whom it is permitted to re-unite themselves, they do not limit the continuance of the re-union once properly effected: in other words, we think that, if a re-union actually takes place between the proper parties, their representatives and descendants, however remote, will remain joint until a fresh partition takes place, exactly in the same manner as in an ordinary case of a joint family the members remain joint until partition.

The Dya-krama-Sangraha—which we construe as we do the Dyabhaga—likewise generally supports the appellant's case (*see* Chapter V., para. 8, and the other paragraphs of that Chapter); so also does the rule as stated in the Vyavastha Durpana of Baboo Shama Churn Sircar. And Colebrooke's Digest, Book V., Chapter VIII., Section 1, para. 433, pp. 561, 562 (Madras Ed. 2nd Volume) does not seem opposed to it, although so expressed as to be almost wholly unintelligible.

The text books of the other schools of Hindoo Law lead to the inference that, according to those schools also, the appellant, if re-united as alleged, would take the inheritance (Mitakshara, Chapter II., Section 9; Vyavahara Mayukha, Chapter IV., Section 9; Vivada Chintamoni, Chapter "On succession to property of re-united parceners," page 304).

In the second Volume of Macnaghten's Hindoo Law, page 72, there is a case which is very much to the point. Five brothers having separated, two of them re-united. One of them having died childless, it was held that the sons of the re-united brother took, to the exclusion of the sons of the other brothers: the "property "should devolve on his re-united brother "only, on whose death his son alone is "entitled to the succession. The sons of "the unassociated brothers have no title "thereto." So, in another case at page 173, three brothers in the lifetime of their father caused him to divide his estate among them, and from that time one brother lived apart, and the other two lived together as a united family. After the father's death, one of the united brothers died childless. It was held that, if there was no clear evidence of re-union, *all* the brothers of the deceased would share equally, but if there were particular evidence of an express and distinct re-union, then the associated brother alone succeeded, to the exclusion of the unassociated brother.

In a case in the High Court at Madras (Stokes's Reports, Volume II., page 235), to which the Mitakshara Law would be applicable, the question of the right to succeed by reason of re-union was raised, but it was not decided, because it was held that the re-union was not proved.

On the whole, although we have been referred to no decided cases which completely support the appellant's contention, and although we know of none save those which we have quoted, we are of opinion that, if he can establish the re-union, he is entitled to succeed, to the exclusion of the plaintiffs. The case is, therefore, remanded for trial on the issue as to the fact of re-union; and the Lower Court will decide the case on the facts finally, taking the law to be as we have laid it down in this judgment.

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The 11th May 1866.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Joint Hindoo Family—Presumption—Onus probandi (of separation)—Limitation.

Case No. 10 of 1866.

Regular Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 27th November 1865.

Hureehur Mookerjee and others (Defendants), *Appellants,*

versus

Nobeen Kishore Banerjee and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboos Bama Churn Banerjee* and *Ombika Churn Banerjee* for Appellants.

Mr. G. C. Paul and *Baboos Mohendro Lol Shome* and *Pearee Mohun Mookerjee* for Respondents.

Suit laid at Rupees 30,381, 12 annas, 18 gundahs.

In a case of separate messing by Hindoos living in the same enclosure and with no apparent separate incomes, though, as mere presumption of law, the estate may be assumed to be joint until it is proved to be separate, yet, as the law limits such claims to 12 years, any honest party must be in a position to show whether he has had any enjoyment of the estate, either jointly or by division of profits, within that time.

THIS is a case regarding the property of a Hindoo family alleged to be joint in estate. It is admitted that the family springs from a common ancestor whose five sons are represented by five branches. The putnee, the surplus sale-proceeds of which are in dispute, was held as the ostensible property of the elder son Roop Churn, and by him transferred to his eldest son Joy Narain. It is, we think, clear that, up to a recent date, the whole family lived in what is by some called one enclosure with separate houses, by others one house with separate rooms. It is shown that, after the property in dispute was acquired, the different branches of the family separated in mess, that is, they eat separately in their separate compartments of the family dwelling-place. There is not the least evidence of separate acquisitions or separate income. The case of the plaintiffs, representing four of the original brothers, is that the family have been all along joint in estate; and they claim four-fifths as their share. The defendants, claiming under Joy Narain, assert that the putnee was his separate self-acquired and individual property. The first question raised is that of *onus*. On one side, it is contended that the family must be presumed to be joint in estate till it is shown to be separate; on the other, that plaintiffs are barred by limitation, unless they can show some kind of enjoyment of this ancestral property within the prescribed period. A case decided by Trevor and Campbell, JJ., is quoted, in which it seems to be laid down that, when the parties are separate in mess, it lies on plaintiff to show some sort of joint or other enjoyment of the estate; but that remark is at most *obiter*, since in fact in that case the party was not thrown out on this ground; and it seems probable that, if the case be examined, it will turn out that, though the words "separate in mess" are somewhat broadly used, the case is like another case also quoted, in which there was not only, as in this case, a separate messing by parties living in the same enclosure and with no apparent separate incomes, but in fact an apparent separation in mess, purse, and means of maintenance, the parties having adopted separate professions, one being a Dewan and the other a Jemadar of the Rajah of Tipperah. We are by no means prepared to say that, in this case, as mere presumption of law, we must not assume the estate to be joint till it is proved to be separate. But, be that as it may, it is evident that, the law limiting such claims to twelve years, any honest party must be in a position to show whether he has had any enjoyment of the estate, either jointly or by division of profits, within that time; and accordingly in this case both parties have given evidence on the point. We think that the evidence for the plaintiffs is, as found by the Principal Sudder Ameen, far preferable to that of the defendants. They give evidence circumstantial and, we think, reliable. Their witnesses by no means stretch the case in a partizan way in favor of plaintiffs; in fact, they have made us aware of several circumstances, so far favorable to defendants, which we should not have thought in any way proved by defendants' own evidence, *viz.*, that there was a separation in mess during the life of Joy Narain, and that, after Joy Narain's death, the name of his widow Drobo Moyee (mother of the minor Promothonath) was used in the management of the estate. Still we the more readily believe them when they testify that the family has all along been joint in estate. The defendants' evidence to separate estate is of the weakest description; there is no-

thing but the vaguest evidence of three or four persons, on whom we place no reliance whatever. Under these circumstances, we think it unnecessary to go further into the case, and dismiss the appeal with costs.

The 11th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement (under Section 49, Regulation VIII., 1793)—Evidence—Jummabundee papers.

Case No. 3520 of 1865.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 28th August 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 24th February 1864.

Romesh Chunder Dutt and others (Plaintiffs), *Appellants,*

versus

Modhoo Soodun Chuckerbutty and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Greeja Sunkur Mojoomdar* for Appellants.

Baboos Dwarkanath Mitter and *Unoocool Chunder Mookerjee* for Respondents.

Proof of the existence of the tenure *from* the time of the Decennial Settlement is sufficient to bar a suit for enhancement, where the plaintiff is not an auction-purchaser. Where the plaintiff is an auction-purchaser, he must show when he purchased before he can insist upon direct proof of the existence of the tenure 12 years prior to the Decennial Settlement.

The fact of the mention of a tenure in a jummabundee paper prepared 7 years before the Decennial Settlement affords the presumption of the existence of the tenure 12 years before the Decennial Settlement.

It is first objected by the special appellant that the order of remand has not been carried out. This plea is futile, as we find that the Lower Appellate Court unnecessarily made issues of each and all points indicated by the order of remand, and has duly adjudicated them.

It is further pleaded that a copy of the ikrar has been received without any proper proof of the existence of its original, or of sufficient reason for its non-production. Now, the Court below admitted the copy, because it was stated before it that the original could not be found, that it had not been traced, that the members of the defendant's family had been numerous: since the time of the execution of this deed, it might have fallen into hands other than those of the defendants producing the copy.

Then it is urged that the Lower Appellate Court has decided, upon insufficient proof and only upon incorrect assumption, that the lands to which this document refers may have formed a portion of Zillah Hooghly; moreover, that the case was brought there, where the attested copy was, because of the knowledge of the opposite party that the copy would be suspected if tried under the Twenty-four Pergunnahs Court, in the jurisdiction of which the land really was. Now, it is properly remarked by the pleader for the respondent that, as long as the decision of the Judge below regarding the *bonâ fide* nature of the deed and the correspondence of the attesting seal of the kazee with the seal of the said officer as attached to other papers—vakalutnamas—is not disputed, the question of jurisdiction is immaterial. The case in which the deed is said to have been produced in Hooghly need not have been of lands now in dispute, but still, the deed being connected with the case, it may have been necessary to produce it there. It is also evident that so old a deed, if such evidence to the copy as is produced here be not sufficient, cannot be proved at all. But, even if there were no such deed, the fixed nature of the tenure of the respondent is proved by other facts and evidence irrespective of the ikrar.

It is lastly pleaded that the jummabundee of 1190 and other papers relied upon by the Lower Appellate Court do not carry over the tenure of the respondent twelve years previous to the Decennial Settlement. and that this proof is required by Section 49 of Regulation VIII. of 1793, and the precedents of the late Sudder Dewanny Adawlut.

Now, it is clear that the existence of the tenure is traced by a decision of a Court of Justice at a time quite near the Decennial Settlement, and passed to compel the farmer of the landlord to return to the predecessor of the present ryot rents that he had exacted more than the said predecessor of the respondent had paid before. It is quite just and legal to presume from this fact, and from the mention of the tenure in the jummabundee papers of 1190, that the tenue existed upon the jumma that the respondent is now paying more than 12 years preceding the Decennial Settlement. This presumptive evidence is legal evidence, and, in a case of this kind, evidence of the most important kind.

The jummabundee of 1170 was made after Government had held the lands recorded in the said Register for several years, and the fact of a tenure or jumma being mentioned there shows the previous existence of the tenure or jumma for several years preceding the year in which this paper was prepared. The year itself is about seven years previous to the Decennial Settlement, and 5 years more are required to make up the 12 required by direct dates. These five years are supplied by the presumption on which we think it was quite legal under the law of evidence for the Lower Appellate Court to act.

Lastly, we do not see why the plaintiff should consider it necessary for the respondent to prove that the tenure existed twelve years before the Decennial Settlement. We think the fact of the existence of the tenure up to the Decennial Settlement is sufficient to bar the suit of the special appellant for enhancement. The special appellant does not plead any right of an auction-purchaser, and, if he did, he must show when he purchased before he can insist upon direct proof of the existence of the tenure 12 years previous to the Decennial Settlement. In fact, under no one of the sale-laws has he shewn himself, as he was bound to do, in a position to enforce the proof from defendant which he is trying to do as under Section 49 of Regulation VIII. of 1793.

On all these grounds, we dismiss this special appeal with costs.

The 15th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Limitation—Mortgage—Bona fide purchaser from mortgagee (Meaning of—under Section 5, Act XIV. of 1859).

Case No. 400 of 1865.

Regular Appeal from a decision passed by Mr. H. K. Madocks, Officiating Judge of Bhaugulpore, dated the 28th August 1865.

Messrs. Gisborne and Co. (Defendants), Appellants,

versus

Radhanauth Dass and others (Plaintiffs), Respondents.

Messrs. A. T. T. Peterson and *R. T. Allan* for Appellants.

Mr. R. V. Doyne and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee,* and *Romesh Chunder Mitter,* and *Moonshee Ameer Ali* for Respondents.

By *bonâ fide purchaser,* Section 5, Act XIV. of 1859, does not necessarily mean a *bonâ fide* purchaser *without notice,* but an honest purchaser without actual fraud. In this view, the defendants, who were purchasers from a mortgagee for valuable consideration of an estate with a doubtful title, were held, as *bonâ fide* purchasers, protected by Section 5, and entitled to plead, in a suit brought for the redemption of the mortgaged estate, the ordinary limitation of 12 years from the date of their purchase.

Norman, J.—This was a suit for the redemption and for obtaining possession of 14 annas of 36 villages in Talook Moheeawan, Tuppah Nyadesh, as the acquired property of one Bissumbhur Doss, the common ancestor of the plaintiff, and one Kunhyaloll, by whom the property had been mortgaged in November 1828 to one Russickloll for Shaw and Hawes. The plaintiffs seek to obtain a declaration that the sale had not become absolute as alleged by the defendants, the plaintiffs contending that Russickloll, acting for Mr. Shaw, in collusion with Kunhyaloll, obtained from him the return of an ikrar, and, in a certain suit of Bholanath Sahoo *versus* Kunhyaloll Doss, fraudulently claimed the estate as belonging to him absolutely, in order to prevent its being brought to sale for the debts of Kunhyaloll.

The evidence has been very fully taken and most elaborately and carefully considered by the Judge, who has made a decree in favor of the plaintiff.

The defendants appeal.

It appears that, on the 26th of May 1826, Talook Moheeawan was mortgaged by Kunhyaloll to Mr. Shaw to recover the sum of 13,739 rupees.

On the 7th of September 1827, Mr. Shaw gave the usual notification of foreclosure, under Regulation XVII. of 1806, to Kunhyaloll, Mr. Shaw alleging that 27,650 rupees was then due to him for principal and interest on the mouzahs now in dispute and Ugda.

On the 9th of September 1828, Kunhyaloll put in a petition, by way of answer, stating that he had received the notice and copy of the mortgage-deed, that he had executed the deed, having had extensive mercantile transactions with, and owing a considerable sum to, Mr. Shaw, but that the account had not then been balanced; and he alleged that, by the existing law, Mr. Shaw was precluded from taking possession.

We may remark that, at this period, Regulation XXXVIII. of 1793 (Sections 3 and 4) was in force, by which Europeans, though not prohibited from lending money to talookdars and others, were forbidden, *directly or indirectly, to hold possession of the lands*, the proprietary right in which might be mortgaged to them as security for the loan, or to make or appropriate the collections, or to have any concern or interference whatever in the management or collection of the rents or revenue of the lands. The foreclosure-proceedings would therefore be necessarily ineffectual.

It does not appear what became of the proceedings, or how the claim of Messrs. Shaw and Hawes was reduced. But on the 21st of November 1828, thirty-six villages of Talook Moheeawan (excluding Ugda, which, as we shall see, was afterwards mortgaged to another person for 17,000 rupees) were conveyed by a deed to one Russickloll Doss, the gomastah of the factory of Mr. Shaw.

The deed was to the effect that Kunhyaloll, being of sound mind, did, of his own free will, acknowledge that all the estate of Moheeawan had been in his sole possession as proprietor, no one else having any right to it, and that he sold the same to Russickloll Doss for Rupees 17,011, without any condition to render the same void.

Russickloll, with Kishen Gobind as his security, at the same time executed to Messrs. Shaw and Hawes an ikrar in the following words:—

"I, Russickloll Doss, resident in Muhusheemoonda, and gomastah of the Bhudeer Concern, execute this to the following effect:—

"The proprietor of the said Concern had to receive from Kunhyaloll Doss, the proprietor and zemindar of Talooka Moheeawan in Pergunnah Bhaugulpore, the sum of Rupees 17,011 on account of money lent, &c. Accordingly, for the said sum of Rupees 17,011, I have obtained from the said Kunhyaloll a conditional sale of the said talooka. Now, as regards the said sum, I agree to pay interest at 1 per cent. per mensem. I agree to repay the said amount with interest from 1236 to 1246 Fuslee out of the profits of the said talook. This ikrar-bond I execute of my own free will, that it may be used when required. Dated 21st November 1828, corresponding with 7th Aughun 1236.

"I, Kishen Gobind Doss, resident of Vooktea, do of my own free will affix my signature to this bond as malzamin or security.

"(Signed) Russickloll Doss.

——— what is within is genuine.

——— Rupees 17,011."

Russickloll Doss executed a contemporaneous agreement to Kunhyaloll, whereby, after reciting that Kunhyaloll Doss had sold 36 mouzahs of Moheeawan to him for a consideration of sicca Rupees 17,011, and had executed a bill of sale, &c., and had also executed an ikrar for effecting registration of the conveyance, and for registering the name of him (Russickloll) for liquidating the consideration-money with interest from the usufruct of the said mouzahs, &c.; and further reciting that Kunhyaloll had retained in his possession the said Mehal: therefore he (Russickloll) executed that ikrar in consideration that, from the amount which, after deducting the salary of a Tehsildar and the expenses of collection, should be remitted to him, interest at 12 per cent. per annum should be paid, and the Government revenue Rs. 442-1-2 every year, and that the balance should be allowed as a set-off against the principal debt of Rs. 17,011 in favor of Kunhyaloll, his heirs, &c.; that he (Russickloll) should have nothing to do with profit or loss in cultivation or reclamation of the lands; that, if the said sum of Rs. 17,011 should not be paid in full within the period named, the conveyance should be absolute; and that, in the event of the property being sold for arrears of revenue within the period above mentioned, he (Russickloll) would be held responsible.

This last-mentioned ikrar was given up by Kunhyaloll to Russickloll at some date prior to 1832, and the following endorsement was written on it by Kunhyaloll:—

"Owing to drought in the Mehal mentioned, the villages are not fit to pay the revenue due to Government, and the interest on the consideration-money, according to the terms of the ikrarnamah. I, therefore, return this ikrar to Russickloll Doss, the vendee, and foreclose the sale of the mouzahs mentioned therein. Dated the 17th of Kartick 1237.

"(Signed) Kunhyaloll Doss,

"Proprietor and Zemindar."

This endorsement purports to be attested by witnesses, two of whom were servants of Kishengobind, one the putwarry of Hurdwana. Their signatures are not proved; but, though

not recognized, they are apparently not expressly stated to be otherwise than genuine by Kadernath Doss.

In 1832 the whole of Talook Moheeawan was attached under a decree obtained by one Bholanath Sahoo against Kunhyaloll Doss. On the 17th November 1832 Russickloll put in a petition, alleging that the whole of the talook had been sold to him, on which the Judge, Mr. Harding, on the 20th of January 1833 (Russickloll not having then produced his deed of sale), considering that, as Kunhyaloll was deeply indebted, the conveyance to Russickloll was probably collusive, proceeded with the execution, and on the 28th of February put up the property for sale. On that day Russickloll produced the kobala. Mr. Harding adhered to his former order. Russickloll appealed. The Sudder Court reversed Mr. Harding's order, and directed that he should enquire into the circumstances under which the ikrar had been given up.

On the 17th of May 1833, Hoolas Monee and others, alleging themselves to be co-sharers with Kunhyaloll, and proprietors of 15 annas 12 gundahs of the property, came in as claimants, and prayed the Collector to put up to sale the 8 gundahs share of Kunhyaloll. The Collector noted that they must bring a regular suit, and there was no necessity to pass an order.

Shortly after the passing of Act IV. of 1837, following on the 3 & 4 W. IV., Cap. 85, Section 86, by which Her Majesty's subjects were empowered to hold land, or any emoluments issuing out of land, in any part of the territories of the East India Company (*viz.*, on the 16th of May 1838), Russickloll transferred Talook Moheeawan absolutely to Shaw and Hawes for the nominal consideration of Rupees 17,011.

This brought forward Kunhyaloll, who, on the 28th May, commenced a suit against Russickloll, Shaw, and Hawes, alleging that there had been an agreement that, on the termination of Bholanath Sahoo's case, the ikrar which had been given up to Russickloll in order to save the talook from sale should be restored, but that the promise had never been fulfilled, and that the whole amount of the mortgage-money had been realized.

Russickloll, by his answer, alleged that the plaintiff had given back the ikrar unconditionally with the endorsement, as it now stands; that, even if the plaintiff had not returned it, he could not sue without depositing the mortgage-money. The Principal Sudder Ameen non-suited the plaintiff on the miserable and futile objection, that the valuation of the suit at three times the jumma was sufficient, inasmuch as the jumma of one of the villages (Ugda) included in the settlement, but not in dispute in the cause, was omitted.

On the 26th August 1839, Hoolas Monee and the alleged co-sharers brought a suit against Russickloll, Shaw, and Hawes for possession of 15 annas 12 gundahs of the property in dispute. They alleged that Kunhyaloll had an 8 gundahs share; that Mr. Shaw had obtained a conditional sale of 36 mouzahs from Kunhyaloll in the name of Russickloll. Therefore they sued for possession of the property, except the 8 gundahs share of Kunhyaloll.

Russickloll answered, denying that the plaintiff had any right or interest in the property, alleging that the same belonged to Ramanath Doss; that, after the death of Ramanath Doss, the estate came to Kunhyaloll, aud from Kunhyaloll to herself, in pursuance of a bill of sale executed by Russickloll.

Shaw and Hawes in like manner answered that, from the time of the settlement in 1800, Ramanath was in possession; that he was succeeded by Kunhyaloll; that Russickloll took by purchase from him; and they wholly denied the title of the plaintiff.

It appears that, on the day of hearing, the plaintiff's pleader was absent, and the plaintiffs were non-suited on the ground of having excluded the jumma of Ugda from the valuation of the suit. The decision bears date the 30th of November 1839.

The plaintiffs appealed to the Judge, and the decision of the Principal Sudder Ameen was affirmed on the 11th of August 1840. The mutation of names in the Collectorate had been stayed in consequence of the pendency of these suits; but on the 8th of September 1840, a mutation of names took place, and the names of Shaw and Hawes were placed on the Collectorate Register in lieu of that of Russickloll.

On the 18th of January 1840, Shaw sold his moiety of the factories to Hawes for Rupees 80,000; and on the 6th of February 1841, Hawes sold the factories and their dependencies to the persons who were at that time members of the firm of Gisborne and Co. for 2,10,000 rupees. Moheeawan is part of Bhudeer, one of six factories so transferred.

The Judge laid down several issues: *first*, whether Kunhyaloll Doss was a co-parcener with the plaintiffs or not.

On that point he found in favor of the plaintiffs. The evidence for the plaintiffs has been gone into before us at very great length—in fact, the case has occupied the entire time of this Division Court for nine days. Upon the facts, as established by the evidence before us, we are disposed to think the Lower Court came to a right conclusion in finding that it was proved that Kunhyaloll was registered in the Collectorate and in possession of Moheeawan as a member of, and manager for, a Hindoo family which had been originally joint, but which had ceased to live as a joint family with a common purse and joint in food, the members of which resided in separate houses, but continued to hold Moheeawan as a joint estate, to the profits of which they were entitled according to their several shares. There are, however, many circumstances which cast very great doubt on the plaintiff's title as co-parceners of Kunhyaloll. For instance, it is clear that Kishen Gobind, the father of the principal plaintiff, and the brother of Kunhyaloll, possessed Talook Hurdwana and other lands as his separate property, a part of which at least he derived from Newal Kishore Doss, the great-uncle of Kunhyaloll, by whom he was adopted. By that adoption, it may or may not be that he ceased to belong to the same family as Kunhyaloll, and be joint in estate with him. That might depend on the question whether he was adopted in the Kritima or Dattaka form, as to which there is no evidence. The family appears to be Bengallee, and governed by the Dayabhaga. The presumption is, therefore, against the Kritima form of adoption which prevails chiefly in Mithila. It appears from the decision in 1814, reported 2 Select Reports, page 114, that a part of the property had been acquired by Ramanath, the father of Kunhyaloll, and not by the common ancestor Bissumbhur. Kishen Gobind became a party to, and as a surety executed, the ikrar of November 21st, 1828, in which it is mentioned that Moheeawan belonged to Kunhyaloll. Mohesh Sing, a witness examined in 1844, deposed that no one except Ramanath and Kunhyaloll ever had possession of Moheeawan; that, in lieu of Moheeawan, Kishen Gobind had obtained Hurdwana and Runkoul. This witness knew the history of the family, and said he had heard what he stated from Kishen Gobind and Kunhyaloll. The names of the plaintiffs' predecessors in estate nowhere appear as co-sharers in the dealings with Shaw and Hawes prior to 1837. Shaw and Hawes have constantly denied that Hoolas Monee and the members of the family were in any way interested in Moheeawan. Bholanath Sahoo attached Moheeawan as the sole property of Kunhyaloll; and if the plaintiffs' theory is true, it is exceedingly difficult to see what adequate object Kunhyaloll had in surrendering the equity of redemption in Moheeawan, which was mortgaged nearly to its full value, in order to avoid the sale of the estate at the suit of Bholanath Sahoo for his own debt, if his (Kunhyaloll's) own share was only eight gundahs, or one-fortieth share, or why Kishen Gobind and the other alleged co-sharers did not come forward with their claims in the first instance, instead of waiting until after the claim of Russickloll had been rejected by the Judge. Again, Woomanath Ghose, as we shall presently see, lent a large sum of money to Kunhyaloll on the mortgage of Ugda, one of the mouzahs of Moheeawan, having clearly treated with him as solely interested in Ugda, which was one of the mouzahs belonging to Moheeawan.

We are disposed to agree with the Court below in thinking that the surrender of the ikrar, the supposed abandonment of the right to redeem by Kunhyaloll, was not entirely *bond fide*.

The inference is stronger if we believe that Kunhyaloll was entitled only as a member and manager of a joint family. If he really meant to surrender his equity of redemption, it is most extraordinary that he did not get back from Shaw and Hawes the ikrar of November 21st, 1828, by which his brother and alleged co-sharer, Kishen Gobind, as security for Russickloll, became liable for the payment of the debt and interest out of the profits of the talook. It is not easy to see what his motive could be in surrendering an estate clearly fully worth all the money advanced upon it, and probably more.

Certain accounts were put in of the profits of the talook and the amount due in respect of the mortgage down to 1832. We are disposed to think that these accounts are genuine accounts. They are said by the plaintiff's witnesses to have been rendered by Russickloll to Kunhyaloll. As to their exact character we entertain great doubt, because they do not purport to be so rendered; and it must be remembered that, down to the passing of the 3 and 4 W. IV., Cap. 85, it was absolutely necessary for the security of Shaw and Hawes that Russickloll's char-

acter, as of a party liable to the payment of the mortgage-debt, should be preserved.

It may or may not be that Kunhyaloll, for the purpose of defrauding his creditors, and preventing the sale of his property, colluded with Russickloll, and set up a surrender of the equity of redemption by which these parties did not mean to abide. But there is no direct evidence to shew that Shaw and Hawes participated in the fraud, if fraud there was. Having had some experience of him in the dealings arising out of the mortgage in 1826, it is most unlikely that they would have consented to endanger their own security as mortgagees, and creditors for a large sum of money, by co-operating with him in any trick to defraud his other creditors.

It is certainly possible that the surrender may have been *bonâ fide* even as regards Russickloll. It may have possibly been the fact—and certainly Shaw and Hawes may have supposed it to be the fact—that Kunhyaloll, finding himself pressed by debts, with a decree hanging over him, was willing to give, and did give up, to the factory with which he had dealings for many years, the possession and management of the estate. It is proved that the estate was liable to drought; the income, as appears from the accounts filed, assuming them to be genuine, was in ordinary times barely sufficient to keep down the interest on the mortgage and Government revenue, and defray the charges of collection. The endorsement may have been executed on the day when it bears date in November 1829 or in 1832. Whether Kunhyaloll hoped that Russickloll would return him the ikrar after the execution-case had been disposed of, or whether or not Russickloll held out such hopes or made a promise that he would do so, there is no evidence that Shaw and Hawes were ever parties to, or assented to, such agreement.

Whatever may have been Kunhyaloll's object or motive, it is indisputable that, by writing under his own hand, he did in fact surrender the ikrar, and did thereby in express words forego all claims to redemption. He abandoned his rights under the contemporaneous agreement, and left the sale as an absolute one. Neither he nor his heirs are parties to this suit, and, so far as he is concerned, it may be taken that he no longer disputes the surrender.

We find that, from 1837, Shaw and Hawes, in the most direct and positive manner, asserted their title as absolute owners under the title acquired from Kunhyaloll, and as distinctly repudiated the claims of the predecessors in title of the now plaintiffs. Whether they were right or wrong, it is clear that their assertion of title in themselves to hold the property as absolute owners, free from any right in any one to redeem, was not wholly one without foundation or color of right.

The principal plaintiff who now disputes it would, according to the pedigree, be only an 8 gundahs shareholder; but he claims by deeds of gift and alleged adoption the shares of other members of the family, aggregating 10 annas 16 gundahs. As, in our opinion, he must altogether fail, even if he can prove his title to the several shares claimed by him, we did not call upon Mr. Doyne to go into the proof of this plaintiff's title to the shares other than the ancestral share of 8 gundahs which he would apparently take by descent. As far as we can see at present, his claim looks very like a speculative one. We certainly should not have given plaintiff a decree without strict proof of his title to the shares.

The accounts produced by the plaintiffs as having been rendered to Kunhyaloll by Russickloll do not, in our opinion, prove that Russickloll acknowledged the title of Kunhyaloll as mortgagor after the surrender. For ourselves, we entertain considerable doubts whether these accounts are really anything more than accounts kept by Russickloll for the factory, showing his position as regards the mortgage of which, by some means or other, the plaintiffs have become possessed. But if we accept the plaintiff's theory, and suppose them to be accounts rendered by Russickloll to Kunhyaloll, they may show that the surrender was antedated: but they do not prove that, after the ikrar had been given up to Russickloll, he ever accounted to Kunhyaloll as mortgagor.

We have seen that, after the suits of the plaintiff's family, and of Kunhyaloll, to contest the claims of Shaw and Hawes, had been non-suited, Shaw sold his moiety to Hawes, and that soon afterwards Hawes sold to the then members of the firm of Gisborne & Co., from whom the present defendants, by successive transfers, derive title.

The sales—indeed, the whole transactions of the successive owners of the factory with regard to this talook—are perfectly open and above board. No consideration was paid for the surrender of the equity of redemption, nor does the instrument profess to show that any was given. No separate price appears to have been fixed for the Talook Moheeawan which passed to the purchaser as part of, or

a dependency of, the Bhudeer factory. It appears from the papers that Muddun Thakoor, the vakeel of Messrs. Shaw and Hawes, three months before the date of the conveyance to Gisborne & Co.. took from the Collectorate a copy of the proceedings in the mutation of names from that of Russickloll to that of Hawes. That copy, which alludes to the history of the disputes between Shaw and Hawes and Kishen Gobind, was apparently handed to Gisborne & Co., probably to satisfy them as to the title, and was openly produced by their vakeel in the suit in 1844. It appears, from proceedings which have been referred to in evidence before us and before the Judge as shewing that Talook Moheeawan was joint property, that in 1837 Kunhyaloll borrowed from Woomanath Ghose Rupees 17,000 on the mortgage of Ugda, one of the villages of the talook, with 25 other villages. Woomanath sued for possession, when it turned out that other parties claimed the 25 villages, and Woomanath obtained a decree for Ugda only. On this the alleged shareholders sued Woomanath Ghose and Kunhyaloll to recover Ugda as part of their estate. Kunhyaloll's answer admitted that the estate was joint, the shareholders obtained a decree, and Woomanath must have been left with 8 gundas, one-fortieth part of this single village, as a security for the debt due to him of Rupees 17,000 with the interest.

Even if there had been any fraud on the part of Shaw and Hawes, we think that Gisborne & Co. were no parties to it. Shaw and Hawes had directly, and so far successfully, repudiated the mortgage, and the plaintiffs claim as co-sharers of Kunhyaloll.

It appears to us to be proved that Gisborne & Co. bought that which Shaw and Hawes alleged themselves to possess, *viz.*, an absolute interest in Moheeawan. We see no reason to suppose that they may not have fairly believed that the title of Shaw and Hawes as absolute owners was a good one. They knew that such a title had been asserted. We may, and indeed, looking at the matter, cannot but draw the inference that Gisborne & Co. paid a fair price for Moheeawan. We need not trouble ourselves to enquire whether the cloud over the title and the litigation, which was not unlikely to be removed, may not have induced Shaw and Hawes to value Moheeawan at a somewhat lower price than they would have insisted upon had the title been entirely unexceptionable.

There is no ground for imputing any want of good faith to Messrs. Gisborne & Co. There is no ground for supposing that they actually knew either that the plaintiffs were co-sharers with Kunhyaloll, or that Kunhyaloll's surrender of the ikrar was colorable. After this long enquiry, we are not absolutely satisfied of our own power to arrive at a correct conclusion on these points. Assuming that Gisborne & Co. knew that the plaintiffs were putting forth claims on such allegations that they knew that they were buying a disputed title, it will, in our opinion, not affect their claim to be considered as *bonâ fide* purchasers if they dealt honestly, openly, and above board, and were buying what they may have fairly believed to be a good title.

The point then arises: Is the suit barred by limitation? In trying the question of limitation, the Judge says that the defendants are mortgagees, and therefore comes to the conclusion that, under Clause 15, Section 1 of Act XIV. of 1859, the period of limitation is sixty years.

Now, it is a fruitful cause of confusion and mistake to call things by names that do not properly belong to them. The defendants were *not mortgagees*, but persons claiming under a purchase from the mortgagee. There was no contract or express trust as between them and Kunhyaloll, much less was there between them and the plaintiffs. The defendants do *not* fall within the words of the 15th Clause; and whether their case comes within the 5th Section or not, their position is very different from that of a person who holds simply as a mortgagee under an express contract with the mortgagor, or who, as assignee of a mortgagee, undertakes the obligations of his assignor. The defendants came in, and have always held and openly asserted their own title as absolute owners hostilely to the mortgagor, and such title as the plaintiffs claiming under him alleged themselves to possess. It may be that the defendants have held under circumstances which would induce this Court to fasten a trust upon them, and to declare that they must be treated as mortgagees, and stand in no better position than if they had been parties to the contract of mortgage. We may assume that, upon the facts of this case, if the plaintiffs had sued in proper time, the Court would have declared that, the giving up of the ikrar by Kunhyaloll being without the authority or consent of his co-sharers, the surrender of the equity of redemption was not effectual, and that the

defendants, having purchased with notice of circumstances which should have put them on their guard, had no greater rights than Shaw and Hawes, their vendors. But, if so, it is difficult to see any principle on which they ought to be placed in a worse position, as regards limitation, than if they were mere trespassers. In Hovenden *versus* Lord Annesby, 2 Schoales and Lefroy 633, Lord Redesdale says that the question of fraud is very different from that of a trustee who does not perform his trust. "A person "in possession by virtue of the fraud is not, "in the ordinary sense of the word, a trustee, "but is to be constituted a trustee by the "decree of the Court of Equity founded on "the fraud; and his possession in the mean-"time is adverse to the title of the person "who impeaches the transaction on the "ground of fraud."

Mr. Peterson, for the appellant, cited a number of cases decided before the 3 and 4 W. IV., Cap. 27, from English Courts of Equity, to show that, though time would not have barred a claim arising from an express trust, yet that constructive trusts were barred by long acquiescence, such as Beckford *versus* Wade in the Privy Council, 17 Vesey 97; Bonney *versus* Ridgard, 1 Cox 145; Townsend *versus* Townsend, 1 Cox 28-34; and *see* in the late Sudder Court, Rajah Ajoodhy Ram Khan *versus* Musst. Khenunkeree Dossee, S. D. A. Rep. 1859, p. 158. He showed that, according to the rules of English Law, though the purchaser of an estate at its full value taking with notice of a trust may be liable to the same extent and in the same manner as the person from whom he purchased, the right must be pursued within the period allowed by the Statute of Limitation (*see* Lewin on Trusts, 557, 560, 573).

If the defendants were mere volunteers, who had taken the property without the payment of any consideration; if they had taken with full knowledge of the existence of the mortgage and of the title of the plaintiffs; or if they had taken it secretly, and held it fraudulently for the purpose of defeating the rights of those whom they knew to be entitled as mortgagors, it may be that they could only stand on the title of the person from whom they took, and probably the plaintiffs might have redeemed as against them within the sixty years allowed by Clause 15.

There is one case in the late Sudder Court (S. D. A. Rep., 1852, p. 392), and one in this Court (Marshall's Reports, page 391), in which suits to redeem brought against the heirs of mortgagees who had allowed the mortgaged estates to be sold for arrears of revenue, though brought within 60 years (*viz.*, one after an interval of 35 years, and the other of upwards of 50 years), were held to be barred by limitation. We need not now consider whether a mortgagee can, by any act or omission on his own part, alter his position as regards the mortgagor. The defendants, as we have seen, are not mortgagees; they stand in the position of purchasers from the mortgagee for valuable consideration; and, if they can be considered *bonâ fide purchasers*, they are protected by Section 5 of Act XIV. of 1859.

We have shown that it must be taken as proved that they purchased honestly.

But Mr. Doyne, referring to the language of Lord Hardwicke in Le Neve *versus* Le Neve (*see* White and Tudor's Leading Cases, Vol. II., pp. 33, 34), says that purchasing after notice of a prior equitable right makes a person a *malâ fide* purchaser. The proposition is perfectly correct, but is not applicable to the facts of the present case. Fraud or no fraud is a question of fact, and, as Lord Hardwicke says in the same case, "fraud is the true ground on which a Court "of Equity is governed in questions of "notice."

Mr. Doyne contended that a purchaser is bound to take all reasonable precautions; that Gisborne and Co. should have looked beyond Russickloll's title; that they were bound to take notice that Kunhyaloll was a member of a joint family; that these were circumstances which should have put them upon enquiry whether the equity of redemption had been effectually surrendered or not; that the defendants had voluntarily shut their eyes, and could not therefore be treated as *bonâ fide purchasers*. In construing the Section in question, we must remember that the terms "*bonâ fide purchasers*," "for valuable consideration," and "without notice," as applied to purchasers of real and other property, are all of them perfectly familiar and well understood by all English lawyers. As we do not find the words "without notice" in the Section, we cannot but suppose that the omission was intentional; indeed, we think that the Legislature could never have contemplated that honest purchasers should be deprived of the protection, which was probably not created for the first time by this Section merely by constructive notice, or notice of doubtful claims or equities. If the de-

fendants at the time of the purchase had *actual knowledge of the existence of the alleged rights* of the plaintiff; if they designedly abstained from making enquiries for the purpose of avoiding knowledge; if it appeared that they had a suspicion of the truth, and fraudulently determined not to learn it; if there had been any concealment or subterfuge, any attempt to misrepresent the circumstances of the purchase or of the title, the inference would be that the purchase was not an honest one, and therefore not *bonâ fide* within the meaning of Section 5.

We have shown that, in the present case, there is no imputation whatever on the perfect good faith of the appellant's purchase.

We are therefore of opinion that the suit is barred by Section 5. The decree of the Court below must be reversed; but, under the circumstances, we think each party should bear his own costs in both Courts.

We need not express any opinion as to whether or not the suit of the plaintiffs, as against the appellants, who claim under their cashier. Kanhyaloll, is barred under Clause 13 of Section 1, as to which Mr. Peterson referred us to the case of Khoman Singh *versus* Sree Kishen, 9 N. W. P. Reports, p. 543.

Campbell, J.—I concur generally in the view taken by my learned colleague of this case. The essential points are that the plaintiffs were shareholders of the estate as found by the Court below, and were, as such, joint mortgagors to Messrs. Shaw and Hawes, who held in the name of Russickloll; that the assignment of the right of redemption afterwards executed by Kunhyaloll, the manager of the joint family, was without the consent of plaintiffs, was probably merely nominal, and, at any rate, being wholly without consideration, was altogether ineffectual as against plaintiffs; that, consequently, plaintiffs would have been fully entitled to redeem as against Messrs. Shaw and Hawes; but that, nevertheless, Messrs. Gisborne and Co., being *bonâ fide* purchasers within the meaning of Section 5, Act XIV. of 1859, are entitled to plead the ordinary limitation of 12 years from the date of their purchase; and that 12 years (even excluding the time occupied by the non-suited cases) having elapsed, the suit of the plaintiffs must be unsuccessful, and the decision of the Judge must on that ground be reversed.

The position of the family as descendants from common ancestors by whom most of the property was acquired—the ancient records of the joint holding of the family (one of which, at any rate, is authenticated by the Registers still existing in the Collector's Office, while others are attested as true copies by former Collectors)—the evidence given in the earlier suits to show a joint enjoyment of the profits—and the absence of any sufficient evidence of separation (even in the earliest litigation)—all go to show the joint holding as found by the Judge, a fact which is indirectly confirmed by the statements made by Kunhyaloll in 1814, by the appearance of the name of the principal shareholder in the mortgage transactions of 1828 as a security, and by the conduct of the shareholders, who, as early as the year 1833 (when the mortgage-money was still owing), fully admitted their participation in the mortgage. At this distance of time we do not too curiously test the strict regularity of all the evidence; but, taking it as a whole on both sides, I must come to the above conclusion. Messrs. Shaw and Hawes, who had had many dealings with the family, must well have known of the existence and rights of those whom the plaintiffs represent. If a long period has elapsed since the expiry of the term fixed for the mortgage, it is impossible to blame plaintiffs for the delay, since they brought no less than five successive actions, and were again and again defeated, after years of litigation, by the incredibly infamous system of non-suits on technical points (adjudicated, not at the commencement, but at the close, of litigations) which then prevailed. The case then comes before us to decide between plaintiffs seeking to redeem their mortgaged estate on the one hand, and Messrs. Gisborne and Co. claiming to be *bonâ fide* purchasers from the mortgagees on the other.

As respects the circumstances of Messrs. Gisborne and Co.'s purchase, the facts seem to be clear. The sellers gave no covenant of title; they did not even specifically sell the estate now in dispute; it went under the general designation of dependencies of the indigo factory; so far the purchasers might be considered as mere assignees of the mortgage. But when we look to the title-deeds handed over to them, and which we must suppose them to have looked at, it appears from those papers that the sellers had asserted their absolute right to the estate; that the plaintiffs had claimed their shares, and had brought actions to assert their right; that they had been recently non-suited (with leave to sue again); and that the sellers had then been recorded as proprietors. Messrs. Gisborne and Co. may then be taken

to have bought a doubtful title with a knowledge that a claim was hanging over it—a title which was originally one of mortgage, which had never been regularly foreclosed, and which had only been completed by a voluntary surrender by the head of the family now seeking to redeem. In fact, Messrs. Gisborne were challenged, and put on their defence very soon after their purchase; and it may seem hard on the plaintiffs, whose delays may naturally have resulted from the exhaustion of successive defeats on non-suit, that they should now be shut out. But we are unable to consider that; hard cases might make bad law. We must put out of sight the non-suited litigation, and must merely consider whether plaintiffs were in law bound to bring their present action against Messrs. Gisborne and Co. within 12 years. That entirely turns on the construction of Section 5, Act XIV. of 1859. Were Messrs. Gisborne and Co. *bonâ fide* purchasers? If they either knew that plaintiffs were the rightful owners, or wilfully shut their eyes, they would not be *bonâ fide* purchasers from the mortgagees. That there was no actual bad faith or fraud on the part of Messrs. Gisborne, is, I think, beyond doubt. They purchased an estate with a doubtful title for what it was worth; but they neither knew nor had the means of knowing that plaintiff's claim was a good claim. They had no knowledge of, nor dealings with, the plaintiff's family; they had been no party to the prior transactions regarding the estate. If they made any enquiry regarding plaintiff's claim, they would only learn that it was a doubtful and difficult case, the issue of which must be very uncertain. Plaintiffs were not recorded as proprietors, and the case was such that, as honest men, defendants might fairly have defended an action, and put plaintiffs to their proof. That being so, I think that, though they might not be *bonâ fide* purchasers without notice, who could at once defeat a *cestui que* trust, they are *bonâ fide* purchasers within the meaning of the Law of Limitation; that is, they are parties who purchased honestly without actual fraud. The policy of the law seems to be that doubts should not hang for ever on titles; that, if a man, without fraud or concealment, purchases a doubtful title, it must be attacked within 12 years, or never. To make the purchase *bonâ fide*, a man must have reasonable ground for believing it to be a good title, although he may know that it is liable to attack. In this case, we think that Messrs. Gisborne & Co. may have reasonably believed that they took a title which they could as honest men defend. In that light, we have considered them *bonâ fide* purchasers, and on that ground I concur in dismissing the suit on limitation, although I confess that I have had much doubt and hesitation about the case. I also concur in the order that each party should bear their own costs in all Courts.

The 15th May 1866.

Present:

The Hon'ble W. S. Seton Karr and A. G. Macpherson, *Judges.*

Possession—Complicated facts—Previous litigation—Dispossession in execution of a decree to which the plaintiff was not a party.

Case No. 269 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 7th June 1865.

Baboo Gunesh Lall Singh and others (some of the Defendants), *Appellants,*

versus

Shaikh Ahmedoollah and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Appellants.

Messrs. R. V. Doyne and *C. Gregory* and *Baboos Sreenath Dass, Mohesh Chunder Chowdhry,* and *Khetternath Bose* for Respondents.

Suit laid at Rupees 34,596-9-6.

Suit to recover possession of a share of an estate granted by the defendants' predecessors to the plaintiff's father as their *surparast* or patron by way of remuneration for his management of some extensive and important litigation which resulted in their favor in the Privy Council. The Lower Court's decision in favor of the plaintiff, on the ground that he had been in possession for more than 12 years before his dispossession and was unfairly dispossessed in execution of a decree to which he was no party, was upheld.

This is a somewhat complicated case, in which it will be necessary to refer to previous litigation regarding the same property.

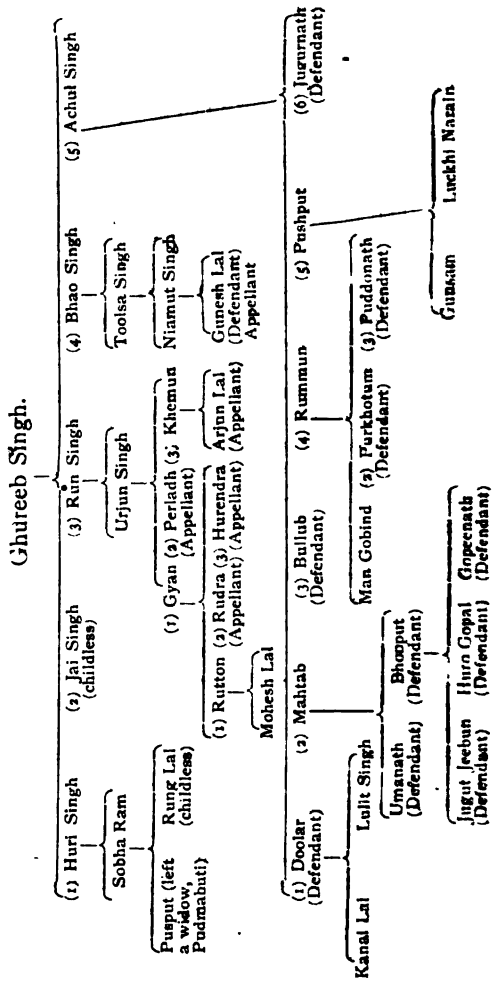
The plaintiff, who is the son of Shaikh Musiatoolla and the grandson of Panaoolla, sued the defendants, who are many, and the heirs and descendants of a common ancestor Gnureeb Singh, for a 4 annas share of Pergunnah Powakhalee, the share consisting of no less than 115 *guches* or *mouzahs.* The plaintiff's case is that a division of the shares in the zemindary took place in 1249,

and that, by three deeds of Wasika, or Ikrarnamah, dated the 29th of Kartick 1248 (1841), the 14th of Pous 1248, or the 2nd January 1850, and the 19th of Pous 1257, his father became possessed of the property which he now claims. The bequests were made by the heirs of Achul Singh, Bhao Singh, and Urjun Singh, all three sons of Ghureeb Singh, because the plaintiff's father, as their *surparast*, or patron, had managed some extensive and important litigation, which resulted in their favor, in the Privy Council. It is important to note that the deeds of Kartick 1258 and Pous 1257 purport to be signed by Doolar Singh and others, the heirs of Achul Singh, while that of the 14th of Pous 1248 alone bears the signature of Toolsa Singh. The two documents of 1258 purport to have been executed after the case had been won in the Sudder Court. That of Pous 1257 is a confirmation by the sons of Achul Singh, *i. e.*, Doolar Singh and others, after the result of the appeal to England. Disputes, however, eventually arose, and the plaintiff was maintained in possession under an Act IV. award, dated the 31st of December 1853. Just before this date, a suit was instituted by Toolsa Singh, now represented by the appellants, against the other members of the family, which turned on the due application of the Law of Mithila, that law having been declared by the Privy Council to regulate the succession in this family; and by the decree of the Sudder Court in this suit, dated the 17th of May 1862, as well as by the execution of the first Court's decree, the plaintiff, it is said, was prejudiced, and was directed to bring a regular suit for the preservation of his rights, which he has accordingly done.

The defendants, appellants, filed a written statement denying the alleged partition amongst the shareholders, impugning, though not distinctly denying as fraudulent, the alleged bequest, and repudiating any possession on the part of the plaintiff, as well as his right in the property claimed. They also urged that none of the original deeds had been filed, and that the same had not been registered, and that the Revenue-authorities had refused to register the name of the plaintiff to the full extent of his claim. The defendant, Jugurnath, who has not appealed, and who is one of the sons of Achul Singh, also filed a long statement denying the plaintiff's claim.

The Principal Sudder Ameen, in a very lengthy judgment, has overruled all the pleas in bar urged by the defendants, several of which were obviously frivolous, and, on the issues of fact, has found that the plaintiff had a title, and had been in possession of the property claimed, up to the 16th of September 1860. The Principal Sudder Ameen has also found that a partition amongst the shareholders did really take place; and he carefully enumerates the various documents, public and private, on which he bases his opinion on the whole claim.

The appeal is preferred to us by certain of the defendants who represent the interests of two brothers, Run Singh and Bhao Singh; and it is necessary here to set forth the position of the parties under the family-tree:



To go back to the previous litigation, without a detailed specification of which the case will not be complete, it appears that Doolar Singh and others, the heirs of Achul

Singh, sued Ranee Pudmabuttee, who had set up a title to the share of her husband's brother, Rung Lal, who, as the family tree given above shows, had died childless. The family had originally been Sudgopes, who had migrated from Burdwan to Purneah; and the question for decision was whether the Bengal or the Mithila Law prevailed. The Sudder Court, on the 3rd of December 1839, decided that the succession was to be regulated by the Law of Mithila, and this ruling was endorsed by the Privy Council in 1847 (Moore's Reports, Volume IV., page 259). In this case, Toolsa Singh, son of Bhao Singh, the ancestor of the present defendants, appellants, and Urjun Singh, son of Run Singh, had intervened, and the case was heard and decided in their presence.

The result of this case was simply to declare that the succession in the family was governed, not by the Law of Bengal, but by that of Mithila; but it led to ulterior litigation.

A suit was next instituted by Gunesh Lal and others against Doolar Singh and others for two-thirds of the ancestral property. The Judge decided, on the 10th of April 1854, that the rights and interests of the plaintiffs had been already decided in the previous suit appealed to the Privy Council, and he dismissed the suit.

The Sudder Court, on the 22nd of December 1856, ruled that the previous suit merely disposed of the false claim of Ranee Pudmabutee, or ruled which law governed the succession in the family, and that it did not settle the question of the shares between the parties before them as the heirs of Run and Bhao Singh on one side, and of Achul Singh on the other.

The suit was, therefore, remanded for trial on the merits; and the Judge of Purneah accordingly tried the same, and held that the heirs of Run and Bhao Singh were entitled to two-thirds of the property left by Rung Lal, while the six sons of Achul could only claim the remaining one-third share. In appeal on the 17th of May 1862, at the instance, not of the heirs of Achul Singh, but of Musiatoolla, the plaintiff before us, who had been made a *pro formâ* defendant in the suit, the Sudder Court decided that the Judge had correctly ruled the succession to be *per stirpes*, and not *per capita*; that the chief defendants had not appealed, and that no injury could accrue to Musiatoolla, the appellant before them, for both parties had been determined to be entitled to a larger share of the property than that which they were alleged to have assigned to the appellant. The Court say further: "Moreover, if, "as alleged by him, appellant is in possession of 4 annas under an agreement between him and the plaintiff and defendants "in the case, his possession cannot, in execution, be interfered with; but if *he be not* "*in possession* of all that to which he considers himself entitled, he must sue the "different parties for the acquisition of his "rights under the deed of assignment in his "favor."

The prayer of the appellant for a remand in order that his rights under the agreement or ikrarnamah should be enquired into was consequently rejected. In the Lower Court, however, on execution, it appeared that the plaintiffs had already, at that very time, obtained possession under their decree, and a further effect was given to this by the ruling of the High Court in the Miscellaneous Department of the 8th of October 1863. The Court ruled that the Principal Sudder Ameen, to whom Musiatoolla had applied in order to protect his rights while the case in question had expressly been reserved, was wrong in treating him as a decree-holder, and the Court reversed his decision accordingly, and allowed the appellants to retain possession of everything.

Only one other previous suit remains to be noticed between the parties.

On the 31st of August 1853, the Judge of Purneah dismissed a claim by Musiatoolla for 85,704 rupees, made against the members of the family being the heirs of Run Singh and Bhao Singh, including the defendants before us. The claim was brought for actual expenses incurred by the plaintiff's father in conducting legal proceedings for the benefit of the defendants.

In appeal against the order of dismissal, the Sudder Court ordered the plaintiff to be non-suited. This was on the 30th of January 1858 (page 103, Sudder Dewanny Adawlut), and no fresh suit was ever brought to establish this claim.

Now, on the result of this varied litigation, and on the evidence laid before the Principal Sudder Ameen, which satisfied him of the justice of the plaintiff's claim, Mr. Allan, for the defendants, Gunesh and others, who are the heirs of Run Singh and Bhao Singh, has raised a strong contention before us, of which the main points are as follows. Mr. Allan urges that the deeds of Wasika or Ikrarnamah are not proved; that it is not even alleged that his clients ever signed, or agreed to, two of those deeds;

and that there is no proof that the signature of Toolsa Singh on the third deed was ever attached with this person's knowledge or consent. He pleads that the possession of the plaintiff of the 115 *mouzahs* or *guches* is, at best, a shadowy, fugitive, and uncertain possession; that only a few *dakhilas*, showing payments of Government revenue on the part of the plaintiff, have been produced; that there is nothing to show that the plaintiff ever received any of the profits of the estate during the period from 1842 to 1850, when it was managed by the Collector, pending the result of the appeal to England, first through a surburakar, Mr. Coles, and then by lease to Mr. Barnes; that the alleged deed of partition, whereby the zemindary was said to have been divided in 1249 Mulki (1841), has not been accounted for or produced, and that no such partition ever took place; that the possession which was conferred on the plaintiff by the decision of the Deputy Magistrate of Kissengunge on the 31st of December 1853 cannot override or prevail against the decree gained by Toolsa Singh in May 1862, whereby the share of the appellants was found to be two-thirds of the whole estate; and that that possession, whatever it was worth, has been, admittedly, lost by the effect and execution of that decree; that the possession under the award of Act IV. was not a possession derived from any title shown to have been conferred by his clients; that the oral or other evidence does not satisfactorily make out a case of possession for the period anterior to the award under Act IV., and that the evidence of Mr. C. Palmer especially is irreconcilable with the defence which he made some years previously to a suit in which rent was claimed from him by this plaintiff; that the order of the High Court in October 1863 in the execution case was correct and proper; and that the appellants are not to suffer by any collusion between the plaintiff and the heirs of Achul Singh, the existence of which either now or previously, there is good reason to suspect.

The position of the plaintiff is, it must be admitted, a peculiar one. The award, under Act IV. of 1840, of the Deputy Magistrate, of the 31st of December 1853, confirmed shortly afterwards by the Sessions Judge in appeal, is a most important one. The Deputy Magistrate went at great and perhaps unnecessary length into the rights and position of the various parties, but he ended by affirming the possession of the plaintiff on what appear very full and sufficient grounds. The same documents were filed then as now. Copies of the Ikrarnamahs and Amulnamahs—that is, of the documents whereby the plaintiff claimed the 115 mouzahs—were then put in. The defendants, both the heirs of Achul Singh, as well as those of Run and Bhao Singh, made at that time a determined but ineffectual resistance to the claim of the plaintiff. Papers relating to the actual division of the sharers—dakhilas, kubooleats of ryots, and other proofs—were all duly filed by the plaintiff, and considered by the Criminal Court. And there can be no doubt that the decision of the Deputy Magistrate was well considered and conclusive as to the possessory right of the plaintiff to 4 annas of the estate, or to 115 mouzahs of the Pergunnah of Powakhalee.

No civil suit was ever instituted to set aside this decision, although the parties to it, now represented before us, were hostile defendants, fully alive to the claim put forward by the plaintiff, and anxious to protect and vindicate their own rights.

Then the oral evidence adduced on behalf of the plaintiff is not without its significance. It has been all read to us, and is that of the witnesses named in the margin.*

* Mr. C. Palmer, Shaikh Mirun Rohim Buksh, Khaja Mir Mahomed, Keeramutoolla, Elahee Buksh.

The evidence of these witnesses is to the effect that the plaintiff's father was in possession from and after 1249, the year of the partition, to 1251, when the property was managed, first by a surburakar, and then by farmers, the estate being under attachment; that he had afterwards full and practical dominion over the property, giving leases, bringing suits for rent, and paying revenue to Government; and that the name of the plaintiff had been registered in the Collectorate to the extent of 2 annas 8 pie share, though not to the full extent of the 4 annas claimed. One of the witnesses, Mirun, gave evidence very much to the same effect, apparently in the case under Act IV. of 1840. Mr. Palmer shows clearly that he was the plaintiff's lessee, and it in no way invalidates his evidence that, in his answer in the rent suit brought by the plaintiff against him, he stated that he had not obtained possession, and was not liable for rent. The denial related merely to one year's possession, and the suit, in spite of the denial, was decreed against him in November 1856.

The oral evidence as to possession is consistent, and, considering the plaintiff's

exclusion from the share he claims, this evidence is quite as good as could be expected. It is remarkable that no oral evidence on the part of the appellants has been shown to us by Mr. Allan in order to invalidate these statements.

Objection has been made by Mr. Allan to the dakhilas for revenue paid to Government—not indeed on the score of their authenticity, but on that of their paucity. In all, they show that a sum of less than Rs. 8,000 has been paid by the plaintiff to the Collectorate, and has there been acknowledged. The total sum payable for the time of the plaintiff's practical possession would, in round numbers, be half a lakh of rupees. It would perhaps have been more satisfactory if larger payments of revenue were shown by the plaintiff, but as there can be no doubt that the plaintiff was formally put in possession of his 4-annas share, or his 115 mouzahs, since 1853, this omission does not tell much against him. We cannot assume that the possession so awarded was never enjoyed afterwards, or was a mere sham. But there is truth in Mr. Allan's observation, that the plaintiff does not actually now show that he shared in the proceeds of the estate for the time it was under attachment, or was farmed pending the appeal. Mr. Allan calls our attention to the proceeding of the Civil Court of Purneah drawn up on the 3rd of June 1850, at a time when the attachment was to be withdrawn after the result of the appeal to the Privy Council. But the only thing that this document clearly proves is that the services of the surburakar were to be dispensed with. It does not show in whose hands the various shares of the zemindary were replaced. Certainly, it does not in the least prove that the plaintiff was then excluded.

Then the question naturally arises, how was the possession of the plaintiff, formally affirmed to him by the Criminal Courts in 1853, ever lost? We may observe here that no evidence has been adduced to us on the part of the defendants to lead us to think that the decision of those Courts was at all erroneous, while all the other evidence for the plaintiff lends color to the belief that possession had been enjoyed by the plaintiff before that Act IV. decision, and that it was only confirmed and sanctioned thereby.

Natives of this country, whose practical dominion over property has been affirmed by the Criminal Courts, are not wont readily to surrender such possession. The rights of the plaintiff were expressly reserved to him, as we have already seen, in the civil suit between the different shareholders, by the ruling of the Sudder Court of the 17th May 1862, to the effect that "no injury" was to accrue to him from their decision, and that, if he was in possession of 4 annas under an agreement, his possession could not be interfered with. Clearly, as we have shown, he had been confirmed in possession so far back as 1853, and clearly no special suit to remove him on a superior title had ever been brought by any one, while his prayer that his claims should be judicially decided in the separate suit between the shareholders had been rejected, with the *proviso* that his rights would be reserved.

We find it somewhat difficult to understand how, after this order, the possession of the plaintiff was disturbed in the execution of the decree gained by the appellants against Doolar Singh and others, the heirs of Achul Singh. But that he was disturbed in such execution, there is not the slightest doubt. Some stress has been laid by both parties on the order of the Principal Sudder Ameen of the 15th of September 1863, and on that of the High Court immediately afterwards, on the 8th of October 1863. In the Lower Court, the plaintiff appeared and complained that the judgment holders, sharers, had taken possession, because some security had been tendered; and the Principal Sudder Ameen passed an order that the rights of Ahmedoolla should not be interfered with, inasmuch as his possession had been affirmed by the Criminal Courts. In appeal, this order was reversed, because the Principal Sudder Ameen had treated Ahmedoolla as a decree-holder.

It seems to us that the full facts of the case could scarcely have been brought to the knowledge of the Divisional Bench which passed the above order, and we are quite certain that it was the intention of the Sudder Court, in May 1862, that the possession of the plaintiff should not be interfered with, and that the order of the Principal Sudder Ameen, which ascertained that possession had been held up to that time by the plaintiff, and which would not have prejudiced it, was substantially correct. But by the order in appeal, founded, as we have said, on an imperfect view of the actual position of the various parties, the plaintiff, instead of being kept in the position of the holder of a possessory award, which could only be disturbed by a Civil suit and by a superior title, has been sum-

marily ejected, and has been placed in the position which should really have been that of his antagonist. In fact, he was unjustly displaced, without any consideration for his long practical possession.

We think that great stress has deservedly been placed by Mr. Doyne on the proceedings under Act IV., and on those in execution of the separate decree, by which the plaintiff's position ought to have been left intact.

What, then, is there to prevent the plaintiff from recovering that position which the Criminal Courts had given him, and which the highest Court of the country, sitting in regular appeal, had never taken away?

Mr. Allan argues persistently that the plaintiff has shown no title from the appellants, and has not produced any original title deeds, and that he must prove his contract with the appellants, or his title under them, before he can be permitted to recover, seeing that he is *de facto* out of possession.

We think it out of the question, at this stage of the complex and varied litigation that has taken place, to expect that either the partition of 1249 or the Wasikas or Ikrarnamahs of 1248, could be satisfactorily enquired into and proved. It would be unreasonable to expect that the plaintiff could produce the original deed of partition, which in all probability was restored to some one of the Hindoo sharers in the property.

But it is quite clear that an original deed of partition of some kind was filed in the Collectorate so far back as 1840 or 1248, and that, from the original and the papers so filed, are derived the copies of some of the papers which have been filed in the Courts in 1853 and in 1863. A good deal has been said on another document to which we have not yet adverted, which is the petition presented by Amzad Ali in 1841, 30th of January, to the Collectorate. This petition is a copy of the original; but no objection was taken to it in the Lower Court, and we are therefore warranted in accepting it, showing what was the statement of the facts actually made at the time to which it relates. This petition was avowedly presented on behalf of Toolsa Singh. It mentions the partition of the shareholders, and the gift of 4 annas of the zemindary to Musintoollah for his trouble and pains as *surparast;* and it sets to right a mistake inadvertently made in a previous petition as to the shares of the parties, whereby the heirs of Achul Singh would have got 12 annas, or 4 annas more than what the zemindary itself contained.

It would be impossible, at this distance of time, to ascertain whether the above petition was or was not presented on behalf of Toolsa Singh. All we can say is that the petition itself was never objected to at any time, and that, so far back as 1853, the appellants were perfectly well aware that such a statement was put forward by the father of the plaintiff as his claim to hold the 4 annas of the pergunnah, and that possession on the ground of such claim and title was formally recognised by the Criminal Courts.

The deed of 1258, 14th of Pous, being the second of these deeds, does, we observe, bear a seal and the signatures of Toolsa Singh, and of the grandsons of Run Singh. We hold that it would be hopeless to expect that such a transaction could be investigated now, a quarter of a century after its execution, when the parties are and have long been in open hostility to each other, and when Toolsa Singh is dead.

But in such a case as this, we have to look at the probabilities of any such bequest as that which forms the basis of the plaintiff's title. That the father of the plaintiff did exert himself in the cause of the family, and that, through his timely aid and advocacy, the suit by which the family were large gainers was finally carried to a triumphant result against Ranee Pudmabuttee, is undeniable. It is, of course, *possible* that the aid of the plaintiff was secured, and that reward was promised to him on the part of the heirs of Achul Singh alone, and not by the heirs and descendants of Bhao Singh and Run Singh. It is possible, we say, to conceive a state of things in which the Ikrarnamahs of the sons of Achul Singh, both that executed in 1248, before the result of the appeal to the Privy Council, and that executed afterwards, in 1257, should be genuine, and that the deed intermediately executed by Toolsa Sing in Posh 1248 should be false, or at least should have been drawn up without the consent of all the parties. And such an hypothesis might receive some additional confirmation from the conduct of Toolsa Sing, who certainly afterwards refused to consent to the registration of the plaintiff's name in the Collectorate as the entire 4-annas shareholder.

But, looking to the conduct of all parties throughout, and to the legitimate and reasonable inferences to be drawn from such

conduct, we think the version of the plaintiff far the more probable. It is likely that the father of the plaintiff, when he took on himself expense and trouble for the family, would demand and insist on a guarantee for his remuneration from all the members of that family. It is not very unlikely that Toolsa Sing in 1258 would refuse to guarantee such remuneration on what was then an uncertain contingency, or at best a hopeful speculation. And it is quite within our knowledge and experience of the native character that, when the suit was won, and the time came for the remuneration of the person to whose efforts success was due, some of the parties should begin to repent of their bargain, should refuse registration, and should throw obstacles in the plaintiff's way. It is, moreover, highly improbable that, if the appellants could have resisted his claim, and have challenged his possession with any hope of success, they should have abstained from doing so for a period of more than ten years after the plaintiff had been placed in formal possession of what, by their own account, then as now, they had never conceded to him.

We do not attach any weight to the contention of Mr. Allan, raised more by way of insinuation than by way of argument, that this is an attempt on the part of the plaintiff and Doolar Singh to throw off the liability from the latter, and to impose it on the appellants. The agreement with the plaintiff's father was that he should get one-fourth of the whole zemindary which the sharers had obtained by a decree in the Sudder Court, and which they hoped to retain in appeal to the Privy Council. It does not appear either possible or probable that, at this distance of time, the plaintiff would ever stir in the matter again in order to alter this state of things, or to vary the liability of the different shareholders; or, even if he should fail in the present appeal, that he could look to Doolar Singh to reimburse him for what he might lose by the recusancy of the appellants. The very nature of the agreement itself, as well as the length of time that has elapsed, put an end to this supposition.

The plaintiff has been quite consistent throughout, and his conduct in resolutely demanding a trial of his title in the suit between the shareholders decreed in 1862, although his request could not be acceded to, is certainly not calculated to throw suspicion on his cause. On the other hand, the appellants may be supposed anxious, when they had gained their suit against the other Hindoo shareholders, to conclude the claims of the Mahomedan plaintiff, by rapidly and dexterously taking out a full execution of their decree.

The conclusion, then, to which we have arrived in this long contest is that the plaintiff, having once been formally put in possession of 115 villages or mouzahs, ought never to have been dispossessed, and that it was not the intention of the Sudder Court, in May 1862, that he ever should be dispossessed, if in possession, as he unquestionably was; that his possession is shown by independent and trustworthy evidence, oral and documentary, apart from the award under Act IV. of 1840, and is shown to have existed previous to the same; that the conduct of the parties throughout, and the reasonable probabilities of the case, give a strong support to, and confirmation of, his title, even though the execution of the title-deeds themselves have not been enquired into and proved; that the deeds themselves have long been propounded in Courts, and have been judicially acted on; that it is impossible to separate the acts of possession done in virtue of the shares of Achul Singh from those done in virtue of the share of the appellants; and that the Lower Court is quite correct when it finds that the plaintiff had been in possession for more than 12 years previous to the date of dispossession in 1267 Mulki, or 1860.

In this view, we have no hesitation in affirming the judgment of the Lower Court, and in dismissing the appeal with costs.

The 15th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell *Judges.*

Evidence—Admission of former owner of property.

Case No. 3301 of 1865.

Special Appeal from a decision passed by Moonshee Anwar Ali, Principal Sudder Ameen of Tipperah, dated the 30th August 1865, reversing a decision passed by Moonshee Abdool Khuliq, Moonsiff of

that District, dated the 31st January 1865.

Khenum Kuree Chowdhrain and others (Plaintiffs), *Appellants*,

versus

Gour Chunder Mojoomdar and others (Defendants), *Respondents*.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellants.

Baboos Motee Lal Mookerjee, Beneenath Bose, and *Chunder Kalee Ghose* for Respondents.

Admissions subsequently made by a debtor, whose property has been sold, are not evidence against the purchaser of the property.

THIS is a special appeal by the plaintiff from the decision of Moonshee Anwar Ali, the Principal Sudder Ameen of Tipperah. The defendant comes before us by way of cross-appeal. The defendant in this suit, having been dispossessed, unlawfully and otherwise than in due course of law, by the plaintiff, of the property now in dispute, obtained a decree, and was summarily restored to possession under Section 15, Act XIV. of 1859.

The plaintiff then sued to obtain a declaration of his right, alleging that the piece of land in dispute was included in two droons of land purchased under a deed of private sale from one Bun Kishore by Roy Wooma Kant Sein, the ancestor of the plaintiff. The Moonsiff, Moonshee Abdool Khuliq, in a clear and sensible judgment, pronounces that, though the plaintiff had produced the deed of sale, and had examined several witnesses, and the Civil Court Ameen had submitted a report, yet the plaintiff and his predecessors could not produce any sufficient documentary proof of their possession as purchasers; that the Civil Court Ameen's investigation was defective; that, on looking at the language of the kobalah produced by the plaintiff, it would appear that Wooma Kant purchased two annas out of ten annas in talook 125, while the claim of the plaintiff is to two annas out of a nine-annas share. He says that, under these circumstances, the plaintiff is not entitled to a decree, without strict proof of the kobalah. He then goes into the defendant's case, and finds that, by the deed of sale, the mutation-proceedings, and other documents filed by the defendant, Gour Chunder, and the depositions of witnesses examined before the Court and before the Ameen, it is proved that the disputed land appertains to that purchased at the sale in execution of a decree by the defendant, and is in his possession; and accordingly he dismissed the suit.

The plaintiff appealed to the Principal Sudder Ameen, who reversed the Moonsiff's decision, and declared the plaintiff entitled to a nine-annas share in the property claimed, and gave him a decree for 3 gundahs 9½ cowries of land appertaining to the nine-annas share, as per boundaries given in the plaint. The Principal Sudder Ameen's decision from beginning to end is most extraordinary.

The plaintiffs appeal on the ground that they are entitled to the whole, and not merely a nine-annas share of the land claimed. The Principal Sudder Ameen raised an issue whether the entire 16 annas of the talook was in the joint possession of all the shareholders, and decided it in the affirmative. This, as was admitted before us by the vakeels on both sides, was entirely contrary to the allegations of the plaintiff and the defendant, who each admitted that what was called the 9-annas share held by Bun Kishore was a distinct estate which had been divided, and is now held separate from the seven-annas share, with which we have nothing to do.

The defendants, on cross-appeal, object that the purchase by the plaintiff of the two droons of land is not proved. The Principal Sudder Ameen finds the purchase proved, because it was admitted by Bun Kishore.

Now, the plaintiff claims as purchaser at a sale in execution of a decree against Bun Kishore in the year 1858. The admission of Bun Kishore appears to have been made in a proceeding before the Moonsiff of Dighee, whose decision bears date the 24th of August 1859. It is a common and well-known principle of the Law of Evidence that the admissions of a former owner of property,

made after he has ceased to have any interest, are not evidence against the party in possession. No case can illustrate the good sense of such a rule more forcibly than the present. The property of Bun Kishore had been sold in execution of a decree against him. It would be a monstrous thing in any case to hold that the purchaser should be prejudiced by admissions subsequently made by the debtor whose property has been sold.

We have in this case not the mere fact that it is only too probable that the debtor would be willing to collude with others to defeat the purchaser, but the actual finding of the Moonsiff that such was the case, in the very proceeding in which the admission to which the Principal Sudder Ameen apparently refers was made.

That, under such circumstances, any judicial officer should have relied on that admission, is indeed strange.

We called on the respondent's vakeel to point to any proof of the execution of the kobalah. He read, as the strongest instance he could adduce, the evidence of Ram Jeebun Dey, who says that 8 or 9 years ago "Wooma Kant Sein purchased the two droons, of which the land in dispute is a part," and has since been in possession.

This is really no evidence at all. So far as it is an attempt to prove the deed of sale, it is mere parol evidence of the contents of a written document, which is in itself legally inadmissible. He was not asked if he knew the signature of the vendor, or whether he was present when the deed was written. In fact, it is an attempt to ignore the deed. He does not prove that he was present at the negotiation for the sale, heard the bargain struck, or saw the money paid. His evidence is a mere vague statement, inadmissible in point of law, which he may or may not have known to be false and utterly worthless in itself.

We may stop here and say at once that the decision of the Principal Sudder Ameen must be reversed. After the decision against him in the former suit, the plaintiff had the fullest warning that he must on this occasion prove his title as purchaser, and that he could not rely on any mere evidence of possession. As he has wholly failed to do so. the decision of the Lower Court must be reversed, and the suit must be dismissed with full costs in all the Courts and interest.

The 16th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit to recover possession—Lakheraj.

Case No. 428 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 10th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 15th June 1865.

Boodha Mudha and others (Plaintiffs), *Appellants,*

versus

Shaikh Khyrat Ali and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Moonshee Ameer Ali and *Baboo Romanath Bose* for Respondents.

In a suit to recover possession on the allegation that the plaintiff, having been in possession, was suddenly and recently ejected, the sole question for decision is the right to possession apart from any question of the validity or otherwise of the lakheraj title under which the plaintiff claims.

THE Lower Appellate Court has erred in considering, as it evidently did, that the plaintiff could not succeed unless he proved his lakheraj title. The question of lakheraj or no lakheraj is in no way in issue in this suit. The plaintiff alleges that, having been many years in possession, he was suddenly and wrongfully recently turned out of possession. All that he has to prove is that he was in possession, and had some right (of what kind soever) to be in possession, at the time he was turned out. A separate suit may, if necessary, be brought hereafter to determine the validity or otherwise of the lakheraj title which the plaintiff sets up. In the meantime, the case must be tried on the mere point of right to possession, quite apart from any question of valid or invalid lakheraj. In so deciding, we follow the rule laid down in two cases reported in I. Weekly Reporter 111, and Weekly Reporter (Full Bench Cases) 174.

The case is remanded for trial with reference to the above remarks.

The 16th May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Appeal (from decision dismissing suit for default)—Remand.

Case No. 1300 of 1865.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 27th February 1865, reversing a decision passed by the Moonsiff of that District, dated the 26th November 1863.

Kedarnath Bhuttacharjee and others (Defendants), *Appellants,*

versus

Kirpa Ram Bhuttacharjee and others (Plaintiffs), *Respondents.*

Baboo Rajendurnath Bose for Appellants.

Baboos Bhugobutty Churn Ghose and *Anuntram Ghose* for Respondents.

An appeal lies from a decision dismissing a suit for default under Section 170, Act VIII. of 1859; and it is in the discretion of the Lower Appellate Court to remit the case to the Court of first instance to consider the other evidence in the case.

THE Lower Appellate Court has remanded this case, which was dismissed by the Court of first instance under the provisions of Section 170, Act VIII. of 1859.

The plaintiff has been ordered to attend and give evidence; he defaulted, and his case was dismissed under Section 170.

Such a judgment is not final, and an appeal will lie. It is further in the discretion of the Lower Appellate Court to remit the case to the Court of first instance to consider the other evidence in the case.

The case No. 1474 of 1861, dated 23rd June 1863 (Marshall, page 568), is in point.

Appeal dismissed with costs and interest.

The 16th May 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Pre-emption (in Tipperah)—Right of—by a Mahomedan as against a Hindoo purchaser.

Case No. 3320 of 1865.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 26th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 20th January 1865.

Dewan Munwar Ali (Plaintiff), *Appellant,*

versus

Syud Azhurooddeen Mahomed and another (Defendants), *Respondents.*

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Romesh Chunder Mitter* for Appellant.

Baboos Kishen Kissore Ghose and *Unoocool Chunder Mookerjee* for Respondents.

The right of pre-emption by a Mahomedan as against a Hindoo purchaser can only be enforced in Tipperah after proof of the right or custom of pre-emption existing generally in that part of the country in cases in which Mahomedans are not, or only partially, concerned.

PLAINTIFF in this case sued to enforce the right of pre-emption and to obtain possession of 8-annas share of a Kharija talook which had been sold by his co-partner, Syud Azhur, to Raj Kishen Roy. He alleges that he made the necessary processes immediately on hearing of the sale, and therefore is entitled to what he asked for.

The defendant, Raj Kisto, pleads that plaintiff, on the death of his wife Luteefa, set up a fraudulent will in favor of her step-son Masood, with a view of defeating the right of his vendor Syud Azhur; that this will has been set aside at his instance; but, as it has been supported by the plaintiff, the plaintiff cannot enforce his present right, when he has not acquired the right to his wife's property under Mahomedan Law, which must form the basis of his present claim, and consequently his suit should be dismissed; that the right of pre-emption cannot be enforced

against him, a Hindoo in Bengal; and that, even if it could, he has not fully performed the forms required by Mahomedan Law.

The first Court gave plaintiff a decree. The Judge, on appeal, was of opinion that, as, when the suit was instituted, Masood was in possession under the will, and as, since this suit was instituted, the plaintiff, who was not in possession of the 8 annas, has not sued to set aside the will as far as regards his 8 annas, he cannot take advantage of the decree in the suit, in which the defendant Raj Kishen was plaintiff, by which the will was set aside as far as regards Syud Azhur's 8 annas, but must sue separately to get rid of the will, as regards his 8 annas, before he can maintain his present action. The Judge, therefore, dismissed the plaintiff's suit on this ground alone.

Plaintiff now appeals specially, urging that, as the will has been set aside *in toto*, and as he is, under Mahomedan Law, clearly entitled with defendant's vendor, Azhur, to half his wife's property, and as no one opposes his title under that law, or even under the will, it is quite competent to him to institute the present suit, and to enforce his claim in it.

We think that the will having been set aside, it is quite competent to plaintiff, whose title is admittedly good under Mahomedan Law and unopposed, at once to proceed to enforce his right in this suit. But his right as against the defendant, a Hindoo purchaser, can only be enforced after proof of the right or custom of pre-emption existing generally in cases in which Mahomedans are not, or only partially, concerned in the Zillah of Tipperah, as laid down by this Court in the case * of Fukeer Kowal *versus* Imam Buksh; and this point has not been enquired into.

We therefore remit the case to the Judge, with directions that he will enquire into the point above noted. If the right does not exist by custom, plaintiff's suit must fall; if it exist, the Judge will enquire, according to the same custom, whether, for the exercise of the right, the forms prescribed by Mahomedan Law must be gone into, and if any or what modification of them has been sanctioned; and he will then find whether the acts proved in evidence satisfy the requirements of the custom which he may find to exist in the part of the country in which the property is situated.

* Sevestre's Reports, Volume VIII., page 159.

The 17th May 1866.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Remand by Privy Council—What ought to be forwarded to Zillah as judgment—Nature of Accounts required from mortgagee.

Case No. 9 of 1866.

Regular Appeal from a decision passed by the Judge of Chittagong, dated the 4th December 1865.

Goluck Chunder Dutt and others (Defendants), *Appellants,*

versus

Mohun Loll Sookul and others (Plaintiffs), *Respondents.*

Mr. A. T. T. Peterson and *Baboos Dwarkanath Mitter* and *Sreenath Banerjee* for Appellants.

Messrs. R. V. Doyne and *R. E. Twidale* for Respondents.

When the Privy Council remits a case to this country, with directions that the Zillah Court may arrive at certain results by certain enquiries, the objects and reasons of those enquiries, as set forth in the judgment of the Privy Council, are part of the judicial record, and may be forwarded to the Zillah Court with the decree of the Privy Council.

In a suit for possession of mortgaged lands on the allegation of satisfaction of mortgage from the usufruct, the mortgagee is bound to furnish an account of the *bonâ fide* proceeds of the estate while in his possession. Toujees, mehal melanee papers, jaidads, and jumma wasil bakee papers, are not *per se* such an account within the meaning of Section 3, Regulation I., 1798, but may corroborate such account.

It will be necessary, in giving judgment in this case, to refer, more or less, to the previous decisions by Courts of first instance, and by Appellate Courts, and by H. M.'s Privy Council.

The following is the extent and duration of the litigation:—

The case was instituted in 1852, and was decided by the Principal Sudder Ameen, Moulvee Abdool Futteh, on the 5th February 1855; *then in appeal* by the Zillah Judge on the 21st April 1855; *then on remand* by the Principal Sudder Ameen, Moulvee Ashruf Ali, on the 31st December 1855; *then* by the Zillah Judge in appeal again on the 9th December 1857; *then* by the Sudder

Dewanny Adawlut on the 14th February 1859; *then* by H. M.'s Privy Council on the 8th December 1863; *then* by the Zillah Judge again on the 28th December 1864; *then* by the High Court in appeal on 31st May 1865; and *then* again by the Zillah Judge on the 4th December 1865, from whose decision this appeal is now before us.

As two points, however, now alone call for our decision, and as we have sufficiently indicated where all particulars of the case may be found, we shall not advert to any other matters than so far as may be absolutely necessary for their decision.

These two points are—

I. Whether the order of the Court of 30th May 1865, passed by Mr. Justice Bayley and Mr. Justice Phear, was not erroneous, inasmuch as only *the decretal order* of Her Majesty should have been transmitted to the Zillah Court, and the judicial reasons in the judgment should *not* have been communicated to the Zillah Court, or the Judge desired to carry out the views expressed therein, *viz.*, that *notice* should be served on the decree-holder.

II. Whether the appellant had not proved, by his evidence generally, and especially by his toujee of 12th Bysack 1190, that the rates of collections decided by the Judge in the Zillah Court to be those upon which the accounts are to be based, are not too high.

Of these accounts we may add, the Zillah Judge, in remanding the case in 1855, *then* remarked: "*The accounts must be made up* "*in such a way as to preclude any further* "*ground for litigation.*" It is, however, now, in May 1866, after 11 years' protracted litigation up to the highest British Court of Justice, our unavoidable duty again to remand the case *for such accounts.*

The following is a very brief outline of the case. Plaintiff sued on the 16th April 1852, as representative of the mortgagors, to obtain possession of 121 droons, 7 kanees, 6 pakees of mortgaged land, upon the averment that the mortgage had been paid off by what the mortgagee had realized.

Defendants, amongst other pleas, specially denied that the land or its assets were of the extent alleged, or had sufficed to pay off the mortgage.

Defendants relied on a toujee of 12th Bysack 1190, alleged to have been given to them by the mortgagor as the practical guide to the available assets of the mortgaged property.

(In order to prevent mistakes as to the document termed the "toujee," it may be as well *here* to remark that one of the plaintiff's witnesses, by name Kalee Doss, also filed *a* "toujee," as evidence for plaintiff, in this case. We shall, therefore, call this last toujee "*Kalee Doss's toujee,*" and the other, of 12th Bysack 1190, "*Defendants' toujee.*")

Moulvee Abdool Futteh, the Principal Sudder Ameen who first tried the case, dismissed the suit on the 5th April 1855, on the ground that the rates assumed to have been those at which the usufruct had been taken were higher than were in any way realizable.

Plaintiff on this appealed; and the Additional Judge, on the 21st February 1855, held that there were allegations and references to the evidence which rendered it necessary to remand the case in order that it might be clearly ascertained—*Firstly*, Whether plaintiffs so represented the rights and interests of the original mortgagors, that they were in a position to sue for possession? *Secondly*, What was the real area of available land which had been lost, and whether 8 or 14, or more or less, villages were comprized in the mortgage—the defendants toujee only showing 8 villages, and other papers 14 and 17?

Upon this remand, another Principal Sudder Ameen, Moulvee Ashruf Ali, on the 31st December 1855, decided that plaintiffs were entitled to sue; that the defendants' toujee, on which the latter based their pleas, were incorrect; and that 17 villages, and not 8, as shown in the defendants' toujee, were in defendants' possession. *Lastly*, that 100 droons, 13 kanees, 6 pakees (including 10 droons in excess), were held by defendants, and that the assets of these had been more than sufficient to pay of the mortgage. This Principal Sudder Ameen put much reliance on a *jaidad*, or receipt given to the Government Revenue Officers in 1848, acknowledging the possession of all the lands of the mehal—that is, without any claims for diluvion or diminished assets as set up by defendants in this case.

This Principal Sudder Ameen accordingly decreed plaintiff's suit, holding 2 rupees per kanee—a proper rate as the basis of the calculation of wasilat.

This view being affirmed by the Zillah Judge on appeal on the 9th December 1857, a special appeal was preferred to the Sudder Dewanny Adawlut; and it was held by that Court, on the 14th February 1859, that the proceedings taken by the mortgagees, with a view to foreclosure, had effectually barred the

equity of redemption; and that 2,419 rupees being due to the mortgagees, defendants, on the last day of the year of grace, the plaintiff had no right to recover possession. The Sudder Dewanny Adawlut accordingly decreed the appeal, and reversed the decisions of the Courts below with costs.

An appeal was made to Her Majesty's Privy Council from this order, and was admitted, on its being shown that the actual value of the matter in suit was beyond 10,000 rupees The Lords of the Judicial Committee of H. M.'s Privy Council, on hearing the appeal, ruled that it was clear there had been no such trial of the question of foreclosure as law and justice required, and then gave detailed orders as to what was requisite to be done in the matter of *foreclosure*, as well as in that of *accounts*.

The decretal order of H. M.'s Privy Council was, on its receipt in the Registrar's Office here, transmitted in the usual way—that is, without any judicial action by the Judges of this Court—by the Registrar, to the Zillah Judge.

The Zillah Judge thereupon recorded his judgment of the 28th December 1864, to the effect that the notice was duly served as required by law, and that, if there remained anything due at the end of a year from that date, then the sale was absolute. The Zillah Judge then stated that he had a fresh account made from the defendants' toujee, which showed that, at the close of the year of grace, a sum of rupees 8,034-3-6 was still due to defendants. The Zillah Judge, therefore, dismissed the suit of plaintiff with all costs.

Plaintiff appealed, urging that the orders of H. M.'s Privy Council required that notice should be served on the decree-holder and the purchaser, and that these orders had not been fulfilled; that the Judge had, moreover, erred in relying solely on defendants' toujee, because it referred only to 8 villages as comprising the assets, while there were really 14 villages; and, further, that other evidence showed that more had been realized by collections than had been accounted for by the mortgagee. On the part of respondent before the High Court, no serious contention was made as to the validity of these objections, but the respondent's case was put entirely on the inadmissibility of a Regular Appeal in this case, which had been one of Special Appeal before the late Sudder Dewanny Adawlut.

This Court, then (Bayley and Phear, JJ., on the 31st May 1865), overruling the respondent's plea, and taking at length the directing parts of the judgment of the Privy Council, ordered as follows:—

"Thus, there being no valid objection to "overhearing this appeal, and referring to "the obvious errors in the Judge's decision "noticed, and on which respondent, when "called on, has nothing to urge—that is to "say, in his (the Judge's) disregard of the "instructions of Her Majesty's Privy Coun-"cil as to the notice to which the decree-"holder and purchaser were entitled, and "as to his (the Judge's) reliance solely on "the defendants' toujee for proof of the "accounts of the receipts without meeting "the appellant's objections to that account—"we decree this appeal, and remand the case "to the Zillah Judge to be re-tried with "reference to the above remarks."

The Zillah Court then, on the 4th and 13th December, held that, as the defendants were unable to show that notice was served on the purchaser and decree-holder, and that, as in fact it was admitted that such notice was not served, the plaintiffs right of redemption was not foreclosed or barred.

The Judge then recorded his judgment as to the defendants' toujee, and the other evidence in these words:—

"With regard to the second issue, the "defendants file an account showing that "a balance of 4,900 rupees principal, and "7,074-9-2 rupees interest, is still due to "them. This account is prepared from "the toujee filed by them, but the toujee "only contains mention of 8 mouzahs, "while the measurement papers, and the "taidad signed by the defendants, mention "that there were 17 mouzahs. The defend-"ants were accordingly called upon to give "in proofs in support of their toujee. "They now file numerous kubooleuts, which, "they plead, show that all the mouzahs "are entered in the toujee. The plaint-"iffs plead that these kubooleuts are false "and fabricated. However, admitting that "they are properly executed documents, "they do not prove the correctness of the "toujee. The toujee is dated 1190, while "the kubooleuts are almost all for 1194, "1195, and 1196. While, therefore, they "support the toujee to a certain degree, "being executed after it, they cannot be "taken as proof of its genuineness. It "also appears that, while the bill of sale is "dated the 12th Falgoon 1189, the toujee "bears a subsequent date, *viz.*, the 12th "Bysack 1190. The defendants plead that "they were not confined to the toujee "received from Tilokchand, and were

"obliged to make the settlements according "to the land which they found in possession "of the different parties. From the word-"ing of the kubooleuts, however, it would "appear that most of them were prepared "according to the toujee, the area of the "land being mentioned; but in the toujee "there is no specification whatever of the "land. *The jumma wasil bakee papers "also filed by the defendants are pre-"pared in the same manner*, there being "no specification of the land. Under the "circumstances, therefore, there being only "8 mouzahs mentioned in the toujee, and "it being entirely established that there "are more mouzahs in the defendants' "possession, that toujee cannot be taken "as the correct basis for the account.

"The defendants have no further proof to "bring forward in support of the toujee, and "request that an Ameen be deputed to make "a local investigation and prepare an account "from the actual collections made, and ordi-"narily this is the best means of obtaining "a correct account; but in the present case, "what is proposed to be the basis of the "Ameen's investigation, but the toujee "which is objected to and manifestly in-"correct? This course would, therefore, be "of no avail, and merely prolong the suit. "The question, then, comes to be, how is an "account to be prepared, if not prepared "according to the toujee?"

The Judge added that 20 Rs. per droon, equal to 851 Rs. as nett profits, had been found by the then Principal Sudder Ameen, Ashruf Ali, in his decision of the 31st December 1855; and that 950 rupees were shown to be the annual profits of the estate when the Zillah Judge enquired into the marketable value of the profits in order to regulate the admissibility of the appeal to the Privy Council. The Sudder Ameen then, taking 20 rupees per droon, and deducting 5 per cent. as the usual percentage for collection charges in the Chittagong District, gave plaintiff a decree accordingly, with all costs against defendants.

Again, the parties appeal to this Court. On the first of the points for decision thus before us, we remark that the learned Counsel, Mr. Peterson, contends that this Court was bound to transmit to the Zillah Court *only the decree* signed by Her Majesty, and *not*, as we did, the *judicial reasons for that decree;* that the decree did not direct that the notice should be served on the decree-holder and purchaser; and that the Zillah Judge, therefore, could not, and would not, have held plaintiff's right of redemption barred and foreclosed, had it not been for the erroneous proceeding of the Judges of this Court, in citing, in their order of remand, the judicial reasons and directory views of the Privy Council, in respect to the necessity of notice to the decree-holder, as part of the Privy Council's decree which had to be carried out, while in fact it was not so.

On this objection, we are unhesitatingly of opinion that it cannot be taken in this appeal, which is one from the decision of the Zillah Judge, or in this form, or at this stage at all.

What we have now before us for decision is a regular appeal from a decision of the Judge of Zillah Chittagong, of the 4th and 13th December 1865—not an application for the admission of a review, nor an admitted review of this Court's judgment of 31st May 1865, the correctness of which last is in fact now thus impugned.

The latter, we hold, cannot be altered or declared erroneous by us in any other way than by the means (if available) prescribed in the Sections of Act VIII. of 1859 applicable to reviews. But, even were this not so, we hold that this Court were right to cite the directory views and judicial reasons of H. M.'s Privy Council in giving its decisions in a regular appeal before it judicially and in a case remanded to carry out the plainly-expressed object of H. M.'s Judicial Committee; and, further, that the judgment of the Privy Council, as cited, was a judicial record of this Court sent out officially to this Court by command of the President of the Committee of their Lordships in the exact shape in which this Court used it, and quite properly used it, as such record.

When their Lordships of the Privy Council shall be pleased to order that, when (as here) they remit a case with directions to this country that the Zillah Court may arrive at certain results by certain enquiries, the reason and objects of these enquiries, as recorded by the Privy Council, are not to be considered part of the judgment or judicial record, or be used for the guidance of the Zillah Court—then, but not before, shall we be prepared to accept the view of the learned Counsel. We may, however, remark that Her Majesty's *order* itself contains directions to the same effect as this Court's order of remand. The order itself is this:

"Her Majesty, having taken the said "report into consideration, was pleased, by "and with the advice of Her Privy Council, "to approve thereof, and to order, as it is

"hereby ordered, that the said decree of the "Principal Sudder Ameen of the 31st De-"cember 1855, and likewise the decree of "the Zillah Court of Chittagong of the 9th "December 1857, and likewise the decree "of the late Court of Sudder Dewanny "Adawlut of Calcutta of the 14th February "1859, respectively be, and the same are "hereby each of them, discharged; and Her "Majesty is hereby further pleased to order "that the cause *be remitted to India, and that* "*the High Court at Calcutta, or under its* "*direction the proper Zillah Court, do en-*"*quire whether the appellants' right or* "*equity of redemption, as concerning the* "*mortgaged estates in question, or any and* "*what part of them, has become foreclosed* "*or barred*, and if it has not become so as "to the whole of the estates, then *to take* "*an account of what anything is due to the* "*respondents* or any of them on the security, "and for that purpose *to take the usual ac-*"*counts* as to rents and profits and disburse-"ments with just allowances, and upon the "result of that account to deal *with the* "*matters in dispute accordingly*, the parties "respectively to be at *liberty to adduce* "*evidence in addition to that now before* "*Her Majesty on those issues upon the* "*determination of which the final decision* "*of the cause must depend;* the costs of the "trial, including those of this appeal, to the "amount of six hundred and fifty-two pounds "eighteen shillings and ten pence sterling, to "abide the events whereof the Judges of the "High Court of Judicature at Calcutta for the "time being, and all the other persons whom "it may concern, are to take notice and "govern themselves accordingly."

But further, taking the obligations of this Court to be limited (as Mr. Peterson urges) by the actual words of Her Majesty's order, it was proper and right that, in remanding the case in obedience to that order, this Court should, in its discretion, give instructions to the Lower Court with regard to the law bearing upon the investigation which had been directed. The law laid down on that occasion, with reference to the notice of which Mr. Peterson complains, was, in our judgment, upon the admitted state of facts, quite correct; and it is a matter of indifference for the present whether it be treated as having been expressed by Her Majesty's Privy Council, or as having been enunciated by this Court alone, unassisted by Her Majesty's advice.

On the 2nd point—*viz.*, that the evidence on the appellants' side generally, and especially the toujee, shows that defendants had not realized their legal dues from the usufruct of the Mehal—we are clearly of opinion that we are not even *yet* in a position to decide this question of fact, because we have not the proper materials.

The law, Section 3, Regulation I. of 1798, enacts that "in all instances wherein the "vendee on a 'byebil wafa' or similar "conditional sale may have been put in "possession of the land, and an adjust-"ment of accounts may subsequently be-"come necessary between him and the "borrowers, *the lender is to account to the* "*borrower for the proceeds of the estate* "*whilst in his possession.*"

The Lords of Her Majesty's Privy Council also, in their judgment in this case, state: "The Zillah Courts, in coming to this con-"clusion" (*i. e.*, that there was not anything "due to the mortgagee on their security) "seem to have proceeded, not upon proof "*of the actual collections* which were, or "ought to have been, made by the mort-"gagee, but upon materials which were in "a great measure speculative and conjec-"tural."

In this view, then, of the requirements of the law and of the judgment of the Privy Council, we ought to have in this case *a set of accounts, duly furnished by the mortgagee* (and to be duly proved by him), of the *bonâ fide* collections which have come to his hands for the property mortgaged during the time he has had possession of it. But we have no such account. On the contrary, the contest from 1852 to 1865 has been entirely on the defendants' toujee. Can that toujee be said in any sense to be an *account* of the *actual collections* by the mortgagee? It is admitted by all to be the rent-roll alleged to have been given by the mortgagor on the 12th Bysack 1190 to the mortgagee, for a guide to the latter, before they had made any collections, as to what they might expect to be the assets available for them on which to base their means of collections.

Next, we come to the Mehal Melanee papers which are furnished to the revenue-authorities by the zemindars. These are statements of estimated and supposed assets to be used as ground-work for registers of statistical and survey and settlement-details. These, therefore, are as little the account required as the defendants' toujee; that is, in no way an account of *actual collections*, which is *the* account that the law and order of H. M.'s Privy Council require.

The Jaidad of 1848 is a receipt given to Government for certain lands, and specifies seventeen villages to be comprised in Durrumpore, the first village entered in the defendants' toujee. This paper, too, cannot properly be said to show actual collections, and like the defendants' toujee and Mehal Melanee papers, may or may not be *confirmatory*, or otherwise of the mortgagee's *account* of his actual collections, but cannot be *that account itself*.

It is, however, strongly pressed upon us that appellants filed their *jumma wasil bakee papers—i. e.*, those showing what was the demand, what the collection, and what the balances—and that a mortgagee could not give a more full account, or one more in accordance with that indicated in Section 3, Regulation I. of 1798, above cited. Of these jumma wasil bakee papers the Judge records that they are prepared in the same manner (as the toujee), *there being no specification of the land*.

Now, on the one hand, we may admit that the Judge's view of jumma wasil bakee papers is not a very correct one. Such a paper does not ordinarily purport to do more than to record the tenant's name, where his lands are, and what the demand, collections, and the balance may be on account of his tenure. But, on the other hand, jumma wasil bakee papers, although they may, and perhaps may very strongly and directly, support a mortgagee's account put in under the law (Section 3, Regulation I. of 1798), *are not, and cannot be, that account itself*. That account, which the mortgagee by law has to put into Court, is not that of his agent or tehsildar, given by the latter for his master's (the mortgagee's) information as to such agent's collections. The *jumma wasil bakee* paper, however, is this latter only. The account to be put in under the law is one to be made, verified, and proved by the mortgagee himself in the way before indicated. His *jumma wasil bakee* papers, duly attested by those who prepared them, or who collected according to them, and supported by the receipts of the talookdars or ryots, who also may be called to depose to those receipts, and to what was the real demand, collection, and balance of each of their respective tenures, may well be adduced to support the mortgagee's own account when made and put into Court under the law cited.

In fact, the account required from the mortgagee is one setting forth *what he has realized—from what portions of the mortgaged property—in what terms or periods—with what loss and gain on the several assets—with what necessary reductions—* and *what remains then as the net profits which* can be taken as actual realizations towards liquidating the sum due under the mortgaged transaction. It is such an independent account as this, to be supported, and proved, and vouched in the way above indicated to such an extent as the mortgagee may think sufficient for his case, that the law and the decree of H. M.'s Privy Council seem to us to require.

We therefore direct that the mortgagee do furnish and prove such an account. He will be at liberty to adduce such proof to support it as he thinks proper, including proof of what was the area and assets, &c., available under this mortgage transaction, and what were the necessary reductions, and what unavoidable losses. The plaintiff, on the other hand, may adduce such evidence as he thinks fit to rebut that adduced by defendant in respect to his account of realizations, salaries, deductions, dues, &c.

In this view, we remand the case to be re-tried with reference to the above remarks.

The 17th May 1866.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Right of action (on decree pending appeal).

Case No. 2640 of 1865.

Special Appeal from a decision passed by Mr. R. J. Richardson, Judge of Behar, dated the 3rd August 1865, reversing a decision passed by Baboo Tarakant Bidyasagur, Principal Sudder Ameen of that District, dated the 28th January 1862.

Ranee Imamum and another (Plaintiffs), *Appellants*,

versus

Hurdyal Singh and another (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboos Onooteol Chunder Mookerjee, Chunder Madhub Ghose*, and *Mohesh Chunder Chowdry* for Appellants.

Baboos Hem Chunder Banerjee and *Bhuggobutty Churn Ghose* for Respondents.

Quære.—Whether a new suit will lie upon a decree pending an appeal.

THIS is a special and not a regular appeal, and, therefore, we cannot enter into the question as to whether the Judge came to a proper conclusion upon the weight of evidence. If the Judge had admitted any evidence which was not admissible, that would be another thing. We do not think that there was anything wrong in point of law in the judgment of the Judge, and, therefore, in special appeal, there is no reason to interfere with it.

We are not now dealing with the question whether the order of remand was correct; but, if we had to dispose of this as a new case, we should doubt whether a new suit will lie upon a decree pending an appeal. As the Judge does not find that there was a decree for the plaintiff, the question does not arise.

The decree of the Lower Appellate Court is affirmed with costs.

The 28th May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Breach of Indigo Contract—Limitation—Damages.

Cases Nos. 3383, 3384, 3428, and 3429 of 1865.

Special Appeals from a decision passed by the Judge of Purneah, dated the 17th August 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 15th March 1865.

Meer Mahomed Kazem Chowdhry and others (Defendants), *Appellants,*

versus

Mr. A. J. Forbes (Plaintiff), *Respondent.*

Messrs. A. T. T. Peterson, R. V. Doyne, J. S. Rochfort, and *C. Gregory* for Appellants.

Mr. G. C. Paul and *Baboo Bungshee Doss Seal* for Respondent.

A contract to sow and cultivate indigo provided for liquidated damages payable in a lump sum in the first year in which a breach of contract took place.

HELD (1) that a suit for damages for breach of contract for two years must, under Clause 10, Section 1, Act XIV. of 1859, be brought within three years from the time when the breach of contract first took place; (2) that a suit for damages to the extent of the injury sustained, brought under Section 3, Act X. of 1836, against a party for prevailing upon ryots who had entered into a lawful contract with the plaintiff, to break that contract, was governed by the six years' limitation provided by Clause 16, Section 1, Act XIV. of 1859; and (3) that both liquidated damages and the amount advanced to the cultivators could not be recovered under Section 3, Act X. of 1836.

IT is admitted that one decision governs these four appeals. The plaintiff, special respondent, an indigo-planter of the Purneah district, sued certain ryots, who had taken advances for indigo-cultivation, for breach of contract, calculating his damages according to the quantity and market value of the crop of indigo which would, under ordinary circumstances, have been produced, had the defendants fulfilled the terms of the contract. The istemrardars or superior holders were made co-defendants, inasmuch as it was alleged that they had *prevailed* upon the principal defendants to break the contract entered into by them with the plaintiff. The suit was brought under the provisions of Section 3, Act X. of 1836, and was instituted on the 25th May 1864. The damages were claimed for the years 1860-61 and 1861-62. The contract is dated 13th February 1860

The Court of first instance gave a decree for *liquidated* damages at the rate of 15 rupees per beegah for the two years claimed, as also for the sum advanced to the cultivators. The principal defendant and the superior holders, as having prevailed upon the others to break the contract, were made jointly liable. This decision was upheld by the Judge in appeal.

In special appeal, Mr. Doyne appeared for the cultivator, Mr. Peterson for the istemrardars, and Mr. Paul for the plaintiff, special respondent.

After hearing all the arguments of the Counsel, and the papers of the record which they required to be read, we are clearly of opinion that the plaintiff cannot recover both *liquidated* damages and also the amount advanced by him to the cultivators; and the learned Counsel, Mr. Paul, admits that his client's claim to recover the advances cannot stand. It is further, in our opinion, clear that the plaintiff cannot, under the provisions of Section 3, Act X. of 1836, recover *liquidated* damages from the *istemrardars* with whom he had no such contract, but simply damages to the extent of the injury sustained by him. This also is not seriously contested by the learned Counsel for the special respondent.

Mr. Doyne, for the cultivator defendants, contends that the plaintiff's cause of action

arose in October 1860, the commencement of the sowing season, when the defendants refused to sow and cultivate; that the penalty stipulated in the contract was a lump sum, and not for each year in which the cultivator might refuse to sow and cultivate; further that, under Clause 10, Section 1, Act XIV. of 1859, the plaintiff's suit is barred.

Mr. Peterson, for the istemrardars, contends that there is no evidence that his clients had any knowledge of the existence of the contract between the plaintiff and the principal defendants; that no advances were proved; and that there is also no evidence of his clients having *prevailed* upon the principal defendants to break their contract. The learned Counsel further contends that the plaintiff's claim is barred under Clause 2, Section 1, Act XIV. of 1859, inasmuch as the plaintiff's suit is to recover a pecuniary penalty or forfeiture for the breach of a Law or Regulation, and ought to have been brought within one year from the time the cause of action arose.

We take the case of Mr. Doyne's clients first. We have read the contract upon which this suit is based. From the terms of it, it is clear that the plaintiff's cause of action arose in October 1860 when the defendants refused to sow and cultivate. The breach of contract took place in that month and year, and the suit ought to have been brought within a period of three years from the time when the breach of contract, in respect of which the action is brought, first took place. The *liquidated* damages specified in the contract were a lump sum, in our view, payable in the first year in which the breach of contract took place, and did not spread over the remaining years of the term. The suits of the plaintiffs, in as far as the principal defendants, the cultivators, are concerned, are, therefore, dismissed with costs, as barred by the Statute of Limitations, and their appeals decreed, the respondent being liable for costs and interest in all the Courts.

With reference to the *istemrardars*, we observe that there is sufficient evidence to show that they *prevailed* upon the other defendants, the cultivators, to break their contracts, knowing of them, and that they included an advance; and they are, therefore, liable, under the provisions of Section 3, Act X. of 1836, for damages to the extent of the injury sustained by the plaintiff. Clause 2, Section 1 of Act XIV. of 1859, is not applicable to this suit, which is not a claim for a pecuniary penalty or forfeiture for the breach of any Law or Regulation, but a suit for damages to the extent of the injury sustained by the plaintiff. Section 3, Act X. of 1836, does not enact that a pecuniary penalty or forfeiture shall be recoverable for breach of the said Act; it merely lays down how and to what extent a party who is injured by another party prevailing upon ryots who have entered into a lawful contract with him to break that contract can recover damages.

Clauses 9 and 10, Section 1, Act XIV. of 1859, cannot apply to the case of Mr. Peterson's clients, for there is no contract between them and the plaintiff. Clause 16 is, therefore, clearly applicable; and, as the plaintiff's suit, as against Mr. Peterson's clients, was instituted within the period of six years from the time the cause of action arose, it is in time.

We reverse the decision of the Lower Appellate Court in as far as the liability of Mr. Peterson's clients for liquidated damages is concerned. The suit is remanded in order that the Courts below may assess the damages to the extent of the injury sustained by the plaintiff according to the provisions of Section 3, Act X. of 1836.

The 28th May 1866.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Onus probandi—Joint Hindoo Family—Allegation of separate gift, and thus of separate acquisitions.

Case No. 27 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 30th December 1865.

Lukhun Chunder Dallal (Defendant), *Appellant,*

versus

Modhoo Mookhee Dossee (Plaintiff), *Respondent.*

Baboos Jugodanund Mookerjee, Onookool Chunder Mookerjee, and *Dwarkanath Mitter* for Appellant.

Mr. G. C. Paul and *Baboo Unnoda Pershad Banerjee* for Respondent.

Suit laid at Rupees 49,999.

The presumption of Hindoo Law being in favor of a family being joint, and of all property being acquired

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from joint funds, until the contrary be shown, the *onus probandi* is on the party who alleges separate acquisitions obtained by means of a special gift.

In this case we do not think it necessary to enter into much detail, for we entertain the same view as the Lower Court does, both on the matter of burden of proof and on the evidence adduced by the appellant; and we see no reason to interfere with the decision of the Court below.

This is a case where there was admittedly originally a joint Hindoo family, and where the appellant went into Court, alleging his self-acquisition of the property in suit from the uncle as derived from a gift from his grandmother of 3,000 rupees.

Under the recognised rules of pleading in cases similar to this, the burden of proof is (with reference to the presumptions of Hindoo Law in favor of the family being joint, and of all property being obtained by joint funds until the contrary be shown) upon the party who alleges that the family was originally joint, but that there *was the gift of Rupees 3,000* from the *nucleus* of which the appellant's *self-acquisitions* were made. That party has to prove this *firstly*; and, *secondly*, that those self-acquisitions were made from these funds or from profits derived from them. If the first be not proved by appellant, we need not go into the *second*.

After hearing all the arguments of Counsel and the evidence itself, we fully concur in the reasons given by the Lower Court for discrediting that evidence.

The donor's brother's son, who is said to have been present and actually concerned at the paying of the money, was not called; and the witnesses of appellant speak, to our view, very much as tutored witnesses.

The alleged gift, moreover, is not supported by any trustworthy accounts. The accounts shown by appellant are not kept in the ordinary way, and certainly, to our view, are not old enough to be the accounts of the period they represent; or, in other words, they do not appear to us to be genuine accounts.

It is objected that the value of the *molasses* was not specified in the claim, and should not, therefore, be awarded. But the claim is generally for a share of the joint property, and the value of the *molasses* being part of the joint property is, by legal implication, to be included.

In respect to the claim to the talook alleged to be purchased by appellant, we do not think that there is evidence to show that this was a purchase from separate funds.

On the whole case, the only modification we think we ought to make in the decision of the Lower Court is as to the sum of 5,378 rupees, which really should have been credited to the opposite party, as it was debited to him separately as if he was a different party from the joint family, whereas it was in fact a joint item, though in the separate name. The payment should be debited and credited accordingly on both sides of the account.

We, accordingly, dismiss the appeal with the above modifications, with costs in proportion.

The 29th May 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Pre-emption—Hindoos in Jessore.

Case No. 425 of 1866.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 16th December 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 2nd April 1864.

Madhub Chunder Nath Biswas (one of the Defendants), *Appellant,*

versus

Tamee Bewah (Plaintiff) and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Moonshee Amir Ali Khan Bahadoor and *Baboo Romanath Bose* for Respondents.

Quære.—Whether the Law of Pre-emption extends to transactions as between Hindoos in Jessore.

The parties to this suit are Hindoos, and the District is Jessore. The claim is based on a right of pre-emption—a right which is peculiar to the Mahomedan Law. The defendant in this case is clearly entitled to object to the suit being tried by the Mahomedan Law. We have not been shown that there is any local custom, which, of course, must be determined by evidence, to the effect that the Law of Pre-emption extends to transactions as between Hindoos in Jessore. The case must, therefore, be remanded, as this point was not taken below. The Judge will find whether such local custom prevails or not, and upon what evidence. Should his finding be in the negative, the plaintiff's suit must be dismissed; if in the affirmative, he

will pass a fresh decision, leaving any party dissatisfied to appeal specially to this Court. The remaining grounds of special appeal have not been entered into, as the order of remand precludes the necessity of so doing. Costs to follow the result.

The 29th May 1866.

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

Estoppel—Mortgage.

Case No. 3196 of 1865.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 28th August 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 8th April 1865.

Dhanunjoy Dey Potedar (one of the Defendants), *Appellant,*

versus

Dwarkanath Singh (Plaintiff) and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Greeja Sunkur Mojoomdar* for Appellant.

Baboo Woomesh Chunder Banerjee for Respondents.

Suit by a purchaser from a mortgagee against a dur-mokururedar for the cancellation of his mokururee lease granted without authority by the mortgagor. In a former suit brought by the mortgagee for possession, the mortgagor admitted the mortgage. HELD that, although that admission was conclusive as between the mortgagor and the mortgagee, the colluding parties, yet that, in the present case brought to avoid the defendant's title on the strength of an alleged collusive mortgage, it was quite competent to him to contest its *bonâ fide* nature.

THE plaintiff in this case, one Dwarkanath, the purchaser from a mortgagee, Ram Dyal, who had purchased and obtained possession of 8 annas of a tenure, sues the defendant, a dur-mokururedar, for the cancellation of his mokururee title, on the ground that his mortgagor, Pragh Bhukut, had, under the deed of mortgage, no power to grant the same.

The defendant pleads that he first obtained a pottah from Pragh Bhukut in 1252; that this was exchanged for a mokururee pottah in 1262 after a measurement which showed that the area of land was beyond that specified in the former pottah executed by the alleged mortgagor, Pragh Bhukut; that the alleged mortgage was a fraudulent contrivance between Pragh Bhukut and Ram Dyal, the present plaintiff's vendor, with a view of avoiding his title, and that, being such, plaintiff's suit should be dismissed; that, anyhow, he (defendant), being on the land since 1252, cannot be evicted, but his rents can only be enhanced.

The Judge of Midnapore considers that, in a previous suit in which the mortgagee sued for possession, the *bona fides* of the mortgage had been determined absolutely, and could not now be questioned by the defendant; that, under that mortgage-deed, the mortgagor was restricted from granting a mokururee lease; that, consequently, it must be set aside, and plaintiff be declared entitled to evict the defendant.

Defendant now appeals specially, urging—*1st*, That the *bona fides* of the mortgage was never absolutely determined in the previous suit; it was only determined as between the mortgagor and the mortgagee, the colluding parties; that, consequently, in the present case brought to avoid his title on the strength of a collusive mortgage, it is quite competent to him to contest its *bonâ fide* nature, though, of course, proof of his allegation rested upon him. *2nd*, That, even if it be not fraudulent, the plaintiff can only have the pottah of 1262 cancelled. He cannot be evicted under Section 6 of Act X. of 1859, but is entitled to possession under the terms of the pottah of 1252 until notice of enhancement is served upon him.

We think there can be no question that the Judge is wrong in determining that the *bona fides* of the mortgage was absolutely settled in the previous case, and that that question could not be re-opened in this case. The mortgagor admitted the mortgage, and, as between the mortgagor and mortgagee, that admission was conclusive; but when the mortgagor, as in the present case, attempts to avoid defendant's title, on the strength of a mortgage pleaded by defendant to be collusive, it is incumbent on the Court to take from him evidence on this point, and to decide in his presence as to its nature.

We remand the case to the Judge for the purpose of making this enquiry. If the defendant proves satisfactorily, and plaintiff is unable to rebut the proof, that the mortgage was collusive, plaintiff's present suit must fall; if the mortgage was not collusive, then the mortgagor was not warranted in granting the mokururee lease, which must stand cancelled; but defendant, having been in possession from 1252, will be entitled to retain possession and to pay rent at the old rates until they are raised by due course of law.

The 29th May 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Limitation—Deduction.

Case No. 3001 of 1865.

Special Appeal from a decision passed by Mr. A. Davidson, Second Principal Sudder Ameen of Hooghly, dated the 5th July 1865, affirming a decision of Baboo Kissen Chunder Chowdhry, Moonsiff of Serampore, dated the 25th November 1864.

Nilmadhub Surnokar and another (Defendants), *Appellants*,

versus

Kristo Doss Surnokar and others (Plaintiffs), *Respondents*.

Baboo Onoocool Chunder Mookerjee for Appellants.

Baboo Tarucknath Dutt for Respondents.

A former suit brought, not against the same defendants as in the present suit, but only against one of them, does not fall within Section 14, Act XIV. of 1859. Consequently, the time of its pendency cannot be deducted in computing limitation.

We think that limitation applies to the whole of this suit, and that the Judge was wrong in deducting the time during which the former suit was pending. Section 14, Act XIV. of 1859, requires that the suit, the time of the pendency of which is to be deducted, should have been one prosecuted against the same defendant, "or some person "whom he represents, *bond fide* and with "due diligence, in a Court of Judicature "which, from defect of jurisdiction or other "cause, shall have been unable to decide "upon it, or shall have passed a decision "which, on appeal, shall have been annulled "for any such cause."

Now, it appears that the former suit was not brought against the same defendants, but only against one of them, and it was merely in consequence of the non-joinder of Bhuggobutty, who has been made a party to this suit, that the former suit, whether rightly or wrongly, was non-suited. If that suit had been brought against the same defendants as those in the present suit, the ground upon which it was non-suited would not have existed.

We think that the case does not fall within Section 14, and, consequently, that the whole of this suit was barred by limitation. The appeal is allowed, and the decision of the Lower Courts reversed, with costs.

There is no hardship in the present case, as the former suit was non-suited nearly 12 years before the present one was commenced.

The 6th June 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Rights of ownership—Fishing in Tanks.

Case No. 649 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 30th October 1865, affirming a decision passed by the Moonsiff of that District, dated the 23rd September 1864.

Syud Ertozah Hossein (one of the Defendants), *Appellant*,

versus

Huree Pershad Singh and others (Plaintiffs), *Respondents*.

Mr. R. E. Twidale for Appellant.

No one for Respondents.

The mere act of fishing in a tank is no proof of ownership

The suit must be remanded to the Principal Sudder Ameen. The suit was brought, on the 27th June 1864, to set aside an Act IV. award, dated the 15th June 1861. The defendant distinctly raised the plea in bar, and this should have been decided. The question, whether the kobalah of the special appellant being registered does not prevail over that of the special respondent, must also be considered.

We also point out to the Principal Sudder Ameen that the mere act of fishing in a tank is no proof of ownership, for nothing is more common than in this country for parties to fish in tanks over which they exercise no rights of ownership.

Costs to follow the result.

The 6th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Defamation—Failure to prove criminal charge.

Case No. 3457 of 1865.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 19th August 1865, reversing a decision passed by the Moonsiff of Jenidah, dated the 17th February 1864.

Brojonath Roy (Plaintiff), *Appellant,*

versus

Kishen Loll Roy and another (Defendants), *Respondents.*

Baboo Umbica Churn Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Every man, who considers that a criminal offence has been committed against him, has a right to make a complaint before the police or before the Magistrate. Failure in proving a *bonâ fide* charge so made by him does not make him liable to an action for damages for defamation.

This is a suit for the recovery of damages on the ground that the defendant charged the plaintiff with a dacoity before the police. It appears that the charge was in fact made, and that the defendant afterwards withdrew it. The Judge finds that the assault by the plaintiff upon the defendant was committed, and that it is not proved that plaintiff "did not plunder the defendant according to the manner of dacoits," or that the charge was false or made improperly.

Every man, who considers that a criminal offence has been committed against him, has a right to make a complaint before the police or before the Magistrate, and it is not because he fails in proving the charge made by him that he is liable to an action for damages for defamation. In making such a complaint, the presumption is that he is pursuing the remedy given him by the law properly and in a legal manner, and he does no wrong, and is not liable to suits except for making such a charge falsely and maliciously, and when there is not any reasonable or probable cause for making it. The present suit was most properly dismissed by the Judge, and we therefore dismiss the appeal with costs and interest.

The 7th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Estoppel—Evidence—Alluvial land.

Case No. 3467 of 1865.

Special Appeal from a decision passed by the Judge of Dacca, dated the 8th September 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 14th September 1864.

Nazimooddeen Ahmed Chowdhry and others (Defendants), *Appellants,*

versus

Mr. J. P. Wise and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellants.

Baboo Onoocool Chunder Mookerjee for Respondents.

Although the decision in a former suit in which it was determined that a disputed *chur* was an accretion to *S*, and was divided and separated off from *R* by a broad river, being merely a determination as to the particular 8 annas share of the *chur* then in dispute, is not binding as an estoppel as to the other moiety now in dispute, it is strong evidence that the whole *chur* is an accretion to *S*.

We are of opinion that in this case the decision of the Judge was warranted by the evidence. The objection taken by the special appellant is that the Judge was wrong in relying on a former decision between the same parties as to the other moiety of the *chur* in dispute. In that case, Mr. Wise had sued for 8 annas of the *chur* as appertaining to the estate of Sonargaon. By the judgment of the Court it was determined that the disputed *chur* was an accretion to Sonargaon, and was divided and separated off from the defendant's estate of Russoolpore by a broad river. He now sues for the other 8-annas share of the same *chur;* and, although the decision in the former suit, being merely a determination as to the particular 8-annas share then in dispute, is not conclusive and finally binding as an estoppel as to the other moiety now in dispute, it is impossible to say that that decision, arrived at in the presence of the parties, which formed the basis of the decree, is not strong evidence against the defendant that the whole *chur* is an accretion to Sonargaon, and that no portion of it belongs to Russoolpore. This being the only substantial point raised in special appeal, the appeal is therefore dismissed with costs and interest.

The 8th June 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and Shumbhoonath Pundit, *Judge.*

Limitation (Dishonest possessor)—Alluvial land.

Case No. 220 of 1864.

Regular Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 21st March 1864.

Kowar Poresh Narain Roy (Plaintiff), *Appellant,*

versus

Messrs. R. Watson and Co. (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Romanath Bose* for Appellant.

Messrs. R. V. Doyne, R. T. Allan, and *J. S. Rochfort*, and *Baboo Mohinee Mohun Roy* for Respondents.

Suit laid at Rupees 80,000.

Dishonesty in obtaining possession will not prevent the possessor from availing himself of the Law of Limitation, which, however, cannot relieve him from the charge of dishonesty.

Where the Government does not take possession of a *chur*, and the river between it and the shore becomes fordable, the land formed by the recess of the river is an increment to the tenure of the person holding the land most contiguous to it.

THE question is whether the land claimed by and in the possession of Messrs. Watson and Co. belongs to the owners of the land on the northern boundary of the river, and whether they are entitled to turn Messrs. Watson and Co. out of it. It is said that Messrs. Watson and Co. are trespassers, and have no title to the land in suit, except such portion of it as may belong to them as an accretion to lands belonging to them on the northern boundary.

It appears that, in 1842, Messrs. Watson and Co. took possession of the land in dispute, and we think it may be admitted upon the evidence that at that time it was an island, and that no portion of the river was fordable between such land and the lands on either side of the river, but that subsequently, either by an additional formation of land or by the falling away of the river, the river became fordable between the land on the northern side and the land in dispute.

It appears that the survey-map as required under Act IX. of 1847 was confirmed by the Government in 1856, and that, although Messrs. Watson and Co. took possession in 1842, they did not settle with the ryots until 8 or 9 years ago, but that they had been growing indigo on some parts of the land.

It also appears that a kubooleut was executed to the Court of Wards by Messrs. Watson and Co. for certain villages north of the river, including, according to Messrs. Watson and Co.'s *jumma wasil bakee* papers, Ramkistopore. Referring to these papers, the Judge says: "These papers do not indicate, "with any certainty, the topographical features of Ramkistopore, and are, therefore, "not conclusive on the question at issue. "The *jumma wasil bakee* papers of 1265 "filed for Jogendro Narain's share would, I "admit, lead to the inference that the Ram-"kistopore there mentioned, with Jote Ashad "and other names, and annexed to the "words 'Shikust Pywast,' was on the bank "of the river; but that the first word in the "entry referred to is 'Turuf,' which is a "term applied to a number of villages in a "tract of country, and is not used to denote "a single mouzah. The words 'Shikust "Pywast' are, no doubt, ambiguous; but on "this point it is sufficient to say that this "entry at the most creates only a very slight "inference on the plaintiff's side. It is "clearly not such an entry as can be con-"strued into a positive admission by the "defendants of the existence of a Ramkisto-"pore on the spot contended for; and all the "purpose it could serve would be to turn the "scale in favor of plaintiffs, if they had proof "of their own to offer."

Ramkistopore on the north side was not on the banks of the river, so as to give Messrs. Watson and Co. any pretence for claiming the land in respect of it. If they took possession of land which they knew did not belong to them, they took (as the civil law calls it) a knavish possession. Speaking of possession and prescription, the civil law says: "To acquire prescription, "it is necessary to have possessed honestly "and fairly, that is, that the possessor must "have been persuaded that he had a just "cause of possession, and must have been "ignorant that what he possessed did "belong to another person. And this in-

"tegrity is always presumed in every pos-"sessor, if it is not proved that he has "possessed with bad conscience, knowing "the thing to be another's" (Domat's Civil Law, 2208, page 876). I do not mean to say that the fact of obtaining possession dishonestly or knavishly will prevent a man from availing himself of an express Law of Limitation. On the contrary, it appears from a note in the same book that it will not (*idem*, page 2209).

The Law of Limitation in this country being express, dishonesty in obtaining possession will not prevent the possessor from availing himself of the provisions of that law. But the law cannot relieve him from the charge of dishonesty.

In the same note it is said: "But as "to the point of conscience, it is most "certain that the length of time does not "secure unjust possessors from the guilt of "sin, and that, on the contrary, their long "possession is only a continuation of their "injustice."

We allude to this point, not for the purpose of determining the question of limitation, but for the purpose of considering whether Messrs. Watson and Co. did in fact take possession as owners of Ramkistopore on the south bank as stated in argument, or whether they did not take it in right of their tenure as owners of a portion of the land on the north bank of the river and as tenants of the remainder of that portion. In considering this question, we should not presume that Messrs. Watson and Co. took a knavish or dishonest possession, if their possession could be attributed to any state of facts consistent with honesty and integrity. If they took possession of an island, knowing that it belonged to Government, it would be just as knavish and dishonest as if they took possession of land which they believed to be the property of a private individual. It is quite as dishonest to take the land of another, knowing it to be his, as to take the goods of another. If Messrs. Watson took possession as part-owners of the land on the north side, with the honest belief that the water was so receding that the land would shortly become a lawful accretion to the land on the north side of which they were part owners, there would not be that degree of dishonesty in their conduct as if they took with the knowledge or belief that the land was not their property, and never could become so. If, therefore, it were necessary to determine the question, we should rather presume that they took possession of the accretion under the honest belief that it was, or would be shortly, an accretion to the land on the north side of the river, than that they were mere knavish possessors (more leniently called, by the Judge, squatters) who took possession with the knowledge that the land belonged to Government or others, and not to them. But, even if they took possession dishonestly as owners of Ramkistopore on the south, and not in right of lands on the north side, the Statute of Limitation will not protect them under the circumstances of the case.

Mr. McLeod says that in 1850, when he went there, the river was not fordable. It is clear that it was not fordable when Messrs. Watson and Co. first took possession in 1842, and consequently, by virtue of Clause 3, Section 4 of Regulation XI. of 1825, the land was at that time a *chur* at the disposal of Government.

Section 4 says: "When land may be "gained by gradual accession, whether from "the recess of a river or of the sea, it shall "be considered an increment to the tenure "of the person to whose land or estate it "is thus annexed, whether such land or "estate be held immediately from Govern-"ment by a zemindar or other superior "landholder, or as a subordinate tenure, by "any description of under-tenant whatever. "Provided that the increment of land thus "obtained shall not entitle the person in "possession of the estate or tenure to which "the land may be annexed, to a right of "property or permanent interest therein, "beyond that possessed by him in the estate "or tenure to which the land may be annex-"ed, and shall not in any case be understood "to exempt the holder of it from the pay-"ment to Government of any assessment for "the public revenue to which it may be "liable under the provisions of Regulation "II. of 1819, or of any other Regulation in "force. Nor, if annexed to a subordinate "tenure held under a superior landholder, "shall the under-tenant, whether a khood-"kasht ryot holding a mourosee istemraree "tenure at a fixed rate of rent per beegah, "or any other description of under-tenant "liable by his engagements or by established "usage to an increase of rent for the land "annexed to his tenure by alluvion, be "considered exempt from the payment of "any increase of rent to which he may be "justly liable."

Now, so long as Messrs. Watson and Co. held the adjoining land under the Court of Wards, neither the Court of Wards nor the infants whom they represented could turn

Messrs. Watson and Co. out of any accretion to the land held under lease. Pending the lease, Messrs. Watson and Co. had the same right in the accretion as they had in the land to which it became an accretion.

The Statute of Limitation would not apply to the land which became an accretion to the land held by Messrs. Watson and Co. under the Court of Wards. The land was a *chur* at the disposal of Government when Messrs. Watson and Co. first took possession in 1842, but it is now an accretion to land on the north side. Before Messrs. Watson and Co. had obtained any right in the land by limitation, they held the land on the north side of the river from the Court of Wards. The lease was first granted in 1846 and continued to 1853, and it was subsequently renewed from 1853 to 1860. If any part of the land being at first an island became an accretion to the land held under the Court of Wards, limitation would not apply during the continuance of the leases under which Messrs. Watson and Co. held.

But it is said that the land was a *chur* or island, and the 3rd Clause of Section 4, Regulation XI. of 1825, is referred to, to show that it was the property of Government.

That Clause says: "When a *chur* or "island may be thrown up in a large navi-"gable river (the bed of which is not the "property of an individual), or in the sea, "and the channel of the river or sea "between such island and the shore may "not be fordable, it shall, according to "established usage, be at the disposal of "Government."

The Regulation does not say "shall belong to Government," but that the Government may dispose of it. If, however, the Government does not take possession or dispose of it for a year or so, and during that time the channel between the island and the adjoining land becomes fordable, the right of Government to dispose of it would cease, and it would become an increment to the tenure of the person holding the land most contiguous to it (Regulation XI. of 1825, Section 4, Clause 3, and Clause 1), and the person in possession of the contiguous land would have the same interest, and the same interest only, in the accretion as he had in the land to which it became an increment.

We entirely agree with the decision of the learned Judges who decided the case which was referred to in the argument (Weekly Reporter, Volume II., page 34), that, if a *chur* be surrounded by water fordable at any point, the owner of the land to which the *chur* adjoins has a *primâ facie* title to it under Clause 3, Section 4, Regulation XI. of 1825, and that the *status* of the land at re-survey, not at the time of the first formation, is to be looked to under Act IX. of 1847.

Now, here is a Revenue Survey map confirmed by Government. Assuming that it is a new map within the meaning of Act IX. of 1847, it would not authorize the local Revenue Authorities to take possession of the land for Government. It does not show that the land thrown up is an island, or that there is a channel not fordable between it and the north shore. The land would not come under Section 7, Act IX. of 1847, or Clause 3, Section 4 of Regulation XI. of 1825.

Therefore, as regards the Government, it appears to us that, although it was originally an island, and Government might at its first formation have taken possession of it, still, as the Government did not do so, and the river between the land in dispute and the shore is now fordable, the land formed by the recess of the river is an increment to the lands most contiguous to it, and belongs to the owners of such land; therefore the Government, the only party who could have a title to it, have lost their title.

Messrs. Watson and Co. are in possession of it, but they are wrong-doers, and the owners of the lands to which it has become an increment are not barred by limitation from asserting their title.

That portion of the disputed land, if any, which is contiguous to the lands held by Messrs. Watson and Co. under the lease from the Court of Wards, belonged to Messrs. Watson and Co. during the lease, but their title to it ceased when the last lease expired.

But the evidence in the case is not sufficient to enable us to say to whom the lands on the north bank of the river belong, so as to enable us to form a sound judgment on the question of fact as to what portion of the lands claimed belongs to the plaintiffs as accretion. It is therefore necessary to send the case back for further enquiry.

The Judge says: "The Thakbust maps of "Jote Ashai and Plassy Futtehpore, alleged "to be synonymous with Chuk Futtehpore, "prove that Chuk Futtehpore lies north and "north-east of Jote Ashai, and, conse-"quently, it cannot be in the position "claimed for it by plaintiffs."

The Judge does not say who alleged Plassy Futtehpore to be synonymous with Chuk Futtehpore. It is clear that Plassy Futteh-

pore is not on the banks of the river. If Chuk Futtehpore and Plassy Futtehpore are not synonymous, it seems very doubtful whether Chuk Futtehpore is not on the north bank of the river. Therefore, it will be necessary to send the case back to the Judge to investigate that fact. It also appears to us that the true mode of arriving at a sound and just conclusion is to order a local investigation. The person who was sent to the spot was sent merely to make a map—not to make a local investigation. His map merely represents the place as it was pointed out to him, but it is not evidence at all as to the rights of the parties. If he had gone with power to make a local investigation under Act VIII. of 1859, the Judge would have been able to treat his report as evidence in the case.

The jumma wasil bakee papers may be referred to by the Judge when the case goes back to him. The Canoongoe's Dehabundee papers will also be admissible in evidence, and entitled to such weight as the Judge may give them. If they are not genuine papers, they will not, of course, be admissible. It will have to be ascertained whether they are genuine or not before they are admitted in evidence. We say that they are admissible if they are genuine documents.

The case is remanded to the Judge for the trial of the following issues:—

1. To whom the lands to which this alluvion adjoins, or is most contiguous, belong, and the shares and interests of the several parties therein; and what portions, if any, of the land in dispute are annexed or most contiguous to lands belonging to the plaintiff.

2. Whether Chuk Futtehpore, or any portion of it, is on the banks of the river.

In trying these issues, the Judge's attention should be drawn to the Full Bench decision of this Court in special appeal No. 1495 of 1863, dated the 26th May 1865 (3 Weekly Reporter, page 51). For the purpose of determining these issues, the Judge is to order a local investigation under Section 180 of Act VIII. of 1859, and direct the Commissioner to annex a map to his report.

The issues, when determined by the Judge, will be returned to us with his finding thereon, together with the evidence.

Regular Appeals Nos. 207, 208, and 349 of 1864.—These cases will be remanded in like manner and for the same purpose, and subject to the same directions as No. 220 of 1864.

Regular Appeal No. 209 of 1864.—This case will also be remanded for the same purpose, and subject to the same directions as No. 220 of 1864. In addition to the first issue therein fixed, the Judge will try when the river first became fordable between the *chur* and the lands on the north side of the river.

Regular Appeal No. 362 of 1864.—We think that this case should go back for re-investigation. The Principal Sudder Ameen does not appear to have taken notice of the letters which, if genuine, would have very much corroborated the kubooleuts. If Messrs. Watson and Co. held as tenants of the plaintiffs, they admitted their title. We think that the case ought to go back to be re-investigated and determined on the merits. In considering whether Messrs. Watson and Co. held under the plaintiffs, and whether the kubooleuts were executed, the Court should consider whether the letters produced by the plaintiffs are genuine or not.

The plaintiff's witnesses ought to have been examined by the Ameen, and should be cited and examined upon the re-investigation.

As cases in Regular Appeal Nos. 220, 207, 208, 209, and 349, have gone to the Judge for re-investigation, and as this case relates to a portion of the same *chur*, it should go to the Judge to be decided by him.

The 8th June 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Rights (in half of a flowing river).

Case No. 272 of 1866.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 11th November 1865, affirming a decision passed by the Moonsiff of Badia Khally, dated the 28th March 1865.

Prosunno Coomar Tagore (Plaintiff), *Appellant,*

versus

Kishen Choytunno Roy and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Kishen Dyal Roy* for Appellant.

Baboo Mohendro Lal Shome for Respondents.

A person cannot claim rights under the alluvial law in half of a flowing river.

THE special appellant was not a party to the survey-proceedings. The river Nul-

d

leah has been demarcated as belonging to the estate of the special respondent. The Judge finds that this river is a flowing stream, and the special appellant, who asserted rights of fishery—which assertion would seem to prove that it was a flowing stream—failed to prove them. The pleader for the special appellant is unable to quote any law or decision whereby his client is entitled to claim half of a flowing river. The appeal is dismissed with costs and interest.

The 17th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Jurisdiction—Erroneous valuation of suit.

Case No. 402 of 1865.

Regular Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of East Burdwan, dated the 23rd June 1865.

Kally Churn Roy and others (Defendants), *Appellants,*

versus

Jeetoo Soondüree Dossee and others (Plaintiffs), *Respondents.*

Baboos Bama Churn Banerjee and *Obhoy Churn Bose* for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Plaintiff estimated his suit at less than 5,000 rupees, but the items, if added up correctly, would have amounted to more than 5,000 rupees. Defendant did not contest the correctness of the addition, and appealed to the Judge, who remanded the case to the Principal Sudder Ameen, from whose decision the present appeal is made. HELD that the Judge's decision, however erroneous, was not a nullity, but operative until set aside either by him or by a Court of Appeal, and that the plaintiff had a right to treat the decision of the Principal Sudder Ameen on the remand as a valid judgment.

* * * * * *

THE respondent took a preliminary objection to the hearing of this appeal, that a former appeal to the Judge, upon which a remand order was passed, was without jurisdiction.

The fact appears to have been that the plaintiff had estimated the suit at less than 5,000 rupees; but the items, if added up correctly, would have amounted to more than 5,000 rupees. The defendant did not contest the correctness of the addition, and appealed to the Judge. Upon this apparent jurisdiction the Judge proceeded, and remanded the case to the Principal Sudder Ameen, from whose decision the present appeal is made.

We think that the plaintiff has a right to call upon us to treat the decision of the Principal Sudder Ameen on the remand as a valid judgment. We need not express any opinion as to whether the plaintiff might not have abandoned some of the items so as to give the Judge jurisdiction, or whether the former decree may be considered as abandoned and set aside by the consent of both parties. We have no doubt but that, when the case came before him on the second occasion, the Principal Sudder Ameen had a right to try it, and power to pronounce a valid judgment. And from that judgment the present appeal is properly presented. Again, if the defendant meant to object that the judgment of the Judge in remanding the case was wrong and without jurisdiction, he should have presented a special appeal to this Court. The judgment of the Judge, however erroneous, is not a nullity, but operative until it is set aside either by him or a Court of Appeal.

There is absolutely nothing in this point.

The 28th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Possession of land by single shareholder (with consent of all parties).

Case No. 2907 of 1865.

Special Appeal from a decision passed by Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 7th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd December 1861.

Chowdhry Nil Kant Pershad Singh (Plaintiff), *Appellant,*

versus

Ahlad Singh and others (Defendants), Respondents.

Mr. C. Gregory, Moonshee Ameer Ali, and *Baboos Dwarkanauth Mitter* and *Unnoda Pershad Banerjee* for Appellant.

Baboos Anund Gopal Paleet, Kishen Succa Mookerjee, and *Kalee Prosunno Dutt* for Respondents.

A suit for possession of land will not lie against a single shareholder for a particular portion of a joint

estate held separately under an existing arrangement acquiesced in by the plaintiffs and agreed to by the other co-sharers; nor can the plaintiffs let to a tenant the property in the lawful possession of such shareholder.

On the 24th January 1857, the plaintiff, Ram Pershad Singh, for himself, and as guardian of Chowdry Nil Kant Pershad Singh and others, instituted a suit against Ahlad Singh for the rents of 14 dams of two villages called respectively Dheera and Mothoorapore, being portions of Pergunnah Bisthazaree, 14 dams whereof were leased to the defendant, the kubooleut being dated the 24th October 1852.

Ahlad Singh defended the action, claiming to keep back the rents for Dheera and Mothoorapore, of which he said he never had possession.

One Deg Narain Singh intervened, alleging that the suit against Ahlad Singh for the rents of these two villages was collusive; that he himself was in possession of 12 annas of Mothoorapore and the entire 16 annas of Dheera; and that the plaintiff had no interest in these mouzahs. He was admitted as a defendant.

After several remands, the case came before Mr. Richardson, the Judge of Bhaugulpore, on the 23rd December 1861.

Mr. Richardson found that the plaintiff's ancestor Dowlut purchased from Mahomed Khan and Ahmed Khan a share, 14 dams, in Pergunnah Bist Hazaree; that he was put in possession; that he granted a lease of 14 dams in 13 villages to Ahlad Singh for the years between 1260 and 1264; that the defendant, Deg Narain, alleged himself to have rights in Dheera and Mothoorapore, but that these rights in no way affected Ram Pershad's rights to 14 dams. He says the decree of the Principal Sudder Ameen in 1858 shows that plaintiff had a right in Dheera; and, thinking plaintiff's right clearly established, he inferred, contrary to the allegations both of Deg Narain and Ahlad Singh, that Ahlad Singh had possession.

On appeal, this Court thought that the Judge had taken it for granted, without sufficient enquiry, that the plaintiff's 14 dams were distinct from the defendant's 12 annas in Mothoorapore; and, as to Dheera, that the decree of the Principal Sudder Ameen in 1858 might show that the plaintiff had 14 dams in the entire Pergunnah, but not of what that 14 dams consisted.

This Court directed that an issue should be tried whether the whole interest, which the plaintiff's predecessors in estate may have had in these two mouzahs, had not passed out of them by deeds of sale, compromise, or otherwise, prior to the date of the pottah to Ahlad Singh.

The case has been tried on the remand by the present Judge of Bhaugulpore, Mr. Madocks.

He says: "The documentary evidence seems to me fully to establish the fact that the interest which Ahmed Khan and Mahomed Khan may once have had in the estate had passed out of them previous to the date of the plaintiff's lease to the defendant Ahlad Singh" (*viz.*, the 25th October 1852). "What I gather from the documents and decision is that, under the provisions of a Solehnamah, dated 7th February 1823, and Safeenamah, 14th November 1830, &c., Khajah Rassool Khan and Mussamut Newaz Bibee had possession of Dheera and Mothoorapore till the sale in execution of decree in July 1845, when 12 annas of Mothoorapore and the whole of Dheera passed out of their hands, as per decree of the 11th July 1851, and came into the possession of Babooram, from whom Deg Narain purchased; and that Ahmed Khan's and Mahomed Khan's interest in those estates passed away by the decision of the 13th December 1820, under the compromise, dated the 7th of December 1823." He adds: "I am not prepared to say that they had no legal title subsequently to a share of these estates, but merely state that these documents, coupled with other proofs, show that the interest which they once may have had passed out of them by the deeds of compromise." Under these circumstances, he dismissed the suit as against Deg Narain.

The plaintiff appealed specially. The first objection is that the Judge has misconstrued the deeds of compromise of 1823 and 1830, inasmuch as neither Unur Khan nor his sons Ahmed Khan and Mahomed Khan were parties to them, and that Ahmed Khan and Mahomed Khan were declared by the decree of 1828 not to be bound by the compromise in 1823.

The question on the remand appears to us to have been properly tried, and the decision to be a very sensible and satisfactory one. It may well be that, after obtaining the decree in 1828 as a matter of fact, the plaintiff's predecessors in estate fell in with, and adopted the arrangement for holding, the shares separately which had been entered into by the other proprietors in 1823.

Assuming that the Judge uses an inaccurate expression in one passage of his judgment, when he says that "the interest which Ahmed Khan once had passed out of them

by the deeds of compromise;" suppose these deeds of compromise are not binding upon the plaintiff; assuming them to be of no more value, as regards the plaintiffs, than a map would be which admittedly showed the manner in which the several villages of the Pergunnah were held in 1823—the evidence and finding of the Judge shows at least that, at the date of the pottah to Ahlad Singh, the villages were *de facto* held by, and in the possession of, Deg Narain, and not by the plaintiffs. It is not necessary to discuss the question, and we express no opinion whether, in a suit for partition or some other proceeding in which all the shareholders might be brought before the Court, and the rights of all the several parties might be dealt with and taken care of, the plaintiffs might not have a right to a re-division of the Pergunnah. But they cannot, in a suit for possession brought against a single shareholder for a particular portion of the joint estate held separately under an existing arrangement which has been acquiesced in by themselves and agreed to by the other co-sharers, disturb the possession of a person holding under a title as a joint proprietor of the Pergunnah. Nor can they be allowed to better their position by the notable expedient they seem to have resorted to in the present case, of pretending to let to a tenant property in the lawful possession of such a co-proprietor.

There is no ground for this appeal, which is dismissed with costs and interest.

The 31st May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Estoppel (by representation).

Case No. 76 of 1866.

Regular Appeal from a decision passed by Moulvee Itrut Hossein Khan, Principal Sudder Ameen of Behar, dated the 18th December 1865.

Moonshee Syud Ameer Ali (one of the Defendants), *Appellant,*

versus

Syef Ali (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Kishen Kishore Ghose* for Appellant.

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Respondent.

Suit laid at Rupees 8,652-8-5.

Where a person, by his own solemn and deliberate act, wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he and, as a general rule, his heirs, or those who claim under him, are conclusively bound by the representation so made, and will never be allowed to contradict it to the prejudice of the other.

THIS is an appeal by the defendant, Moonshee Syud Ameer Ali, against the decision of the Principal Sudder Ameen of Gya. The plaintiff, Syud Syef Ali, sues for possession of certain shares of landed property, and to set aside alienations by Tegh Ali and Tajoonnissa. The facts are as follows:—

Hossein Ali and Tegh Ali were brothers. Hossein Ali died in December 1856, and Tegh Ali in 1860. On Hossein Ali's death, his brother Tegh Ali became entitled to 12 annas, and Tajoonnissa, his widow, to 4 annas of his property. The plaintiff sues as heir of Hossein Ali. This appears to be the real state of the title.

But Tegh Ali, alleging that he had purchased certain property, including that now in dispute, from this same Hossein Ali under a bill of sale dated the 30th of January 1847, on the 26th of April 1848 executed a mokurruree lease of 12 annas of Mouzah Bhatoora to Tajoonnissa. On the 31st of May 1848, he executed a mokurruree lease of 3 annas of Mouzah Kara in favor of Hossein Ali.

On the 9th June 1849, Tajoonnissa and Tegh Ali executed in favor of Moonshee Ameer Ali a kobala of 8 annas of Bhatoora, Syef Ali making over his proprietary, and Tajoonnissa her mokurruree rights.

On the 9th June 1849, Tajoonnissa executed to Moonshee Ameer Ali a dur-mokurruree lease of 4 annas of Mouzah Bhatoora. On the 7th October 1854, Tegh Ali executed to Moonshee Ameer Ali a bill of sale of 3 annas of Mouzah Kara.

As we have said, at the time of the execution of these deeds, the property dealt with by Tegh Ali really belonged to his brother Hossein Ali, the alleged bill of sale of the 30th of January 1847 having been declared by this Court on appeal not to be genuine.

The Principal Sudder Ameen of Gya, Moulvee Itrut Hossein, says the deeds of lease and sale by Tegh Ali should be cancelled, as, "when the deed of sale (of 1847) in favor of the plaintiff's father was held void, and the right of the father was overthrown, no bill of sale or other deed executed by the plaintiff's father in reference to the estate which was not his property can

be recognized as *bonâ fide;* and not only that, but no business transacted by his father on the strength of such deed of sale can be considered valid."

* * * "On a perusal of the documents themselves, it is clear that the deed of sale and all the other documents were executed on the part of the plaintiff's father Tegh Ali on the strength of the deed of 1847; and, such being the case, the whole of the documents so executed by Tegh Ali, father of the plaintiff, ought to be held a nullity."

The most absurd results would follow, and the grossest injustice might be perpetrated, if the Principal Sudder Ameen's doctrine were well founded in law. If the documents executed by Tegh Ali were nullities, it would follow that, though for fraudulent purposes he himself might have fabricated the deed of January of 1847, by which he was enabled to appear as owner of the property—though by means of that deed he had deceived Moonshee Syud Ameer Ali, and had obtained for him the full price of the property conveyed—still, as against the man whom he had so cheated, he could set up his own fraud and forgery, and, claiming as heir to his brother, could actually reclaim the whole of the land which he had sold, and the price of which he had received.

The appellant's case is that the whole of the leases and deeds of sale under which he claims are made with the assent of Hossein Ali. But whether that be the case or not—assuming that the Principal Sudder Ameen is right in finding that they were executed by Tegh Ali claiming under the fictitious bill of sale—Tegh Ali in his lifetime would never have been allowed, as against the appellant, to deny that he possessed the estate and interest which by the leases and bill of sale he represented himself to possess. As regards him, the case would fall within the well-known rule of law that *where a person, by his own solemn and deliberate act, wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he is conclusively bound by the representation so made, and will never be allowed to contradict it to the prejudice of the other.* As a general rule, the heirs, or those who claim under such a person, are bound to the same extent that he himself is. Applying these principles to the present case, we declare that the plaintiff, who must make title as heir to this property through his father Tegh Ali, who survived Hossein Ali, is precluded from denying that Tegh Ali had the interest he professed to have, when he executed the deeds now in question. And we therefore reverse the decision of the Principal Sudder Ameen on this point. As to the deed of earnest of the 4th December 1857 executed by Tajoonnissa after the death of Hossein Ali, and the deed of sale also executed by her in favor of the appellant, dated the 20th May 1858, relating to Mouzah Bhaskur, it appears that, at the time of the execution of these deeds, Tajoonnissa was, as widow of Moulvee Syud Hossein Ali, only entitled to 4 annas of the Mouzah, the remaining 12 annas belonging to Tegh Ali. Tajoonnissa, by these deeds, professed to convey 8 annas to the appellant.

The plaintiff will retain his decree for the remaining 12 annas. The result will be that the decree of the Lower Court must be modified. The suit must be dismissed except as to 12 annas of Mouzah Bhaskur. The defendant will get costs, both in this Court and the Lower Court, in proportion to the value of the several properties decreed to him.

The plaintiff will have a decree declaring his right, as heir of his father Tegh Ali, to 12 annas of Mouzh Bhaskur, and will get costs from the defendant, appellant, on a valuation equal to 4 annas of that Mouzah—that being the extent to which his claim was resisted by the defendant.

The 22nd July 1865.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Ghatwalee Tenures (Resumption of).

Case No. 131 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated 10th January 1865.

Mussamut Sona, widow of Joymungul Singh, and guardian of his minor sons (Defendant), *Appellant,*

versus

Rajah Leelanund Sing and Mrs. A. Sandys (Plaintiffs), *Respondents.*

Baboos Chunder Madhub Ghose and *Luckhee Churn Bose* for Appellant.

Messrs. R. V. Doyne and *G. C. Paul, Baboo Unnodapersad Bannerjee,* and *Moonshee Ameer Ali* for Respondents.

Suit valued at Rs. 2,15,000.

Suit for resumption of a ghatwalee tenure. HELD that the sunnud in this case was personal to the grantee,

and that it did not confer on his descendants or representatives an hereditary, transferable, and permanent tenure at a fixed rate. HELD also that the clearest and most precise definition, such as *istemraree* and *mourosee* with the addition of *nuslun bá nuslun* (from generation to generation) would be necessary to support the appeal.

General question of ghatwalee tenures pressed on the Court, but not touched on in this decision.

THIS is a suit for resumption of a ghatwalee tenure of very considerable extent, comprising no less than 64 mouzahs, brought on the allegation that Joymungul Singh, to whom the said tenure is granted by a sunnud of the Rajah, dated the 30th of March 1801, died on the 1st of November 1803, and that the tenure reverted to the zemindar. The plaint and written statement also stated that the duties of police-service, on performance of which the tenure was held, had now ceased to be necessary, owing to an arrangement made between the zemindar and the Government; that, there being no further necessity for the services of the ghatwal, the tenure itself must lapse.

The defendant, besides limitation and other points, pleaded that she was not bound by any settlement between the zemindar and the Government, and that the ghatwalee tenure was an ancient tenure, of which she could not be dispossessed. In appeal, it is added that the occupant is quite ready to perform the duties at any time required of ghatwals.

The Principal Sudder Ameen went fairly into the merits of the case, and gave a decree in favor of the plaintiff, holding that there was no longer any service left for the ghatwal to perform, and that, in the deed of March 1801, there was no mention of the sunnud being istemraree or mourosee.

In appeal, the appellant's pleader at first wholly relied on an elaborate judgment of a Divisional Bench of our Court, passed by Justices Trevor and Campbell, on the 17th June last (Weekly Reporter, Vol. III., p. 84), as ruling that ghatwals hold a perpetual hereditary tenure at a fixed jumma payable in money and service, and that they cannot be evicted except for misconduct. We have carefully considered that judgment, as well as the arguments for and against the view taken by our learned colleagues as to the rights of ghatwals. Those arguments have been pressed on us by Mr. Doyne and Mr. Paul for the zemindar, and by Baboo Chunder Madhub Ghose for the ghatwal; but we find it is not necessary that we should decide this case on any general view of the position, duties, and privileges of ghatwals. The present suit ought, in our opinion, to be decided wholly by a reference to the sunnud of 1801, and to a previous suit in which the rights of the predecessor of the defendant were successfully impugned by the same zemindar.

In that case, which was decided by the late Sudder Court on the 11th of December 1857, Rajah Leelanund sued Jugomohun, who was the father of Joymungul, lately deceased, for resumption of his ghatwalee tenure; and the Court ruled that, although the defendant's ancestors had been in possession since 1185, yet they were not entitled to "hold the lands at a fixed *jumma*, or to retain possession of them after they had ceased to perform the duties for which those lands were assigned to them." The Court also laid it down that the position of ghatwals was very different from that of the mokurrureedars referred to in Regulation VIII. of 1793, or from that of dependent talookdars of Section 51 of the same law. The Court concluded by saying that, whether the ghatwals had held possession from 1185 or from some date later, but antecedent to the Decennial Settlement, their right to hold the lands must be considered to cease when their services were dispensed with.

We find, further, that an application for review of the above decision was rejected on the 4th of September 1858 (page 1471), in which the Court said that the distinction between the tenures of a ghatwal and of a mokurrureedar had been fully discussed, and that the Court had pointed out how, when the necessity for service ceased, the zemindar might dismiss the servant and resume the land.

It is clear to us from the above that the rights of the ghatwals, whom the defendant now admittedly represents, were held by the highest Court of Appeal to have ceased and determined, and that the present position of the defendant must be ascertained by reference to the subsequent sunnud of 30th March 1801, which the Rajah granted of his own free will by way of settlement, when he was about to take out execution of the decree which he had gained.

Now, a careful perusal of this sunnud satisfies us that it is personal to the grantee, and that it can by no means be taken to confer on his descendants or representatives an hereditary, transferable, and permanent tenure at a fixed rate. The sunnud certainly contains the usual specification of the duties to be performed in the prevention of theft and robbery, and the usual exhortation of vigilance and fidelity in the discharge of such duties. But the rent required was an increase from the former amount of Rs. 1,317

to Rs. 3,000 a year, and there is a proviso in the deed that the ghatwal may be discharged if he refuse to perform service, and that another may be appointed in his place. The sunnud does also, we admit, refer to the tenure as formerly (*i. e.*, before the suit alluded to) standing in the name of Joymungul Singh, but it nowhere re-confers the grant on the old tenure. No such expressions as istemraree or mourosee occur in the document as they did in that of September 1777. The rent is simply declared to be *mookurur wa mushukhas*, *i. e.*, settled and fixed, from the year 1269. The appellant lays stress on the words that the tenure was restored to Joymungul "according to the custom which prevails before," as implying that Joymungul Singh was reinstated in his tenure with all the privileges which he had enjoyed previous to the suit which terminated against him. But we can only take these words as referring to the kind of service to be performed, and we feel quite justified in saying that, in a fresh deed of this kind, we should require, not general language which may be interpreted one way or another according to the wishes of either party, but the clearest and most precise definition, such as istemraree and mourosee with the addition of *nuslun ba nuslun*, before we could admit that a sunnud granted by a zemindar, who had been successful in litigation enhancing the jumma considerably, could be other than personal to the grantee, or must not be liable to lapse either by failure of service or by the death of the grantee. In fact, we can see no distinction between such a grant and an ordinary jaghir, which would certainly lapse by the death of the jaghirdar.

We cannot admit that the effect of this sunnud is to avoid and annul the decree of the late Sudder Court, and to replace the ghatwal in the position in which he stood prior to the litigation, whatever that position might be. The old rights must, we think, be wholly effaced thereby, and the parties commence on a new footing.

Holding these views, we find it unnecessary to express any opinion on the general rule propounded for ghatwalee tenures by our learned colleagues in the judgment already alluded to, or to enter into any consideration of the condition of ghatwals in Khurruckpore compared with ghatwals in Beerbhoom, or of the effect of the late arrangement made by the zemindar with the Government, or of the position of ghatwals from whom police-service may be no longer required. Many of these points are, no doubt, of the highest importance, and they have been urged on us with much ability in the present appeal. But they do not influence our judgment in any way, because, for the reasons detailed above, we treat this tenure on the footing on which it was left by the decision of 1857 and by the fresh sunnud of 1801.

The decision of the Principal Sudder Ameen is affirmed, and the appeal is dismissed with costs.

The 6th June 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Ghatwalee Lands (Resumption of).

Case No. 275 of 1865.

Regular Appeal from a decision passed by Baboo Nurottum Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 5th July 1865.

Rajah Neelanund Singh and others (Plaintiffs), *Appellants,*

versus

Surwan Singh (Defendant), *Respondent.*

Messrs. R. V. Doyne and *G. C. Paul*, and *Moonshee Ameer Ali* and *Baboo Unnada Pershad Banerjee* for Appellants.

Mr. Montriou and *Baboo Chunder Madhub Ghose* for Respondent.

In the absence of express words to the contrary, ghatwalee lands held under a lease which neither confirms nor recognises the pre-existing *status* of the ghatwals, nor confers on them any right other than that of holding the lands at a fixed rate as long as ghatwal-service is required from them, are resumable by the zemindar when that service is no longer required.

Kemp, J.—This is one of a number of suits, brought by the plaintiff, the zemindar of Pergunnah Kurukpore, Zillah Bhaugulpore, for possession of a tenure hitherto in the occupation of the defendant. Mesne-profits are claimed for the year 1271 Fuslee, with further profits to date of possession. The suit is valued at Rupees 60,000. The co-plaintiff, Mrs. Sandys, has obtained a kutkina lease of the property in dispute from the zemindar, plaintiff. The plaintiffs allege that the lands in dispute were held by the defendant and his predecessors in lieu of wages, subject to the performance of certain police or ghatwal-services, but that the

appointment, suspension, and dismissal of the ghatwals, were exclusively vested in the zemindar; that, as the zemindar had come to an arrangement with the Government on the 9th of November 1863, whereby, for a payment of Rupees 10,000 per annum in addition to the Sudder Jumma hitherto payable by him, he was relieved of all police-services which he was bound to render through the subordinate ghatwals, the services of the latter being no longer required, the tenures held by them in lieu of wages had lapsed, and the zemindar was entitled to take possession; that, on attempting to do so through the co-plaintiff, the kutkinadar, he was opposed by the defendant. Hence this suit.

The defendant, after raising various issues in bar which have not been pressed upon the Court, answers that, prior to the perpetual settlement, the lands in dispute were in the possession of their ancestors, who reclaimed the lands from waste; that, in 1777 A. D., a mokururee istemraree pottah was granted to the ancestors of the defendant by the officers of Government at a jumma of Rupees 21; that the holding of the defendant is not solely dependent upon the performance of police-services, but comes under the description of the talooks mentioned in Section 4, Regulation VIII. of 1793.

The defendant proceeds to state that the plaintiff on a former occasion obtained a decree in the Zillah Court for resumption and possession of the property in dispute; that, on the defendant appealing to the late Sudder Court, a compromise was made, by which the defendant agreed to pay an enhanced rent, the plaintiff confirming the right and possession of the defendant by grant, dated the 21st June 1853.

The Principal Sudder Ameen of Zillah Bhaugulpore, Baboo Nurottum Mullick, held that this suit and thirty-one others brought by the same plaintiffs were governed by the decision of this Court, dated the 21st June 1864. The suit was dismissed.

In appeal, the main points urged are—

First.—That the decision of this Court, dated 21st June 1864, does not govern this case.

Second.—That a fresh pottah was granted to the defendant on the 21st June 1853, after a compromise come to between the parties subsequent to litigation, in which the plaintiff had been successful in obtaining a decree for the resumption and possession of defendant's tenure; and that, therefore, this suit bears no resemblance to the case cited by the Principal Sudder Ameen.

Third.—That, as the power of appointing, suspending, and dismissing the ghatwals, was vested in the plaintiff—the necessity for police-services on the part of the defendant no longer existing, owing to the arrangement made by the plaintiff with the Government—the tenure hitherto held by the defendant in lieu of wages lapsed, and was liable to resumption.

The first point we have to consider is, whether this case and others of a similar character which are before us in appeal are governed by the decision of Justices Trevor and Campbell, dated the 17th June 1865, in the suit noted in the margin.* We are clearly of opinion that this case and others of a similar character are not governed by that decision. In that case, the appellants, the ghatwals, filed a sunnud, dated 17th September 1777 A. D., granted to them by Captain Brown. The learned Judges were of opinion that this sunnud, which described the tenure held by the defendants in that suit as a "mokururee istemraree" holding or perpetual holding at a fixed jumma, was "the confirmation of an existing tenure rather than the creation of a new one;" that the use of the word "istemraree" or "perpetual" in Captain Brown's sunnud of 1777 was strong evidence that at that time, according to the belief and usage of the country, the tenure was of a perpetual hereditary character which would not be liable to forfeiture even were the services as ghatwal no longer required, and that, except for misconduct, the defendants in that case could not be evicted.

* No. 299 of 1864, Monorunjun Singh and others, Defendants, Appellants, *versus* Raja Leelanund Singh and others, Plaintiffs, Respondents.

In the present case, no original sunnud granted by Captain Brown has been filed. The title of the defendant was created by the pottah, dated 21st June 1853, in which the terms "mokururee istemraree," which the learned Judges in the case cited have construed to mean a perpetual holding at a fixed jumma, do not occur. It is therefore unnecessary that we should here state whether we do or do not concur in the interpretation put upon those words by the learned Judges who decided the case already cited. This case must be decided solely with reference to the pottah of the 21st June 1853, whereby the former rights and *status* of the defendant, whatever they may have been, became extinct. It is clear that the defend-

ant in this suit cannot be relegated to his former *status*. He has taken up an entirely new position, and must stand or fall by the terms of the pottah of the 21st June 1853.

What title, then, does this pottah in its terms create? An hereditary indefeasible title? a grant for life? And here we may remark that, in the case before us, the grantee of the pottah is alive. Or is it a mere grant of land, to be held at a stipulated jumma, in lieu of wages for the performance of certain police-duties, resumable when those duties are no longer required?

The pottah or grant is in the form of an amulnamah addressed to the ryots of the estate. The plaintiff, the zemindar, was under an obligation to the Government to keep up a certain number of ghatwals for the purpose of guarding the ghâts or passes generally, and for the prevention of robberies and other heinous offences. When the contract of 1853 was entered into between the parties to this suit, the plaintiff, the zemindar, was still under that obligation to Government, and that obligation only ceased in 1863. The zemindar, being unable himself to perform the duty of a ghatwal, and having more land than money at his disposal, granted to the defendant certain lands to be held by him at a stipulated jumma, and subject to the performance of certain police-duties which are enumerated in the pottah. The obligations to which the grantee was subject are also specified, the grantor reserving to himself the power of suspension and dismissal.

There is no recital of a former or older grant in the pottah before us, and there is nothing in the terms thereof which, directly or by implication, can be held as creating an hereditary or perpetual tenure. It was purely a service-tenure, dependent for its existence on the will of the zemindar; and we have not been shown that in the lapse of time its original character has been changed.

The words upon which the defendant lays stress are "mokururee moshakhus," or "fixed stipulated." These words clearly apply to the fixity of the rent payable, and not to the duration of the grant.

The contract was clearly one for service, lands were given in lieu of wages, the jumma was fixed, and was payable as long as service was rendered; and, in the absence of distinct words to the contrary, the employer, the zemindar, is, we think, at liberty to determine the tenure, the services of the employé no longer being required.

It is material to observe that the basis of the contract in the present instance was the obligation the zemindar was under to the Government to keep up a police-force; that obligation, which was co-extensive with the obligation of the defendant, ceased in 1853; and as the defendant no longer performs services, nor can, under the altered state of things, services be required from him, his holding under the pottah is liable to be determined, and the zemindar is entitled to resume and take possession of the lands hitherto held by the defendant.

With reference to the claim for wasilat for the year 1271 Fuslee, we observe that no notice to quit of a date prior to the institution of this suit has been shown. This suit is the notice, and, from the date of the institution of this suit, the defendant will be liable for mesne-profits, to be ascertained in execution and after due local enquiry. The decision of the Principal Sudder Ameen is reversed, and this appeal decreed with costs of both Courts, except on the item of mesne-profits, which has been disallowed, bearing interest payable by the respondent. This decision governs Appeals Nos. 276, 277, and 336, which are also decreed with costs and interest.

Jackson, J.—I entirely concur in the judgment delivered by my brother Kemp.

It must be borne in mind that the defendants have not set up any case of hardship, such as the expenditure of capital and labor in improving the lands under any implied assurance from the zemindar that the tenure was perpetual. Their case was simply this: "We are ancient ghatwals, whose title has "been confirmed by a recent grant from "the zemindar; our right to hold the land "is quite irrespective of any engagements "between the zemindar and the Government; "and whether the zemindar's obligation "to perform ghatwal duty subsists or not, "we are ready to continue the antiquated "service, and we cannot be dispossessed."

This is a contention which the Court cannot affirm. The defendants hold under a lease; that lease, in our opinion, neither confirms nor recognises the pre-existing *status* of the ghatwals, nor does it confer on the defendants any right other than that of holding the land at a fixed rate, as long as ghatwal-service was required from them.

It may be objected that our judgment proceeds upon a ground too narrow, and that we avoid any decision upon the broad question as to the origin, history, and character of ghatwalee tenures. That is a criticism

which I shall accept with a great deal of satisfaction.

There are, of course, occasions on which it is necessary to go deeply into historical discussions of this kind. But where the relations between parties, which give rise to litigation, are defined by written documents, I think it the duty of the Court to rest its decision on the construction of those documents.

The 7th June 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Sec. 11, Act XIV. of 1859—Disability.

Case No. 7 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 18th September 1865.

Muddun Mohun Tewaree (Plaintiff), *Appellant,*

versus

Nund Kishore Doss Mohunt (Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboo Hem Chunder Banerjee* for Appellant.

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee* for Respondent.

Suit laid at Rs. 14,500.

An adopted son, after he attains majority, is under no legal "disability" within the meaning of Section 11, Act XIV. of 1859, although his title as adopted son may be disputed, and has not been finally established.

THE appellant in this case is the unsuccessful plaintiff in the Court below. The object of the suit is to set aside certain alienations of properties belonging to the estate of the appellant's adoptive father, which alienations were made improperly and without any justifying necessity, as the appellant alleges, by his adoptive mother Soondur Koomaree, during his minority.

The only issues raised to which we need now refer were two, *viz.—first,* Whether the suit was not barred by limitation under Act XIV. of 1859; and, *second,* Whether the alienations by Soondur Koomaree were not properly made and legally binding upon the appellant.

The Lower Court has found for the appellant on the first issue, and against him on the second. From the judgment of the Lower Court on the second issue the appellant appeals; and he is met by the respondent, who again contends that the suit is barred by limitation, and prays that the decision of the Lower Court on that issue may be reversed.

We are of opinion that the suit is barred by lapse of time, and that the decision of the Lower Court on the first issue was wrong, and ought to be reversed. It is admitted that the alienations which it is now sought to set aside were made much more than twelve years ago (the deeds bear date in 1254 and 1255). It is also admitted that the appellant did not institute this suit within three years of his attaining his majority. But it is contended that this suit is within time, and is not barred, because, when the appellant attained his majority, and for some time afterwards, certain suits were pending, in which the appellant's title as adoptive son was disputed, and because the present suit was brought within three years after the termination of those other suits, which ended in a final declaration of the appellant's title as adoptive son. It is argued that the appellant, so long as his adoption was disputed, was under a "legal disability" within the meaning of Section 11 of Act XIV. of 1859, and, therefore, that a suit, instituted less than three years after the adoption was finally declared to be good, was within time. The Lower Court apparently held that the appellant was not competent to sue, until the validity of his adoption was finally established, and held that the period of limitation must becom-

puted to run from that date. In this view we do not concur. As soon as the appellant attained his full age, he was perfectly competent to sue, and ceased to be under any legal disability whatever. It may be that it would have been more convenient for him to wait till his title was established beyond all question: but his title not having been finally established put him under no *disability*; for if he had sued, and had been able to prove his title as adoptive son, he would have been entitled to a decree in his favor quite irrespective of the other suits. It is argued that there may be "legal disability" within the meaning of Section 11 of Act XIV. of 1859 besides the disabilities mentioned in Section 12. In our opinion, however, married women (in cases to be decided by English Law), minors, idiots, and lunatics, are the only persons who can ever be said to be under a *legal disability* within the meaning of Section 11. Be that as it may, there clearly was no *disability* on the part of the appellant from the time he attained his majority. Our opinion on this point is in accordance with that recently expressed by another Division Court in a case in which also the appellant now before us was the plaintiff (Kishen Mohun Koondoo *versus* Muddun Mohun Tewaree, Weekly Reporter, page 32, Volume V.). We think, therefore, that the decision of the Lower Court on the first issue ought to be reversed, and that the suit of the appellant ought to be dismissed, as barred by the provisions of Act XIV. of 1859, Section 11.

But, irrespective of this point of law, we are not prepared to differ from the Lower Court on its finding as to the alienations having been made by Soondur Koomaree under circumstances which justified them. The evidence is not very full or satisfactory, but it could scarcely be expected to be so, considering the length of time which has elapsed, and considering that the principal parties to the transactions are now dead. But it appears from the deeds themselves, as well as from the evidence of the witnesses, that the loans were raised in order to pay off, and were in fact applied in paying off, Government revenue. It is true it is not clearly shown how the necessity for those loans arose, or why Soondur Koomaree should not have been able to pay the revenue without the loans. But Soondur Koomaree was for many years engaged in an intricate and expensive litigation for the purpose of maintaining the rights of herself and of her adoptive son, the present appellant, as representing her deceased husband. That litigation did not cease even when the Privy Council gave judgment in her favor; and it may very well be that, in consequence of these proceedings, the estate became embarrassed, and that the loans made may have been perfectly *bonâ fide* and essential in order to preserve the property from sale. Furthermore, the appellant himself seems by a petition which he filed in a case under Act XIX. of 1841, after he came of age, distinctly and with his eyes open, to have ratified and confirmed the acts of his adoptive mother.

Some stress has been laid by the Lower Court on the terms of the Onoomotee Potro, the deed which gave Soondur Koomaree the permission to adopt a son. That instrument, executed by the husband shortly before his death, states that he is about to die childless, and that Soondur Koomaree will be his heiress. Then it goes on to give her permission to adopt, and continues: "The gift, sale, or other disposition of the "real and other property, and religious "acts whatever you make, it is in your power "to do the same: I have given you per-"mission." It has been contended that these words gave Soondur Koomaree *absolute power* over the estate, and that she could transfer or dispose of it at pleasure. But we do not read this provision in so extended a sense: we should require language much more express and distinct before we should be of opinion that the dying man intended to put his whole estate in the hands of his widow, to the prejudice and, it might be, total exclusion of the son whom he was, at the same moment, directing her to adopt. In our opinion, these words are merely words appointing her manager of the estate; and, except to that extent, we do not think that, after she adopted a son, she had any greater powers over the estate by reason of those words than she would have had without them. We therefore think the present case is not excepted from the rule which requires that one who deals with the manager or guardian of a minor must be prepared to show *bona fides* on his own part, and a reasonable case of *necessity* on the part of the manager or guardian.

On the whole, we have no doubt that we are fully justified in dismissing this appeal; and we order that the appellant's suit be dismissed, and that the appellant do pay all costs both in this and in the Lower Court.

The 8th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Limitation—Pleaders' Fees.

Case No. 3557 of 1865.

Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 12th July 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 28th June 1864.

Kashinath Roy Chowdry (Defendant), *Appellant,*

versus

Ishur Chunder Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Motee Lal Mookerjee for Appellant.

Baboo Bungsheedhur Sein for Respondents.

A suit for pleaders' fees, upon a vakalutnamah which is in the form of a mere power of attorney, and is not a written contract, is barred by limitation, if not brought within 3 years. In the absence of evidence of any express agreement as to when the fees are to be paid, the implied agreement must be taken to be for payment at the time when the case is decided.

THIS is a suit for vakeels' fees. The suit in which they were earned terminated on the 4th of August 1858. The present suit was instituted on the 29th of March 1864. We find that there has been a decision by this Court (reported in 5 Weekly Reporter, p. 1, Small Cause Court References), by which it was held that the limitation in a suit for pleaders' fees falls under Section 9, Act XIV. of 1859. We have examined the vakalutnamah, and find that it is a mere power of attorney, and not a written contract, which would give a period of 6 years under that Section. The decision already referred to shows that, in the absence of evidence of any express agreement as to when the fees are to be paid, the implied agreement must be taken to be for payment at the time when the case is decided; and the present suit, having been instituted more than 3 years after the 4th August 1858, is therefore barred by limitation. Therefore, reversing the decree of the Lower Court, we now dismiss the plaintiff's suit with costs and interest.

The 4th January 1866.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Enhancement (Right of Mother of infant Shebait or Trustee to sue for)—Grant of Mokurruree Pottah by former Shebait.

Cases Nos. 2778 to 2780 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Jessore, dated the 18th July 1865, affirming a decision passed by the Deputy Collector of that District, dated the 28th December 1864.

Maharanee Shibessuree Debia, mother and guardian of Koonwar Gobindnath Roy, minor (Plaintiff), *Appellant,*

versus

Jumeer Biswas and others (Defendants), *Respondents.*

Baboo Anund Chunder Ghosal for Appellant.

Mr. R. E. Twidale for Respondents.

The mother of an infant *shebait* or trustee cannot sue to enhance the rent of land held under a mokurruree pottah granted by a former *shebait*, whose power to grant such a lease is disputed.

THE principal point in these cases is that the alleged grantor of the mokurruree pottah, being only a *shebait* or trustee, had no power to grant such a lease. But, be that as it may, it seems to us that the plaintiff, as mother of an infant *shebait*, is in no position to sue to enhance the rent. That step, in the face of a grant by a former *shebait*, the validity of which it is intended to dispute, could only be taken by some person having an immediate legal interest in the property which the mother of a trustee has not. We consider that this suit cannot be considered a final determination of the mokurruree right set up by defendant, but that, on the ground stated by us, it should be dismissed. With these remarks we dismiss the appeal. Each party to pay their own costs in this Court.

The 6th January 1866.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Suit for Kubooleut—Claim by Intervenor—Decree of Civil Court.

Case No. 2727 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 28th July 1865, reversing a decision passed by the Deputy Collector of that District, dated the 27th June 1865.

Raj Coomar Chowdhry and others (Objectors), *Appellants,*

versus

Brojo Kishore Bose, Gomashtah, and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Anund Gopal Pauleet for Appellants.

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Respondents.

In a suit for a kubooleut, the decree of a Civil Court, adjudging the land in question to the plaintiff, cannot extinguish the right of an intervenor, not a party to the decree, found under Section 77, Act X. of 1859.

THIS was a suit under Section 77 of Act X. of 1859.

The special appellant intervened in a case wherein the special respondent sued a ryot for kubooleut, on the ground that he had been, and was, in the receipt and enjoyment of the rent of the land in question.

The Judge admits the receipt of rent as alleged, but holds that, as a Civil Court decree has adjudged to the *special respondent* the land for which the intervenor claims to have received rent, the right of the intervenor under Section 77 has been extinguished.

It is urged *in special appeal* that, admitting the fact that the special respondent has got a decree for the land, the special appellant

was no party to that decree, and cannot be bound by it.

The *special respondent* also objects that in any case the principle of Section 77 cannot apply to the special appellant who is the zemindar, and *not* the party in immediate receipt of rent from the ryot.

Section 77 relates to *any third party* "who has actually, and in good faith, received and enjoyed the rent;" and the Lower Court has found that the special appellant, as such third party, has received and enjoyed the rent paid by the ryot in this case. This is a finding of fact which in special appeal we are bound to accept. We observe, moreover, that this objection was never taken before at any stage of the proceedings, and it was never denied that the case came under the Section above quoted, the dispute being solely about the actual payment of rent to the intervenor.

With regard to the objection taken by the *special appellant*, we think that the Judge was wrong. We have gone over the record, and find that the intervenor raised an objection in the Civil Court, but was not made a defendant, and in the execution of that Civil Court decree his rights were specially reserved.

It is true that the land for which a kubooleut was sought, and concerning which special appellant intervened, may have been decreed to special respondent, not only as against other parties, but against this property; but, until it is shown to have been so decreed either by the Court which gave the decree, or by a regular suit as provided by Section 77, and the plaintiff thus makes out a legal title, the special appellant would be entitled under Section 77 to receive and enjoy the rent. Had the special appellant been a party to the civil suit, and not a mere objector who was not made a party, and had there been no reservations in his favor (as there were) in the execution of the decree referred to, there would be no question regarding his liability; but, under the contrary state of facts, as above shown, the Judge could not, in our opinion, make that decree operative against special appellant.

The special respondent is not, however, without remedy; for, if he be so advised, he may sue for his alleged claim in a separate suit against the special appellant, using the previous decree as evidence if it will so operate.

We, therefore, reverse the Judge's order, and decree this appeal with costs on the special respondent.

The 6th January 1866.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Jurisdiction—Suit for possession of land assigned over for a term of years as security for a loan.

Case No. 2721 of 1865.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 28th June 1865, reversing a decision passed by the Moonsiff of that District, dated the 23rd September 1864.

Khetter Mohun Paul and others (some of the Defendants), *Appellants,*

versus

Ram Coomar Paul (Plaintiff) and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Huree Narain Roy for Respondents.

Neither Clause 6, Section 23, nor Section 25, Act X. of 1859, applies to a suit for recovery of possession, on expiry of assignment of land assigned over for a term of years as security for a loan, and as the means for its re-payment. Such a suit is cognizable only by the Civil Court.

THIS was a suit to recover possession of certain land on expiry of assignment, the plaintiff's allegation being that an arrangement was made by her husband, whereby the land was made over to the defendants (who are the special appellants before us) under a farming kubooleut for a term of years, commencing in 1255, and ending in 1271 B. S., for the purpose of securing the liquidation of a debt of 42 rupees contracted by him. There is nothing to show that this conveyance was not of the usual character, *i. e.*, the mortgagees paid the rent of the land to the superior holder, the zemindar, and appropriated the surplus to liquidate the principal and interest of the money lent. At the end of 1271 B. S., plaintiff attempted to re-enter, but was opposed by the special appellants on the ground that they held the land by purchase under a kubala from her deceased husband.

The Court of first instance held the kubooleut to be spurious, and the deed of sale good.

But the Judge on appeal took an opposite view of these documents, and found the lease to be genuine, and the kubala false.

It is now urged *before us* in special appeal:—

I. That, this being a suit to eject a farmer after the expiration of his lease, the Civil

Court had no jurisdiction. Plaintiff ought to have sued under Clause 6, Section 23, Act X. of 1859; and

II. That the evidence in support of the kubala was not properly considered by the Judge.

With regard to the *first* objection, we observe that Clause 6 does not apply, that Clause referring to suits for recovery of possession, where the ejector is the party entitled to receive rent for the same, on an ordinary lease, and not on one given by way of security for a loan; nor will Section 25 of the Act, to which we have been referred by the special appellant's vakeel, in the least assist his case, that Section expressly excepting cases where the lease is "of the kind denominated *theeka zur-i-peshgee* or the like," words which would exactly cover the nature of the transaction between the parties in this case, even were it to be conceded that they stood together in the relation of landlord and tenant.

But we see nothing on the record to induce us to place them in that relationship. The special respondent's husband, being in difficulties, assigns over his land for a term of years as security for a loan and as the means for its re-payment. The rent of this land is not paid to the mortgagor, but to the superior holder of the estate, and, as between the parties to this suit, the matter is one of simple debt and assignment of property to pay that debt, and we do not see how (taking the Judge's decision as to the genuineness of the farming lease as final) the special appellants can in any way be made out to stand in the position of the special respondent's ryots in the manner contemplated by Act X. of 1859.

In this view, therefore, this case could not have been preferred in the Revenue Courts under Act X. of 1859; and that the special appellants themselves did not think so, is proved by the fact that they never took the present objection at any stage of the proceedings below.

The *second* objection is cleary untenable. The Judge has considered all the evidence, and finds, to use his own words, that "she, *i. e.* (special respondent), has proved the kubooleut, and that, on the other hand, respondents (now special appellants) have altogether failed to prove their alleged deed of sale," and full reasons are given for this finding. As a matter of fact, we observe that, under the circumstances of this case, proof of the kubooleut would in itself be disproof of the kubala.

We see, therefore, no reason to interfere with the Judge's decision, and dismiss this special appeal with costs.

The 6th January 1866.

Present:

The Hon'ble W. Morgan and Sumbhoonath Pundit, *Judges.*

Jurisdiction—Collector's decision (Effect of)—Res judicata—Mokurruree right (Establishment of)—Causes of action (Splitting of).

Case No. 2092 of 1865.

Special Appeal from a decision of Mr. F. J. Cockburn, Officiating Judge of Fureedpoor, dated 3rd May 1865, reversing a decision passed by Baboo Opendro Chunder Nyarutun, Principal Sudder Ameen of that District, dated the 29th April 1864.

Ooma Churn Dutt (Plaintiff), *Appellant,*

versus

Mr. J. Beckwith (Defendant), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Mohinee Mohun Roy and *Bhowanee Churn Dutt* for Respondent.

The Collector's Court is vested by Act X. of 1859 with jurisdiction to decide finally all questions of right to receive or withhold rent, &c., when brought before it in suits for rent; and the Collector's decree in any such suit bars the jurisdiction of the Civil Court.

Distinction between the exclusive jurisdiction conferred on the Collectors of Land Revenue by Act X. of 1859 and the jurisdiction conferred on them by the Regulations.

A decree of the Collector in favor of the landlord in a suit brought by him for enhanced rent, in which the tenant relied on his mokurruree right, does not bar a suit in the Civil Court by the tenant to establish his mokurruree right, unless the mokurruree right is the subject of adjudication in the Revenue Court.

A claim for rent in respect of a jumma, which has become divided into a 14-annas share and a 2-annas share, is properly the subject of one suit, and should not be treated as two distinct causes of action for which separate suits are maintainable.

The decrees of both the Lower Courts are in substance the same (that is to say, in the defendant's favor), although they proceed on different grounds of decision, and although the decree of the Lower Appellate Court is given in the form of a mere reversal of the order of dismissal passed by the Court of first instance. The suit was instituted to establish the plaintiff's right to a mokurruree tenure in the land held by him under his

landlord, the defendant. The Principal Sudder Ameen considered that the old pottah and other documents adduced in evidence by the plaintiff were not trustworthy, and that he had failed to establish his mokurruree right. The Judge held that there had already been an adverse decision by a competent Court on the subject of the right claimed by the plaintiff; and that the matter having been thereby adjudicated, it could not again be called in question by suit in any Civil Court.

This special appeal is by the plaintiff, who contends that the Judge has given undue effect to a decree in favor of the landlord made by the Collector in a suit between the same parties to recover rent under Act X. of 1859, wherein the now plaintiff, being the defendant, unsuccessfully relied upon his alleged mokurruree right. It is urged on behalf of the special appellant that the Revenue Court's decree was conclusive only of the cause of action there heard and determined; and that, although the decree is a bar to all further litigation in respect of the rent then sued for, it does not affect the jurisdiction of the Civil Courts in such a suit as the present one, which is instituted for the establishment of the plaintiff's right to hold the land permanently at a fixed rate of rent.

We find from the judgment of the Lower Appellate Court that two suits for rent were brought in the Collector's Court, each for a sum below 100 rupees, in each of which the landlord obtained an *ex-parte* judgment, which was afterwards rescinded; and that both suits were finally heard and determined in the landlord's favor. We shall have occasion hereafter to refer more particularly to those suits, in both of which arrears of rent were claimed to be due from the ryot on account of land alleged to be held by him at a variable rate of rent. The ryot's allegation was that he was not liable for the amount claimed, and that he held the land at a fixed rate of rent (specified by him) lower than the rate stated by the plaintiff; and he relied on the mokurruree pottah and other documentary evidence which has been again adduced by him in the present suit. The Deputy Collector discredited this evidence, and gave the landlord a decree for the sum sued for. The Collector on appeal affirmed this decree, adding at the conclusion of his judgment this remark—"If the appellant can prove the "genuineness of the pottah filed by him, he "can bring a civil suit for the protection of "his rights."

If we assume, notwithstanding the words just quoted, that the Collector sufficiently adjudicated on the subject of the mokurruree right claimed by the ryot for the purposes of the suit then pending, the question for our decision is whether the Collector's decree in the suit for rent is, as the Judge holds, a bar to the maintenance of the present suit to establish the mokurruree right. The former suit was between the same parties; and if the same matter was in question, and was adjudged by a competent tribunal, it cannot now be re-agitated.

The jurisdiction conferred on the Collectors of Land Revenue by Act X. of 1859 differs in many important respects from the summary jurisdiction which they previously had under the Regulations. The earlier jurisdiction had its origin in the Regulation (VII., 1799) which empowered the Zillah Courts summarily to enquire into and adjudge claims to arrears of rent. This summary jurisdiction in cases of rent, which had gradually increased so as to embrace almost every question between the zemindar and ryot, was transferred by Regulation VIII. of 1831 to the Collectors of Land Revenue. The ordinary remedy by a regular suit in the Civil Court was in no way affected by the additional summary remedy thus given; nor was the summary adjudication, although declared by the law not to be open to appeal, a bar to a regular judicial investigation and decision in the Dewanny Adawlut at the suit of any person considering himself aggrieved by such adjudication: so that a landlord, whose claim for an arrear of rent had been summarily rejected by the Judge, might, nevertheless, maintain a regular suit for the recovery of the same rent.

By Act X. of 1859, the Collector's jurisdiction was extended, and rules of procedure were prescribed for the suits thereby made cognizable by him. An *exclusive* jurisdiction was by the act given to Collectors in suits for arrears of rent and in many other cases; and their judgments were generally made open to an appeal to the Zillah Judge, and finally (according to a decision of the Sudder Court in 1861 upon the construction of the Act) to a special appeal to this Court. These and other important changes made by that Act indicate an intention on the part of the Legislature to confer on the Revenue Courts a jurisdiction very different from that which they previously possessed, and sufficiently extensive to enable those Courts to adjudicate in suits for arrears of rent on the right to hold at a fixed rate, the right of

occupancy, and other rights of a permanent nature, arising between landlord and tenant, and to do this in such a way as to bar all further investigation in the ordinary tribunals. The Collector has complete jurisdiction in such matters, and his decree in the suit has between the parties the effect of a decree of a Civil Court in a suit between persons standing in no relation to each other concerning the full proprietary right and title in land. The suits made cognizable by the Revenue Courts are generally those in which the litigants already stand to each other in the relation of landlord and tenant; and the Courts are expressly enjoined in certain cases, when any question of the right to rent arises between the person who sues as landlord and an intervening claimant, to adjudicate, not upon the legal title (which is reserved for adjudication by suit in the Civil Court), but according to the prior actual and *bonâ fide* receipt and enjoyment of the rent, which express provision of the law appears to support the view that questions of right to receive or withhold rent, &c., arising between the zemindar and ryot, are fully, as well as exclusively, cognizable by the Revenue Courts when they are brought before such Courts in suits for rent.

We think, therefore, that the Collector's Court is vested by the new law with jurisdiction to decide finally these and the like matters; and that the Collector's decree in any such suit bars the jurisdiction of the Civil Court.

If, then, the Collector's Court be a competent tribunal to adjudicate finally on the mokurruree right, it is still to be considered whether there has in this case been such an adjudication. The Collector's decree awarded to the landlord rent after the rate claimed by him, that is, as the Collector finds, at the rate previously paid; and in his judgment he observed that the mokurruree pottah was suspicious. Beyond this there is no adjudication on the mokurruree right.

The rule concerning the extent of the operation of a judgment in precluding fresh litigation is thus laid down by great authority:—

"The rule against re-agitating matter adjudicated is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object" (*see* Barrs *versus* Jackson, 1 Y. and C. C. C. 585).

If the Collector's decision had for its direct object the adjudication of the mokurruree right (and if that right has been adjudged), the present suit is not maintainable according to the rule thus stated.

In the Collector's Court, a sum of 113 rupees or thereabouts was claimed as the unpaid balance of rent for the year 1267. The ryot's annual jumma (334 or 335 rupees) was alleged by the landlord to be "variable" (liable to enhancement), and not a "fixed mouroseejote jumma." The Collector's decree was for the sum claimed; but, so far from adjudging whether or not the sum was payable in respect of a mokurruree jumma, the Collector, after briefly noticing the suspicious nature of the documentary evidence on both sides, referred the plaintiff to a civil suit to establish his rights. No issue was framed or decided by him concerning the mokurruree right, and the suit was treated, both by the parties and the Collector, as if no question of right arose for determination; for, having been instituted to recover a sum not exceeding 100 rupees, it was heard by the Deputy Collector, and in final appeal by the Collector. The landlord's whole cause of action, which was for 113 rupees, should have been included in one suit; and the fact that the jumma had by some means become divided into a 14-annas share and a 2-annas share did not of itself justify a splitting of the cause of action, more specially since the effect of this might be (as in this case it was) to change the jurisdiction. Had the suit been instituted in the Collector's Court for the whole balance of 113 rupees, the appeal would have been to the Zillah Judge, whose judgment would again have been open to a special appeal; whereas, by suing for less than 100 rupees, the case is entirely withdrawn from the jurisdiction of the ordinary tribunals, unless a question of right or title arises. It is true that such a question (*viz.*, of the right to enhance) did arise, and was decided here, if the judgment of the Lower Appellate Court is correct; but it was decided, not by the Zillah Judge, but by the Collector. It may be that his deci-

sion is not, under the circumstances, wholly without jurisdiction; but the question for our consideration is whether it is conclusive of the matter which is now in suit, and we are of opinion, for the reasons already stated, that it is not.

Our decision in a case (No. 838 of 1865), decided on the 17th July 1865, was cited for the respondent. That suit was brought by a ryot to establish his mokurruree right, and we held that the Civil Court's jurisdiction was not barred by the Collector's decree for rent in a suit wherein the pottah on which the plaintiff in the civil suit relied had been unsuccessfully put forward by him as defendant in the Revenue Court. In that case, as here, although the pottah was incidentally discussed, the ryot's right seems not to have been directly adjudicated. In an earlier case (1 W. R., p. 223) it was held that, where a mokurruree lease had been adjudged to be valid by the Collector in a suit for enhancement of rent, the zemindar could not maintain a suit in the Civil Court to set aside the mokurruree lease. The case must be remanded for trial by the Judge. The same order applies to another case (No. 2034 of 1865).

The 8th January 1866.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Witnesses (Attendance of recusant).

Case No. 2724 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 2nd August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 13th May 1865.

Ozeer Mahomed (Plaintiff), *Appellant,*

versus

Bydnath Doss Chowdhry and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Baneenath Bose and *Obhoy Churn Bose* for Respondents.

A Judge's discretion in not compelling the attendance of witnesses named by one of the parties must be exercised on reasonable grounds distinctly stated in the judgment.

THE plaintiff in this case (special appellant before us) sued for arrears of rent for the years 1272 and 1273 Tipperah era, corresponding with 1269 and 1270 B. S.

The defence was that the (special respondent) defendant was never in possession of the lands in question, and, therefore, not liable.

Both Courts refused to compel the attendance of certain witnesses named for the plaintiff, and, on the evidence as it stood, dismissed the case.

It is urged in special appeal that the Court of first instance and the Judge were wrong in not compelling the attendance of the recusant witnesses; and that the reasons given for not issuing the usual proclamation are insufficient. Moore's Indian Appeals, Vol. II., page 424, Jeswunt Sing-jee *versus* Jet Sing-jee, is quoted in support.

It is contended on the other side that, under Section 159 of Act VIII. of 1859, proof must first have been given of the necessity of the evidence before proclamation could be issued.

This last objection may be very shortly disposed of. Section 159 refers to cases in which no summonses have been issued. In the present case, the witnesses had been duly summoned, but had failed to appear. The question falls under Section 168, and the words of the law there are permissive, and not peremptory.

But we think that the Lower Court's decision must be reversed. The Judge has given no reasons for agreeing with the Lower Court, but has contented himself with endorsing the Deputy Collector's views. On turning to the first Court's judgment, we find nothing more in the way of reason why the witnesses should not be compelled to attend, than that the Deputy Collector did not think that they knew anything about the matter. He refers doubtless to a so-called verbal statement of the plaintiff; but we are unable to find any mention of this in the record, and are not in a position to say what effect it should have had on the proceedings.

The only thing we find on the record is the opinion of the Deputy Collector that the recusant witnesses were not likely to benefit the special appellant's case. This was, we think, an altogether irregular way of anticipating evidence, and should not have been acted upon without the strongest grounds for such an opinion. No doubt, a Judge has a discretion in cases like the present; but this discretion is a judicial discretion, and must be exercised on reasonable grounds, which should be themselves dis-

tinctly stated in the judgment. As it is, we are left entirely in the dark as to what the plaintiff in the case did say. His statement was not committed to writing, and, under the circumstances, we are not disposed to take it for granted.

We remand the case, therefore, in order that the witnesses who have been summoned, but have refused to appear, may be proceeded against in the ordinary course.

The costs of this appeal will be on the special respondent. The costs in the other Courts will follow the result of the decision that may be come to after taking the fresh evidence now ordered.

The 8th January 1866.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Ejectment — Jurisdiction — Co-parceners — Receipt of one in a co-parceny with recognized shares.

Case No. 2430 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 31st May 1865, affirming a decision passed by Mr. F. G. Millet, Officiating Collector of that District, dated the 2nd April 1864.

Kinee Beebee (Plaintiff), *Appellant,*

versus

Rash Monee Debia and others (Defendants), *Respondents.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

The receipt of one co-parcener, on behalf of himself and others, may, under certain circumstances, be taken as a recognition of joint possession by all, but not in the case of a joint undivided estate, where the shares are recognized and defined as amongst the co-parceners, and each has a right to his own collections, and to give receipts for them.

In this case, plaintiff sued for possession on the allegation that he had been illegally dispossessed of his tenure in Assar 1270 by defendant.

Defendant alleged a lease of 1269, and that plaintiff had been dispossessed in Assar 1269 B. S., by defendant's sub-lessee, of all the lands which plaintiff held, and was thus barred by limitation.

The first Court (the Deputy Collector's) held that plaintiff had failed to prove, by his oral and documentary evidence, his allegation of his possession in Assar 1270 B. S. The Deputy Collector accepted the proof adduced by defendant that plaintiff was dispossessed in 1269 B. S. by defendant's sub-lessee. He accordingly decided that plaintiff was barred by the Law of Limitation, plaintiff not having sued within one year of his cause of action, *viz.*, plaintiff's dispossession.

The Judge on appeal held that plaintiff only adduced evidence of payment of rent to a 5-anna sharer in 1270, but the Judge discredited his evidence of any payment on account of the 8 annas in that year, and the Judge, moreover, clearly finds as a fact that *defendant's sub-lessee, one Khoda Buksh, dispossessed plaintiff from the whole 16 annas in 1269.* The Judge (apparently incidentally) remarks that dispossession of a portion of a joint undivided estate is dispossession of the whole, and adds that payment of rent to one shareholder is not payment to all. The Judge, however, comes to the main finding of fact that plaintiff's allegation of possession of the land in suit in 1270 B. S. was not proved, and that plaintiff was thus barred by limitation, and dismissed plaintiff's appeal.

Plaintiff now appeals specially, urging:—

1st. That the Judge had no jurisdiction, as the question was only really between landlord and tenant; and that, although the landlord did not actually dispossess plaintiff, still the defendant, his lessee, was only the landlord's instrument, and the dispossession must, therefore, be deemed the act of the landlord.

2ndly. That the Judge had wrongly held limitation to bar the suit; and, moreover, that the receipt of one co-parcener of rent was a recognition of the possession of the tenure by all the co-parceners.

3rdly. That the Judge had wrongly held that the dispossession of a part of a tenure in a joint undivided estate was dispossession of the whole.

Judgment.—On the *first* and *second* of these pleas, we have to observe that the Judge has found as a fact plaintiff's dispossession in 1269 B. S., *not* by the zemindar, but by the defendant. It is not shown that,

on such a finding, the jurisdiction is erroneous, or the Law of Limitation has been erroneously applied; and we accordingly overrule these pleas.

We may observe, with reference to the second part of the second plea, that the receipt of a co-parcener, in behalf of himself and others, may, under certain circumstances, be taken as a recognition of possession by all. But in this case, although there is a joint undivided estate, the shares are recognized and defined as amongst the co-parceners, and each has a right to his own collections, and to give receipts for them.

The *third* plea is immaterial here; nor does the Judge, we presume, mean to lay down an abstract rule that, where certain shares are recognised in a co-parceny, dispossession of one is dispossession of all; for that is erroneous. But, as before said, it is immaterial to consider this, since the fact has been clearly found that plaintiff has not sued within the time allowed by law, *viz.*, one year from his cause of action, *viz.*, his dispossession.

Under these circumstances, we dismiss this special appeal with costs.

The 10th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Remand (for taking further evidence).

Cases Nos. 2563 to 2565 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 13th June 1865, affirming a decision passed by the Moonsiff of Pundooah, dated the 22nd August 1863.

Teen Cowree Kharah (one of the Defendants), *Appellant,*

versus

Luckhee Monee Dossee (Plaintiff), *Respondent.*

Baboo Mohendro Lal Seal for Appellant.

Baboo Greeja Sunkur Mojoomdar for Respondent.

The failure of a party to take advantage of a postponement, for the purpose of tendering further evidence, cannot afterwards give him a right to a remand for such further evidence being taken, to which, without such postponement, he was entitled under Section 354, Act VIII. of 1859.

These three cases were remanded to the Lower Appellate Court for further consideration. This Court having considered that the statements of a defendant, Gunga Dhur, both regarding the date of the death of the husband of Huro Monee, who, by the defendants, was said to have predeceased his father, and also regarding the unchastity of that person, were mere hearsay evidence, and not legally admissible.

On remand the Principal Sudder Ameen sent for further evidence on both the issues in the case, and eventually decided it in plaintiff's favor.

Defendant now appeals specially, urging that it was not competent to the Principal Sudder Ameen, under Section 354, to take the fresh evidence; that the case should have been remanded to the Court of first instance in accordance with the Section; that he had no opportunity, when the case was before the Court *before* remand, to file his evidence; and, having had no opportunity to file evidence, the mere framing of the issues is insufficient to deprive him of a right to which under the law he is entitled.

We observe that, before the case came up to this Court, defendants had an opportunity of supporting their side of the issues raised by evidence, for the Principal Sudder Ameen postponed the case for the very purpose of giving them the required opportunity. They, it would appear, omitted to take advantage of that opportunity, relying, it may be, on the evidence of their co-defendant, *Gunga Dhur*, which has been rejected. Their failure, however, to take advantage of the postponement in their favor cannot now give them a right, which, without such postponement, they might have had. Under Section 354 of the Code of Civil Procedure, the issues have been rightly drawn, and the Principal Sudder Ameen, on the part of the Court requiring further evidence, called for such before him under Section 355 of the Code of Civil Procedure; and, having considered it attentively, has decided in favor of plaintiff. To this proceeding we see no valid legal objection; we, therefore, dismiss these three appeals with costs.

The 13th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Res Judicata.

Case No. 2620 of 1865.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 26th July 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 27th September 1864.

Tara Chand Ghose (Plaintiff), *Appellant,*

versus

Rada Monee Dossee and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Appellant.

Baboo Romanath Bose for Respondents.

Where the right to possession as evidenced by the title of the parties was in issue in a former case under Act X. of 1859, and the right to possession as between the same parties under their several titles is also the point in issue in a subsequent suit in the Civil Court, the causes of action in the two cases are identical, and the latter suit is barred under Section 2, Act VIII. of 1859.

PLAINTIFF in this case sued the defendant, another tenant, for possession of certain lands under a particular title.

The defendant pleads that the suit was barred, inasmuch as for these very lands he brought a suit against the zemindar and the plaintiff; that then the defendant's, zemindar's, plea and the plaintiff's claim agreeing with it were rejected, and that his, defendant's, right and title to possession under his pottah were clearly established; that consequently the present suit involving the very point determined under Act X. between the parties cannot be again raised.

The first Court considered that the lands now in suit were not identical with those in dispute under Act X. of 1859; and, being of opinion that the right and title to them were with the plaintiff, it gave him a decree.

On appeal, the Principal Sudder Ameen considered that the lands were admitted to be identical, and that consequently the present suit was barred under Section 2 of Act VIII. of 1859.

Plaintiff now appeals specially, urging that the lands now in suit are not identical with those in issue in the Act X. case, and, even if they were, as in that case, only the fact of possession, and in this case title is concerned, the causes of action are not the same.

There can be no question that the plaintiff in his plaint admits that the lands now in suit are identical with those in litigation in the Act X. case; and it is equally clear that the parties now in suit were essential parties before the former case, and the zemindar's name is only withdrawn to give a color for having recourse to the Civil Court; and it moreover cannot admit of question that the right to possession as evidenced by the title of the parties was in issue in the Act X. case, and the right to possession as between the parties under their several titles is also the point in issue in the present case. The causes of action are, therefore, identical in the two cases, and the present suit under Section 2 of Act VIII. of 1859 is barred. We reject the special appeal with costs.

The 13th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Res Judicata.

Case No. 2646 of 1865.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 15th February 1865, affirming a decision passed by the Sudder Ameen of that District, dated the 5th May 1864.

Shaikh Golam Ahmed and others (Plaintiffs), *Appellants,*

versus

Sham Soondur Roy and others (Defendants), *Respondents.*

Baboo Greeja Sunkur Mojoomdar and *Moulvie Syud Murhamut Hossein* for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

The decision in a suit brought under Act X. of 1859 against the defendants as the plaintiff's tenants will not bar a suit brought in the Civil Court against the same defendants as the plaintiff's vendees, the parties being accidentally the same persons, but legally different persons with different rights and interests.

PLAINTIFFS sued the defendants, their vendors, for possession of certain lands.

The defendants pleaded limitation, and denied the sale of the lands to the plaintiffs.

The Judge has found the case barred under Section 2 of Act VIII. of 1859, and dismissed plaintiffs' suit, and plaintiffs have now appealed specially against that finding.

It appears that the plaintiffs brought a suit for rent from 1262 to 1270 before the Revenue Authorities under Act X. of 1859, on the allegation that they had purchased the lands in 1239 from defendants' ancestors, and that defendants had in 1242 executed a kubooleut in their favor. The Court determined that the kubooleut was spurious, and rejected the present claim. This suit is decisive of the fact that, during the years covered by it, the defendants were not tenants of the plaintiffs. It follows that, during those years, defendants must be considered to have held adversely to plaintiffs. But the present suit was instituted in 1863 or 1270, and the effect of the finding in the Act X. suit will reach only back to 1262 or eight years before the institution of the present suit. It will remain for the plaintiffs to give evidence that they have been in possession at any time within 12 years before the institution of the suit. If they can do this, and defendants cannot successfully rebut it, plaintiffs' title as vendees from defendants must be enquired into on the merits. If they cannot prove their possession within the above-mentioned period, their suit must be dismissed as barred by the Statute of Limitation. We observe that Section 2 of Act VIII. has nothing to do with the present case. The present suit is against the defendants as their vendors; the suit under Act X., against them as their tenants. They accidentally are the same persons, but legally they are different persons with different rights and interests. The case is remanded to the Judge, who will without delay carry out the instructions herein conveyed to him.

The 15th January 1866.

The Hon'ble L. S. Jackson and J. B. Phear, *Judges.*

Present:

Enhancement—Protection under Section 15, Act X. of 1859, of Putnee Talook declared liable to—under decree passed before that Act.

Case No. 301 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of Jessore, dated the 22nd August 1865.

Gobind Chunder Dutt (Defendant), *Appellant,*

versus

Huronath Roy and others (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne and *G. C. Paul*, and *Baboos Dwarkanath Mitter* and *Banee Madhub Banerjee* for Appellant.

Baboos Sreenath Doss, Kalee Mohun Doss, and *Bungshee Dhur Sein* for Respondents.

A putneedar is protected from enhancement under Section 15, Act X. of 1859, notwithstanding the zemindar's right to enhance under a decree passed before that Act, by which decree the zemindar was declared entitled to enhance, but which decree he had rendered inoperative by his omission to take any effectual steps before that Act to vary the rent of the talook since the Decennial Settlement.

THIS was a suit before the Officiating Collector of Jessore, by a zemindar against his putneedar, for an instalment of rent at an enhanced rate which the plaintiff alleged himself to have assessed in accordance with a decree of the late Sudder Court, by which his right to enhance was affirmed, although, from his failure to serve the notice prescribed by law, the tenant was not then liable to pay rent at any enhanced rate.

This suit being admittedly brought under the provisions of Act X., the defendant pleaded that his talook having been created before the accession of the British Government, and held at an unvaried rent since a time antecedent to the Perpetual Settlement, *viz.*, since 1195 B. S., was protected from enhancement under Section 15 of the Act.

But the Collector was of opinion that the right to enhance having been adjudicated upon by the Sudder Dewanny Adawlut in 1860, and, indeed, in a previous decision, as it was thought, in 1821, was no longer open to question, and gave the plaintiff a decree for rent enhanced at the Pergunnah rates.

Defendant having appealed, the learned Counsel who appeared for him went very fully into the successive previous litigations—that in 1811, in which it was decreed that the talookdar should be re-placed in possession, and continue to hold at the original rate, these words being, as he contended, irrelevantly added "according to the *tohoot.*" Next, the decree of 1821, by which the Sudder Dewanny Adawlut finally dismissed the zemindar's suit for rent at a rate increased by the difference between the old talookdary jumma and the Sudder jummah which the zemindar had to pay to Government: this decree containing at the same

time a direction that, unless the parties come to terms, the talook should be assessed at Pergunnah rates. And, finally, the decree* of the late Sudder Court in 1860 (reversing the judgment of the Zillah Court in 1858), by which it was declared that, as the plaintiff's right to enhance had been already determined by the decree of 1821, and as *nothing had subsequently occurred to invalidate that right*, plaintiff was entitled to enhance; but that, as *notice had not been served on the proper parties* under the circumstances. the order would merely be a recognition of the plaintiff's right to assess after notice to the present tenants.

* Sudder Dewanny Adawlut, 1860, page 329.

Mr. Doyne, after showing us the order passed on an application to review this judgment, urged that the decision against parties not properly before the Court, for want of the preliminary notice, was extrajudicial, and ought not to prejudice his client, and he sought to show that the previous decisions properly understood, so far from recognising the plaintiff's right to enhance, had persistently disallowed such claims on his part, and maintained the talookdar's right to enjoy his tenure at the rent assessed on it at the time of its creation.

We, however, being of opinion that the main question was whether, under the circumstances of this case, the rent admittedly never having varied, the talookdar was not now protected by Section 15, Act X. of 1859, desired that the argument might be confined on this point; and, having heard both parties upon it, we are of opinion that the defendant is so protected.

Supposing the decision of 1860 to be legally operative, and supposing Act X. of 1859 not to have been enacted subsequent to the filing of the plaint in that case, no doubt the plaintiff could have assessed the rent of this talook as there determined, whether the interpretation put by the Court at that time in the decision of 1821 was correct or otherwise.

But we think that the right of the plaintiff, suing under Act X. of 1859, with this decree in his hand, stands no higher than the right of any other landlord who, previous to the passing of the Act, would have had a good right to enhance, but whose right by the passing of the Act was taken away. He has taken no effectual steps by which the rent has been varied since the Decennial Settlement, and now the Legislature has stept in, and finally protected the talookdar.

To use the words of the Sudder Court, something has subsequently occurred to invalidate and, indeed, to abrogate the right of the plaintiff.

It was urged upon us by the respondent's pleader, Baboo Kalee Mohun Doss, that the protecting Clause of Act X. of 1859 could not be imported into the case, inasmuch as there were not independent proceedings, but as it were supplementary to the former suit in the nature of executing a decree, and that as, under the old procedure, a suit would lie for the complete carrying out of a decree, the plaintiff ought not to lose his rights by reason of a change in the law which occurred while he was actually prosecuting his remedy.

To this contention we cannot subscribe. Admitting for the moment the correctness of the pleader's view of the old procedure, we must observe that the decree was one which the plaintiff could in no way execute. By his own omission he had rendered it inoperative. He had to sue *de novo* under the provisions of Act X. of 1859, and so suing he was liable to be met by every plea which could be raised under that enactment. We think, therefore, that the plaintiff is too late, if he was ever entitled to succeed; that his right to enhance in this suit was not maintainable; that the decision of the Collector was consequently erroneous, and must be reversed with costs.

The 19th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence—Onus probandi—Unvarying rent.

Case No. 2840 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. C. Richardson, Additional Judge of Jessore, dated the 11th July 1865, reversing a decision passed by the Deputy Collector of that District, dated the 26th February 1865.

Mr. George Mears (Plaintiff), *Appellant,*

versus

Dass Monee Dossia (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Roopnath Banerjee for Respondent.

The mere production of a document of recent date is not proof of the genuineness of such document. Before receiving it, the Court must decide whether, upon the evidence adduced, the party seeking to put the document in evidence has given sufficient legal proof of its being what it purports to be.

THIS case must be remanded.

The Judge, in finding in favor of the defendant (the respondent before us), has relied much on certain *dakhilas* and *canoongoe* papers. The *dakhilas* are all of recent date, produced to prove payments alleged to have been made within 20 years of the institution of the suit. Their genuineness, as well as that of the *canoongoe* papers (which are of earlier date), has all along been contested by the appellants; but the judgment of the Lower Court shows that no one of these documents was legally proved, or considered by the Judge to be legally proved, although the Judge nevertheless has accepted them and relied on them in coming to the conclusion at which he has arrived. The mere production of a *dakhila* or other such paper of recent date, however free from suspicion its appearance may be, is not proof of the genuineness of such document. Nor is it enough that a Court should not think that a paper which is produced is proved by the opposing party to be a forgery. What the Court is bound to do before it receives or acts upon such a paper is to decide as a matter of fact whether or not, upon the evidence adduced, the party who seeks to put the document in evidence has given sufficient legal proof of its being that which it purports to be. These observations apply to the mode in which the Judge below has dealt with the *canoongoe* papers, as well as to the course he has followed with reference to the *dakhilas*. Any further evidence that may be necessary, or may be forthcoming, must be received, and the Court must decide distinctly on the admissibility of these documents, and give the reasons for the decision.

We conclude by remarking that it is for the defendant to prove her case that she has held at an unvarying rent. It does not lie on the plaintiff in the first instance to prove the variation: nor does the case referred to by the Judge throw the *onus* on the plaintiff, as the Judge supposes that it does. The case in question is reported at page 96, Vol. I. of the Revenue Journal, where a very inaccurate marginal note has been appended to it which may have misled the Lower Court.

The 23rd January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Presumption of uniform payment from Permanent Settlement—Section 4, Act X. of 1859—Uniform payment for 20 years.

Case No. 2741 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated 12th August 1865, affirming a decision of Mr. T. T. Allen, Deputy Collector of that District, dated 30th May 1865.

Mussamut Mahmooda Bebee (Plaintiff), *Appellant,*

versus

Hareedhun Khuleefa (Defendant), *Respondent.*

Baboos Bamachurn Banerjee and *Obhoy Churn Bose* for Appellant.

Baboos Sreenath Banerjee and *Luleet Chunder Sen* for Respondent.

The finding that the plaintiff's and defendant's father held *possession* from the Permanent Settlement is not sufficient to prove that the defendant paid a uniform *fixed rent* from that date. To entitle the defendant to the presumption under Section 4, Act X. of 1859, he must prove that he has paid a uniform fixed rent for the last 20 years.

PLAINTIFF in this case sues for a kubooleut for 9 rupees 6 annas 3 pie for a plot of homestead land of 15 gundas 2 krants.

Defendant's case is that he and his father had held the same land always at a fixed rent of 3 rupees 2 annas.

The first Court stating the evidence to be that of witnesses who *heard* that defendant had paid a fixed rent as stated by him, and considering that defendant himself was 70, thought it sufficiently shown that defendant had uniformly, for the last 20 years, paid the fixed rent pleaded by him, thus raising the presumption of having paid the same from the time of the Permanent Settlement, and thereby throwing upon plaintiff the onus of rebutting that presumption by showing a variation since that Settlement.

The first Court further held that the two kubooleuts which plaintiff adduced in order

to prove that variation were not genuine, and thus the presumption under Section 4 was not rebutted, and that, as defendant had uniformly paid the rent he alleged for the last 20 years, he was consequently entitled to the verdict of the Court in his favor.

Plaintiff's suit was accordingly dismissed by the first Court, and the Lower Appellate Court has affirmed this dismissal.

The Judge's decision is that, as the defendant "is a very old man, of not less than "70 years, and that there is no doubt of *the* "*land having been held* long before the "Permanent Settlement by his ancestor, and "as plaintiff had failed to rebut the presump-"tion of law as to 20 years' possession, the "kubooleuts held by him being evidently "falsely prepared for the purpose of the "present suit, under such circumstances "I see no reason to reverse the decision of the "Lower Court, but must presume that the "Deputy Collector, *acting upon the whole* "*evidence*, came to a right conclusion upon "the facts."

On special appeal it is urged that the Lower Appellate Court has held that the plaintiff's and defendant's father's *possession* from the time of the permanent settlement are *proved;* but that such a finding is not sufficient to prove that the defendant paid *a uniform fixed rent* from that date, and further that there is no finding by the first or second Court on evidence that the defendant *paid uniformly* for the last 20 years *the fixed rent* which he alleges that he did.

We are of opinion that these pleas on special appeal are good.

We nowhere see on what evidence it is held that the *rent* for the last 20 years has been proved by defendant *to be the same*, and that fact (as the first Court properly remarks, but does not properly apply his remark) defendant had first to prove.

The Lower Appellate Court will, therefore, re-try the case, with reference to the above remarks, and decide on the evidence on the record, whether defendant proves that, for the *last 20 years*, he has *paid the same rent*, and state what the evidence is, and his conclusions upon it. If the Lower Appellate Court finds that fact of uniform payment of rent for 20 years proved, its verdict will be for defendant, because, the attempted rebutter by plaintiff having failed, the legal presumption, under Section 4, Act X. of 1859, is that the same *fixed rent* has been *paid* from the time of the Permanent Settlement.

Remanded accordingly.

The 24th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover,

Judges.

Jurisdiction—Suit against Agent for money—Arbitration-award.

Case No. 2700 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 31st July 1865, reversing a decision passed by the Moonsiff of that District, dated the 29th March 1865.

Shoshee Mohun Shaha and another (Plaintiffs), *Appellants,*

versus

Aheer Sircar (Defendant), *Respondent.*

Baboo Sreenath Doss for Appellants.

Mr. J. S. Rochfort for Respondent.

A suit for monies received and not accounted for during the agency of the defendant is cognizable only in the Revenue Court under Section 24, Act X. of 1859, notwithstanding that the agency may have been determined prior to the institution of the suit.

An arbitration-award cannot change the nature of the claim, and convert it into a simple debt due by the defendant to the plaintiff, and consequently make it cognizable by the Civil Courts, and the arbitration-award enforcible by them.

PLAINTIFF in this case had a demand against the defendant for monies which he had collected as tehsildar, and for which he had not accounted to him. Instead of bringing a suit under Section 24 of Act X. of 1859, plaintiff and defendant agreed to arbitration. The arbitrators gave plaintiff an award for a considerable sum, and plaintiff had recourse to the Civil Court for its enforcement. The first Court gave plaintiff a decree according to the terms of the arbitration-award. The Principal Sudder Ameen reversed that decree, on the ground that the subject of the suit was a sum of money misappropriated by a tehsildar; that such a claim is cognizable under Section 24 of Act X. of 1859, and not by the Civil Court; that consequently, under Section 327 of Act VIII. of 1859, the Civil Courts had no jurisdiction to enforce the arbitration.

Plaintiff now appeals specially, urging that the Principal Sudder Ameen has incorrectly laid down the law, *first*, inasmuch as, the defendant having been dismissed from his agency before the suit was instituted, the claim could not have been prosecuted before the Revenue Authorities under Section 24 of Act X. of 1859; and, *secondly*, even if the claim could have been so instituted, the arbitration-award changed its

nature, and converted it into a simple debt due by defendant to plaintiff, and consequently made it cognizable by the Civil Courts, and the arbitration-award enforcible by them.

There is, we think, no force in the *first* objection taken by special appellant. Although the agency may have been determined previous to the institution of the suit, the claim was for monies received and not accounted for during the agency of defendant, and, as such, falls clearly within Section 24 of Act X. of 1859. On the *second* point, too, we think the contention of special appellant fails. What the claim was originally, that it remained after the arbitration. The law, Section 327 of Act VIII. of 1859, simply allows parties to come to the Court which would originally have had jurisdiction to enforce an arbitration undertaken without its intervention. The judgment of the Principal Sudder Ameen is quite correct, and we dismiss the special appeal with costs.

The 24th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Notice of Enhancement—Title.

Case No. 2483 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judges of Mymensing, dated the 30th June 1865, affirming a decision passed by the Deputy Collector of that District, dated the 18th April 1865.

Ram Chunder Chowdry (Defendant), *Appellant,*

versus

Hurish Chunder Chowdry (Plaintiff), *Respondent.*

Baboo Nil Madhub Bose for Appellant.

Baboo Nil Madhub Sein for Respondent.

Where a Court dismisses a suit on a preliminary objection to the sufficiency of a notice of enhancement, it should not go on and decide also a question of title.

THE suit was for arrears of rent at an enhanced rate. The Lower Court having decided against the plaintiff, he appealed to this Court, which remanded the case with directions to try an issue as to the validity of a certain sunnud pleaded by the defendant. On the remand, the Lower Courts have found that that plaintiff's notice was bad, and have, on that ground, dismissed the suit altogether. But they proceed to declare the sunnud invalid.

The defendant appeals from so much of the order of the Lower Court as declares his sunnud bad, contending that, as the Courts dismissed the suit on account of the defect in the notice, it became unnecessary to proceed to enquire into the question of the sunnud.

Under the circumstances, the declaration of the Lower Court as to the sunnud does seem to us to have been unnecessary, and it ought not to be treated as of any judicial effect. Considering the turn which the case took on the hearing on remand, the order of this Court to enquire into the validity of the sunnud became, in fact, superfluous, however right it may have been when it was passed.

The 24th January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction—Suit by tenant against landlord (to recover possession of land).

Case No. 2667 of 1865.

Special Appeal from a decision passed by Mr. M. Beaufort, Additional Judge of Dacca, dated the 21st July 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 20th December 1864.

Hosseinee Khanum (Plaintiff), *Appellant,*

versus

Rubbea Khanum and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Respondents.

Where a tenant sues to recover possession from the party to whom she pays rent, she is bound to sue in the Revenue Court under Section 24, Act X. of 1859. The Civil Court has no jurisdiction in such a case under Section 15, Act XIV. of 1859.

THIS was a suit for confirmation of title and for possession of certain lands by reversal of a decision given under Section 15 of Act XIV. of 1859.

The plaintiff (who is the special appellant before us) sued as adopted daughter of one Hoorunissa Khanum, from whom she claims the disputed property under a will

dated 25th Srabun 1259 B. S. Up to the year 1270, she was a minor under the guardianship of her natural father, Gholam Ali. She then (as alleged) took possession for herself under the adoptive mother's will, when she was sued by her step-mother, Gholam Ali's second wife, under Section 15 of Act XIV. of 1859, on the ground that Hoorunissa Khanum had given a howaldaree pottah to her in 1255 B. S., and that she had been paying rent, first to Hoorunissa herself, and afterwards to Golam Ali as guardian of the special appellant ever since.

The result of the suit was a decree in favor of the step-mother.

In the present case, brought, amongst other things, to reverse that decree, the Court of first instance found that the defendant's howaladaree pottah was genuine, and the Judge has confirmed that decision, holding that there is no proof of the falseness of the pottah, whilst the two *dakhilas*, purporting to have been given by Hoorunissa Khanum, are not open to suspicion.

It is urged in special appeal:—

(1.) That, as Rubbea Khanum's suit was to recover possession from the party to whom she paid rent, the Civil Court had no jurisdiction under Act XIV. of 1859; and that, therefore, the special respondent's possession under the decree was a wrongful possession, as having been given without jurisdiction.

(2.) That the Judge has taken no notice whatever of a mass of documentary evidence, which clearly proved that, up to Hoorunis-a Khanum's death, she was in *khas* possession of the disputed lands; and that from that date to 1268, when Gholam Ali's guardianship terminated, the latter retained *khas* possession on the part of his ward; and

(3.) That no notice has been taken of the other evidence on the record, which would have gone far to prove that the howaladaree pottah was false, to wit, that Hoorunissa Khanum's will, which is admittedly genuine, makes her adopted daughter responsible for certain payments out of the estate: whereas, if the pottah be genuine, the assets would not nearly cover the amounts so to be paid.

As the present suit is not only to reverse the summary award under Act XIV., but to settle the question of special appellant's title to the land in dispute, we do not think it necessary to go into the first ground of appeal further than to remark that, as the special respondent sued confessedly as a tenant against her landlord, she was bound to go to the Court provided by law for such cases. Her case came under Section 24, Act X. of 1859, and the action of the Civil Court was altogether without jurisdiction. We do not think it necessary to go farther into this point at the present time.

The *second* and *third* objections must, we think, be allowed. The Judge has omitted all mention of certain evidence, which, if trustworthy, would go far to demolish the plea of holding under a howaladaree pottah; and, as the special appellant's general rights under the will are not denied, everything, of course, depends on the special respondent's proving her special plea.

The Judge must take up the case again, and pass orders after going through all the evidence, and record a full decision, stating clearly and circumstantially the weight to be attached to the statements and evidence adduced by either party.

Costs will follow the result.

The 29th January 1866.

Present:

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Suits against Agents for accounts—Section 24, Act X. of 1859.

Case No. 2285 of 1865.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 30th May 1865, affirming a decision passed by Mr. A. B. Falcon, Officiating Collector of that District, dated the 23rd March 1865.

Jumeer Mundul, Gomashtah (Defendant), *Appellant,*

versus

Mohima Chunder Ghose (Plaintiff), *Respondent.*

Baboos Greeja Sunkur Majoomdar and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Kalee Mohun Doss for Respondent.

Section 24, Act X. of 1859, does not apply to cases in which pure questions of title are involved—*e. g.*, where the plaintiff never was in receipt of the rent or acknowledged by the defendant to be entitled to it, and the defendant never was employed by him and never acted as his agent.

THIS is a suit for papers and accounts under Section 24 of Act X. of 1859. The

case of the plaintiff, who is a minor, suing by his guardian, is that the defendant has been collecting rents, &c., on his account.

The Lower Court finds that the land, the rent of which was collected by the defendant, belonged to one Degambur Pershad in his life-time, and on his death went to his two widows—Chundramalla, who had a ten annas share, and Anundmoye, who had a six annas share. Chundramalla died, having adopted the plaintiff as her son; and he now sues as her son and heir. The validity of the adoption is, however, disputed by the surviving widow, Anundmoye, who contends that, on Chundramalla's death, the property vested in her. The plaintiff has not either by himself or his guardian had possession of the land, nor has he received any portion of the rent collected from it, nor has the defendant ever admitted the plaintiff's right to receive any rent. The defendant was appointed putwaree of the land by Gopeekanth, the naib of the whole estate, who was appointed by the husband Degambur in his life-time. The defendant says he used to account only to the naib, and never to the zemindar direct. Chundramalla during her life received the rents she was entitled to. The present suit is for accounts, &c., for the time subsequent to her death.

The Lower Court decided in favor of the plaintiff. In appeal, the defendant takes several objections to this decision. Of these, we need mention only one, as we think it fatal to the plaintiff's case.

Suits under Section 24 of Act X. of 1859 can be brought only "by zemindars and others "*in receipt of the rent* of the land against "*any agent employed by them.*" Now, the plaintiff is not a person who is or ever has been in receipt of the rent of this land, and the defendant was not an *agent employed by him.* Whatever may be the plaintiff's rights as to the rents, he never has been in receipt of them. And whatever may have been the position of the defendant as regards Chundramalla, the rights of the plaintiff as her adopted son have never been admitted by the defendant. The defendant has never in any way recognised the plaintiff, nor acted as if he were his agent, and the mere fact of his continuing to collect after Chundramalla's death will not make him the plaintiff's agent. The defendant denies that he ever was plaintiff's agent, and denies that the plaintiff ever was or had a right to be in receipt of the rent. Section 24 of Act X. of 1859 does not apply to cases in which pure questions of title are involved. As we think the plaintiff never was in receipt of the rent of this land, and that the defendant never was his agent employed by him, we reverse the judgment of the Lower Court, and dismiss the plaintiff's suit with costs.

The 31st January 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Enhancement—Unvarying rent—Auction-purchaser.

Case No. 2518 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 17th June 1865, reversing a decision passed by the Deputy Collector of that District, dated the 8th August 1864.

Saduck Sircar (Defendant), *Appellant,*

versus

Mohamaya Debia and others (Plaintiffs), *Respondents.*

Baboo Mohendro Lal Shome and *Moulvie Syud Murhamut Hossein* for Appellant.

Baboo Sreenath Doss for Respondents.

The fact of the zemindar who sues for enhancement of rent being an auction-purchaser at a sale for arrears of revenue does not deprive the ryot of his right, under Section 4, Act X. of 1859, to plead uniform payment of rent for 20 years to entitle him to the presumption of uniform payment from the Permanent Settlement.

THE plaintiff (special respondent) in this case, who was an auction-purchaser for arrears of Government revenue, sued the special appellant for enhancement of rent. The defence was that the land had been held at a fixed rent from the time of the Perpetual Settlement, and the ryot claimed the benefit of the presumption arising from a 20 years' uniform payment under Section 4 of Act X. of 1859.

The first Court dismissed the suit; but the Judge on appeal held that the zemindar, being an auction-purchaser at a sale for arrears of revenue, was empowered to demand an enhancement, notwithstanding the ryot's allegation of uniform payment, and that the latter's protection was swept away by the sale.

We have no doubt that the Judge was wrong. Admitting, as the special respondent contends, that he was an auction-pur-

chaser under Act I. of 1845, Section 1 of Act X. of 1859 declares his right to enhance the rent of his tenants subject to the modifications contained in that Act, and one of these is that a ryot who claims to hold at a fixed rate from the date of the Perpetual Settlement, and can prove a uniform payment of rent for 20 years previous to the institution of suit, shall be entitled to the benefit of the presumption that his tenure is protected, and that it is for the landlord to rebut that presumption.

In this case, therefore, the special appellant had a clear right to plead Section 4 of Act X, and the fact of special respondent being an auction-purchaser under Act I. of 1845 could not prevent his doing so.

The case must go back to the Judge, in order that he may find on the evidence whether the special appellant has proved his uniform payment of rent for 20 years preceding the suit; if he agree with the first Court that he has done so, and that he is entitled to the benefit of the presumption under Section 4, he will dismiss the claim of the zemindar to enhance.

Costs will follow the result.

The 1st February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Appeal—Measurement—Standard of Pergunnah Pole.

Case No. 470 of 1865 under Act X. of 1859

Miscellaneous Appeal from an order passed by the Additional Judge of Jessore, dated the 15th May 1865, reversing an order passed by the Deputy Collector of that District, dated the 22nd July 1863.

Tarucknath Mookerjee and another (Plaintiffs), *Appellants,*

versus

Meydee Biswas (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellants.

Baboo Bungshee Dhur Sein for Respondent.

The decision of a Collector in matters of survey and measurement falling within Sections 9 and 10, Act VI. of 1862, B. C., is appealable to the Judge.

The decision of a Collector under Section 11 is not appealable; the Collector being the depositary of the standard pole of each pergunnah, and it being exclusively within his province to declare what the standard of such pole is.

We think that there was no appeal to the Judge in this case. The decision of the Collector in matters which fall within the purview of Sections 9 and 10 of Act VI. of 1862, Bengal Council, is appealable to the Zillah Judge; but the order of a Collector, under Section 11 of the same Act, is not appealable. The Collector is the depositary of the standard pole of each pergunnah, and it is exclusively within his province to declare what the standard of such pole is.

We, therefore, reverse the decision of the Judge; and restore that of the Collector. Appeal decreed with costs.

The 2nd February 1866.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Right of Occupancy—Yearly Tenants.

Case No. 2526 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Behar, dated the 20th May 1865, reversing a decision passed by the Collector of that District, dated the 9th February 1865.

Sadhoo Jha (Plaintiff), *Appellant,*

versus

Bhupwan Qopadhya and others (Defendants), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

Baboos Anund Gopal Paleet and Luckhee Churn Bose for Respondents.

No right of occupancy arises when land is held under a pottah limiting the period for which the land is to be held.

Although a pottah may not contain words specifying a right of re-entry, it must be reasonably construed; and if there are express words really involving that right, effect must be given to them.

A tenant, who holds over from 1265 to 1271 by sufferance without pottah, is a yearly tenant, and, being illegally ousted without notice, may recover possession. But if he held under a lease which expired in 1271, and

the landlord (not having re-admitted him) turned him out early in 1272, the tenant was in fact a mere trespasser, and not entitled to relief.

THIS is a suit by a tenant against his landlord, under Act X. of 1859, to recover land from which he has been, he says, illegally dispossessed. It is admitted that he came in for the first time in 1260 under a pottah, which also shows on the face of it that the land had been previously held by some one else. The pottah, moreover, expressly limits the duration of the holding of the land under it to 5 years, the provisions regarding rent being quite separately and distinctly stated. Although, in the terms of Section 6, there can be no doubt that a right of occupancy can sometimes be acquired when the land is held under a pottah, and it may even be that a definite term of years mentioned in the pottah may only define the period for which the rent is fixed, not the period for which the land is to be held; still in this case we think it clear that the pottah was expressly intended to define and limit the period for which the land was to be held for five years, and to recover the right of re-entry. We, therefore, consider that the Judge is, with reference to the terms of Section 7, right in holding that no right of occupancy accrued while the land was held under that pottah, and that, 12 years not having elapsed since the expiry of the pottah, the plaintiff has no right of occupancy. Although a pottah may not contain words specifying the right of re-entry, we think that it must be reasonably construed, and that, if there are express words which really involve that right, effect must be given to them.

But, further, plaintiff says that, even if he was a tenant-at-will, defendant illegally and improperly ousted him by force in the month of Sawun 1272. Defendant does not allege that he gave him the proper notice to quit. He says that plaintiff took a second pottah from 1265 to 1271, and that he ousted him after the expiry of that lease. It seems to us that the case now depends on the disputed *factum* of that lease and kubooleut. If plaintiff from 1265 to 1271 held on by sufferance without pottah, he is, we consider, a yearly tenant, and, being illegally ousted without notice, must recover possession. If, on the other hand, he held under a lease expiring in 1271, and the defendant, not having re-admitted him, turned him out early in 1272, he was, in fact, a mere trespasser, and can have no relief. The case is, therefore, remanded for a finding of the disputed kubooleut terminating in 1271. If it is genuine, plaintiff's suit will be dismissed; if otherwise, it will be decreed.

The 2nd February 1866.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Appeal—Suit for rent under 100 Rs.—Intervenor.

Case No. 2355 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 27th May 1865, reversing a decision passed by the Deputy Collector of that District, dated the 27th February 1865.

Chundro Kulla Dossia (Plaintiff), *Appellant,*

versus

Dookheet Ram Chung (Defendant) and another (Objector), *Respondents.*

Baboo Motee Lal Mookerjee for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

No appeal lies to the Judge from a decision of a Deputy Collector under Sections 153 and 77, Act X. of 1859, *i. e.*, in a suit for rent under 100 Rs., where a third-party intervenes, and the Deputy Collector decides on the receipt and enjoyment of the rent as between the plaintiff and the intervenor.

THE special appellant urges before us that the judgment of the Deputy Collector was, under Section 153 and Section 77 of Act X. of 1859, final, and that no appeal lay to the Judge.

We think that this objection must be allowed. The suit was under 100 rupees in value, and the Deputy Collector who tried it distinctly went on the "receipt and enjoyment of rent" as between the plaintiff and intervenor, and refused to look into the title of either.

This being so, no appeal lay to the Judge in accordance with the Full Bench ruling of this Court, dated 26th May 1865, in the case of Mahomed Hameedoodeen, appellant.

We, therefore, decree the appeal, and reverse the judgment of the Lower Appellate Court with costs on the special respondent.

The 3rd February 1866.

Present:

The Honb'le W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Suit under Clause 1, Section 23, Act X. of 1859 (against whom it may be brought).

Case No. 365 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of Midnapore, dated the 19th August 1865.

Messrs. R. Watson and Co. (Plaintiffs), *Appellants,*

versus

Koer Narain Singh Bhooya (Defendant), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort,* and *Baboo Onoocool Chunder Mookerjee* for Appellants.

Baboos Hem Chunder Banerjee and *Sreenath Doss* for Respondent.

Suit laid at Rupees 7,404-14-3-1c.

Suits may be brought under Clause 1, Section 23, Act X. of 1859, against parties other than mere ryots in the ordinary sense of that term.

THIS is a suit for a kubooleut and for enhancement of rent under Clause 1, Section 23 of Act X. of 1859.

The plaintiffs are farmers, under the Court of Wards, of the zemindary of Nyagram, comprising several pergunnahs. The defendant is proprietor of the Pergunnah of Jamireepal, admittedly situated within the zemindary of Nyagram, and paying to the zemindar the yearly sum of rupees 115-10-8-1c.

The defendant claims to hold on at this rate, as paid ever since the Mahratta rule, and resists the claim of the plaintiff to raise the rent to 7,404 rupees.

We observe that the right of the plaintiffs to measure the lands of the defendant has already been judicially recognised by the High Court in a special appeal, decided on the 7th of July 1864, No. 2533 of 1863.

The Collector has dismissed the suit of the plaintiff without taking any evidence, and without going into the merits, in an elaborate judgment mainly based on the ground that the plaintiffs sue the defendant as a ryot under Clause 1, Section 23, and under Clause 1 of Section 17, and that the defendant does not stand to the plaintiffs in the relation of a ryot to a zemindar. The chief reasons which have led the Collector to this conclusion seem to us to be that the size of the pergunnah held by the defendant precludes the idea of his being a ryot, or of his holding a ryotty tenure.

We are of opinion that the decision of the Collector on this preliminary point cannot stand. The tenancy of the defendant is proved, and, indeed, admitted. It is true that the plaintiff does not, and cannot, in this action treat the defendant as a dependent talookdar under Section 51 of Regulation VIII. of 1793; but it is most certain that suits may be brought against parties other than mere ryots in the ordinary sense and acceptation of that term, under Clause 1, Section 23 of Act X. Sections 10, 12, 13, 14, and 15 clearly contemplate the cases of under-tenants and of dependent talookdars, as well as those of ryots possessing the amount of land usually or ordinarily cultivated by agriculturists. The argument for the plaintiff on appeal that, whatever be the precise *status* or denomination of the defendant under the plaintiffs, he must be put to the proof of his right to bar the title of the plaintiff to enhance, seems to us quite sound.

We cannot attach the least weight to the contention of the defendant's pleader that the Collector, in deciding on the *status* of the defendant, has virtually decided the real point, of the right to enhance, at issue between the parties. The Collector distinctly states that the case is decided *in limine,* and that it has not reached the stage of taking evidence. The case has not reached a stage at which we could decide it ourselves on the merits, on the ground that the evidence was sufficient for a satisfactory judgment in appeal under Section 353.

The appeal is one which falls clearly under Section 351 of the Code of Civil Procedure, which is applicable to this suit on this particular point.

The case must be remanded to the Collector, whose decision on the preliminary point is set aside. The Collector will allow the plaintiff to file evidence or adduce witnesses, and will consider the proofs adduced by both parties; and whatever definition he may give to the tenure which the defendant ad-

mittedly holds under the plaintiffs, he will consider whether the latter are or are not entitled, on the merits, to enhance. The case, in short, will be regularly and fully tried.

Remand accordingly.

The 3rd February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Enhancement—Julkur.

Case No. 2291 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 29th June 1865, affirming a decision passed by Mr. W. H. Ryland, Deputy Collector of that District, dated the 12th September 1864.

Puran Sautra (Defendant), *Appellant,*

versus

Shaikh Tajooddeen (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Dwarkanath Mitter for Respondent.

A suit for enhancement of a julkur tenure is cognizable in a Revenue Court.

THE first plea taken in this special appeal is that, as this is a suit for *enhancement* of julkur rents, it is not cognizable in the Revenue Courts. We are, however, of opinion that a suit for *enhancement* of a julkur tenure is cognizable in a Revenue Court, just as an action for arrears of rents of other tenures is cognizable under Clause 4, Section 23 of Act X. of 1859. It is urged that the grounds of enhancement set forth in Section 17 of the Act for enhancing the rents of "*lands*" do not apply to the case of an enhancement of a julkur tenure, especially as the law is specific, *viz.*, as to the ground of increased productiveness *of land.* This plea is technical, and as to the letter of the law only; but it is in substance futile, with reference to the reasonable interpretation and the spirit of the law.

As, too, we find that suits for *arrears* of julkur rents are cognizable by the Revenue Court, we cannot see why a suit for *enhancement* of such rent should be tried by any other Court.

It is now urged before us that, although the Judge below found that the *productive powers* of the julkur have been increased by the labor and at the expense of the ryot, he has wrongly decreed an enhancement.

We find that the Courts below have decreed the enhancement on no such grounds, but simply on the finding of fact of the value of the fish having increased. The appellant argues that this value *may* diminish. When it does so, the special appellant may, if so advised, ask for an abatement as provided in the law.

On the whole, we see no reason to interfere with this decision, and, accordingly, we dismiss the special appeal with costs.

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges.*

Jurisdiction (of Civil Court)—Suit to set aside Sale in execution of decree fraudulently obtained under Act X. of 1859.

Case No. 1678 of 1865.

Special Appeal from a decision passed by Mr. A. Swinton, Judge of Tipperah, dated the 1st April 1865, affirming a decision of Moulvie Unwar Ali, Principal Sudder Ameen of that District, dated the 5th August 1864.

Nilmoney Bonick (Plaintiff), *Appellant,*

versus

Poddo Lochun Chuckerbutty and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A suit lies in a Civil Court to set aside a sale in execution of a decree fraudulently obtained in a Revenue Court under Act X. of 1859.

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Peacock, C.J. (Bayley, Norman, and Shumbhoonath Pundit, JJ., concurring).—THE question is whether a suit lies in the Civil Courts to set aside a sale in execution of a decree of a Revenue Court under Act X. of 1859 on the ground of fraud.

The case, decided on 16th March 1864, by a Full Bench, in No. 70 of 1863, does not govern this case. In that case no fraud or other misconduct of the parties to the suit was alleged. The decision was merely that a suit would not lie in the Civil Court to annul the decision of a Revenue Court under Section 151 of Act X. of 1859, or to set aside a sale of a tenure by order of a Collector in execution of a decree for arrears of rent.

I concur entirely in that decision. The suits before a Collector under Act X. of 1859 are not summary suits, but are in most cases suits in Courts having exclusive jurisdiction.

There is no general power in one Civil Court to set aside a decree of another Court of competent jurisdiction, upon the ground of an error or mistake on the part of the Court making the decree. But when a decree of one Court or an execution of a decree is obtained by fraud, the fraud gives a right of action to the party injured by it against the party guilty of the fraud. The Revenue Courts have no jurisdiction to try a suit to enforce that right of action; but the suit is cognizable only by the Ordinary Civil Courts of Judicature within whose jurisdiction the cause of action accrues, or within whose jurisdiction the defendant resides as a fixed inhabitant. Possibly, the Revenue Courts under Act X. of 1859 may have the power to prevent parties from abusing the process of their Courts. But, admitting that they have that power, it does not oust the jurisdiction of the Ordinary Civil Courts of Judicature otherwise two parties may collude, and by fraud obtain a decree against a putneedar for a small arrear of rent, and, before the putneedar has notice of the decree, sell his tenure, however valuable. It may be worth 10,000 or 20,000 rupees; and if the incidental power of the Collector to deal with abuses of its own decrees would oust the jurisdiction of the Civil Courts, the decision of the Revenue Courts under Act X. of 1859, Section 151, would be final, and dispose of property of such a value that, if a decree of the High Court in respect of it were obtained, it would be appealable to the Privy Council.

It is a cause of suit in the Civil Courts which have jurisdiction to administer the rules of equity, justice, and good conscience, to set aside decrees obtained by fraud, and to restrain the parties to the fraud from reaping the fruits of it by enforcing such decrees.

In this case, the Revenue Court upon review set aside the judgment under which the tenure was sold, and passed a fresh judgment for a different amount. When that judgment was set aside, there was no judgment to support the sale which had taken place under it. It is unnecessary to say what would have been the effect of setting aside the decree under which the sale took place, if the purchaser at the sale had been a *bonâ fide* purchaser. It is sufficient to state that a decree set aside for fraud would not support a sale to a purchaser in collusion with the parties to the fraud and acting as *benamee* for one of them. This is the charge in the present case; and, if the fraud alleged be made out, the plaintiff is entitled to relief. The decrees of the Lower Courts are reversed, and the case remanded to the Court of first instance to be tried upon the merits.

Campbell, J.—I concur in thinking that the Civil Court has jurisdiction in this case. But I should like to be understood as confining myself to the very case before us, *viz.*, that of a suit against the fraudulent purchaser of the property, for recovery of the property. I would not commit myself to anything which might seem to lay down that any decree passed between certain parties can be set aside by a fresh suit between the same parties. I think that any suit which could be brought in a Civil Court to set aside or render inoperative the decree of the same or of another Civil Court can be brought to deal similarly with the proceedings of a Revenue Court, when, as in this case, the ground of the action being fraud, it is such that the Revenue Court has no jurisdiction to entertain such a suit. But I would hesitate before in any degree trenching on the principle broadly laid down by Section 2, Act VIII. of 1859, and which seems to render every suit final *between the parties to the suit*, and allows no fresh suit to try the same subject-matter. A fresh suit can, no doubt, be brought by or against a third party injured by or improperly profiting by the decree. But between the same parties respecting the same subject-matter, I doubt whether any fresh suit can in any shape be brought. We

know nothing of any distinctions between law and equity, and I would not admit the possibility of bringing a suit in equity to render ineffectual a legal decree. I should rather think that the remedy under our procedure is, in case of a decree fraudulently obtained *ex parte*, an application for a re-hearing, and in any other case an application for review, as provided for in the Code of Procedure. In this case, however, it appears that, under the decree of a competent Court, the property has been sold, and the sale is so far final. The present suit is of the nature of a suit to force the purchaser to re-convey the property on the ground that the purchaser (who was no party to the original suit) fraudulently brought about the sale of the property, and fraudulently bought it. I think that such a suit will lie, and, so far, I concur in the judgment of my learned colleagues.

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

Jurisdiction (of Civil Court)—Suit to set aside sale in execution of decree fraudulently obtained under Act X. of 1859.

Case No. 2138 of 1865.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Principal Sudder Ameen of Furreedpore, dated the 23rd June 1865, reversing a decision of Baboo Gungakant Mookerjee, Moonsiff of that District, dated the 29th December 1864.

Ramsoondur Poramanick and others (Defendants), *Appellants*,

versus

Prosunno Coomar Bose and others (Plaintiffs), *Respondents*.

Baboos Greeja Sunkur Mozoomdar and *Motee Lal Mookerjee* for Appellants.

Baboo Peary Lal Roy for Respondents.

If a sale of *A's* tenure is made fraudulently under a decree of the Revenue Court for arrears of rent against *B*, the Civil Courts have jurisdiction to set aside the sale and to restore *A* to his rights.

This case was referred to a Full Bench by Justices Bayley and E. Jackson, with the following orders:—

Jackson, J.—The *first* question raised in this appeal is whether the Civil Courts have jurisdiction to entertain a suit which is brought either directly or indirectly to set aside the sale of a tenure under Section 105 of Act X. of 1859. There has already been a decision of this Court passed by three Judges, in which it was ruled that the jurisdiction of the Civil Court was barred by Section 151 of Act X. of 1859. I differed on that occasion from the view of the law taken by those learned Judges. If the facts of this case, however, exactly corresponded with the facts of that case, I might have considered their judgment as finally ruling the disputed point; but there is an important distinction between the two cases. In that suit the defaulter himself sued to have the sale set aside. In the present suit a third party sues to have it annulled. Section 106 of the Act makes provision for the hearing of the claim of a third party by the Collector, if he appears and raises his claim before the day fixed for the sale; but even then the Collector appears not to be required under the Section in all cases to adjudicate on the claim, but to have a discretionary authority to adjudicate if he see sufficient reason for so doing, and if the third party deposit in Court the amount of the decree, or give sufficient security for the same. The law does not go on to state that the Collector shall have authority to adjudicate on the claim if preferred after the day fixed for the sale. The law, therefore, being silent as to such a claim as is now put in by the plaintiff in this suit, the Collector would not have jurisdiction to entertain it. It follows that the Clauses of Section 151 of Act X., which refer only to orders passed in execution of decree within the cognizance of the Collector, would not apply to this suit. I think, therefore, that the Principal Sudder Ameen had jurisdiction to entertain the plaintiff's suit, and to adjudicate upon it.

Bayley, J.—I do not differ from, but assent to, the Full Bench ruling of the 16th March 1864. I find, however, others, to the contrary, of Phear and Steer, JJ., of 9th August 1865, page 156 of the Weekly Reporter, Vol. III.; and of Loch and Glover JJ., Vol. IV., Sutherland's Weekly Reporter, page 5, Act X. Rulings, 31st August,

Johree Lall's case. I think that certainly there is no express provision by the Legislature in Act X. of 1859 for the reversal of a sale in execution under Section 105 of Act X. of 1859, by appeal or regular suit, or revision, as far as the defaulter is concerned. Here, however (in this No. 2138) is a third party, who claims to set aside the sale after it is made on the allegation, and in this case apparently on a well-founded allegation, of fraud and collusion, by which his rights have been swept away, and his tenure becomes the property of another; or, in other words, the plea is that there was no legal sale under Section 105, and, therefore, the Collector's acts were null and void.

Certainly, I think, a conflict exists between the decisions of 16th March 1860 and the others cited above.

No other ruling is shown to us providing specially for cases of fraud; I think, therefore, it is matter to be referred to a Full Bench, with a view to have it declared whether the above decisions of the Division Benches of 9th and 31st August 1863 are correct or not, or under what circumstances the Civil Courts have jurisdiction to interfere in sales made by Collectors under Section 105, Act X. of 1859.

Judgment of Full Bench.—This case is governed by our decision in the case, special appeal No. 1678 of 1865. The tenure was sold under a decree of the Revenue Court for arrears of rent against Bhuggobutty, and not against the present plaintiff. If the plaintiff was the real owner of the tenure, and was treated as the proprietor of it by the zemindar by his accepting rent from him for it, his tenure could not be legally sold under an execution fraudulently obtained against Bhuggobutty. If the allegation of the defendant be made out that the tenure really belonged to Bhuggobutty as the heiress of the registered proprietor, and that the plaintiff never purchased the tenure, never was in possession, and never paid rent for it, the case would be different: for, in that case, the tenure would not belong to the plaintiff, but to Bhuggobutty, against whom the decree was obtained, and the execution issued. But if the sale of the plaintiff's tenure was made fraudulently under a decree against Bhuggobutty, the Civil Courts clearly have jurisdiction to set aside the sale, and to restore the plaintiff to his rights.

The case will be sent back to the Division Bench which referred it to us, in order that it may be determined with reference to our present decision upon the point of law which has been referred to us.

The 5th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, Shumbhoonath Pundit, and A. G. Macpherson, *Judges.*

Limitation (under Section 77, Act X. of 1859).

Case No. 2293 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen, with powers of the Judge of the Small Cause Court of Backergunge, dated the 27th September 1864, affirming a decree of the Moonsiff of that District, dated the 27th September 1864.

Denonath Bose and others (Plaintiffs), *Appellants,*

versus

Kally Coomar Roy and others (Defendants), *Respondents.*

Baboo Shibchunder Mojoomdar for Appellants.

Baboo Motee Lal Mookerjee for Respondents.

When a suit is brought in a Civil Court (under Section 77 of Act X. of 1859) to establish a title against which an adverse decision has been passed on appeal from an order of a Collector or Deputy Collector, the period of limitation for the suit in the Civil Court runs from the date of the decision *on the appeal*, and not from the original order of the Collector or Deputy Collector.

This case was referred to a Full Bench by Justices Morgan and Shumbhoonath Pundit, with the following order:—

Referring Order.—As we see no reason to doubt the correctness of the earlier decision noted in the margin* according to which the Lower Court has decided this case, and as we think that the limitation of one year in such cases should be construed to run from the date of the decision of the Appellate Court, we refer the case to the Full Bench.

* Page 21 of the Act X. Decisions, Vol. IV., W. R., 13th September 1865, Sreemuty Janokee, appellant.

Page 155 of the Act X. Decisions, Vol. III., Weekly Reporter, 8th of August 1865, Nemoy Jogee and others, appellants.

Judgment of the Full Bench delivered by Peacock, C. J.—The question in this case depends upon the proper construction of the proviso to Section 77 of Act X. of 1859.

The words are: "Provided always that "the decision of the Collector shall not "affect the right of either party who may "have a legal title to the rent of such land "or tenure to establish his title by suit in "the Civil Court if instituted within one "year from the date of the decision." The question is whether the word "decision" means the decision of the Collector or the final decision in the suit if an appeal is preferred. It appears to us that it means the final decision in the suit.

By Section 23 it was enacted that suits for arrears of rent should be tried by the Collectors of Land Revenue, and, except by way of appeal, should not be cognizable in any other Court. The Proviso in Section 77 was to prevent decisions in trials under the Act from being final, or barring a suit to try the right to the rent between the plaintiff and the intervenor. When the Legislature spoke of the decisions of the Collector, doubtless they intended to include decisions in appeal from those decisions.

By Section 150, it was enacted that — "All "the powers vested in the Collector by the "preceding Sections of this Act may be exer-"cised by any Deputy Collector in cases "referred to him by a Collector, and in all "cases without such reference by any Deputy "Collector placed in charge of any Sub-"Division of a District; and all applications "and reports allowed or required by this Act "to be made to the Collector may be made "to any Deputy Collector having such local "jurisdiction."

Section 150 was repealed by Act VI. of 1862 of the Lieutenant-Governor of Bengal in Council, and was re-enacted with slight alterations by Section 19. But this does not make any difference with reference to the point now under consideration.

Section 155 of Act X. of 1859 says: "When any such suit as aforesaid, in which, "if tried and decided by a Collector, the "judgment of the Collector would be final, "is tried and decided by a Deputy Collector, "an appeal from the judgment of the Deputy "Collector shall lie to the Collector."

Now, if a person were to sue for arrears of rent under 100 rupees, the decision of the Collector would be final; but, if tried by a Deputy Collector, there would be an appeal to the Collector. Suppose the question had arisen in a suit under 100 rupees tried by a Deputy Collector, would the year be reckoned from the date of the decision of the Deputy Collector, or from the date of the decision of the Collector? If it is from the decision of the Collector, it dates from the decision in appeal. But, if from the decision of the Deputy Collector, it would date from the decision of the original Court. It appears to us that, in such a case as that, it would come strictly within the words "the decision of the Collector." Then it would be from the decision of the Appellate Court; and, if from the decision of the Appellate Court, does not that show that, in the case of an appeal from the decison of a Collector in the first instance to a Judge, the Act meant that the period should date from the decision of the Appellate Court? It appears to us that the decision meant was the final decision in the case.

The party in whose favor the decision of the Court of first instance is given would have no ground to appeal against it; but, if the period of one year is to be reckoned from the date of the decision of the Collector in cases appealable to the Judge, the party in whose favor the decision of the first Court was given would be too late to establish his right by suit in the Civil Court, if, on appeal by his opponent, the case should be determined against him by the Judge after the expiration of a year from the date of the decision of the Court of first instance.

We think that the words of the Legislature must receive a reasonable construction, and that the right of either party, who may have a legal title to the rent, to establish his title by a suit in the Civil Court, is not barred or affected by the decision of the Court of first instance, or of the Court of Appeal, if the suit in the Civil Court is instituted within one year from the date of the decision against him.

Seton-Karr, J.—I only wish, in addition to what the learned Chief Justice has said, to state that this point does not come before me now for the first time. In one of the decisions cited by the Judges who have referred the case, sitting with Mr. Justice Kemp, I decided, on the purely technical and grammatical construction of Section 77, that the limitation must be reckoned from the decision of the Collector. But, subsequently, in another case, sitting with Mr. Justice Macpherson, I re-considered that opinion, and thought, in accordance with the ruling of Justices Shumbhoonath and Phear, that the limit ought to run from the date of the decision of the second Court, and I hold that opinion on full consideration of the subject, whether the decision of the first Revenue Court be favorable or adverse to the plaintiff who has to seek his remedy afterwards in the Civil Court.

This seems to me the only way of avoiding certain inconsistencies, and of removing the difficulties which the Lower Courts would feel in applying the Law of Limitation under this Section, if the literal text of the Section were insisted on. Sometimes the appeal in Act X. lies to the Collector from the Deputy Collector, sometimes from the Collector to the Judge, and sometimes from the Collector to the High Court. If we insist on the grammatical and literal interpretation of Section 77, discrepancies and difficulties must arise. The fair way of meeting them, and of interpreting the Section, is to rule that, in all cases, the limitation should run from the date of the decision of the second or the Appellate Court.

The 9th February 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Decision of Collector in appeal final—High Court (Superintendence over Collector's Court).

Case No. 776 of 1865 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Collector of Hooghly, dated the 24th August 1865, affirming an order passed by the Deputy Collector of Serampore, dated the 7th July 1865.

Huro Mohun Mookerjee, *Appellant,*

versus

Kedarnath Doss, *Respondent.*

Baboos Pearee Mohun Mookerjee and *Banee Madhub Banerjee* for Appellant.

Baboo Nil Madhub Sein for Respondent.

A Collector's judgment in appeal is final under Section 159, Act X. of 1859, whether the judgment be passed on the merits or disposes of the appeal on a preliminary objection.

Section 15 of the High Court's Act does not give the Court a superintendence over a Collector's Court.

A PRELIMINARY objection is taken to the hearing of this appeal by the respondent's pleader, on the ground that, under Section 159 of Act X. of 1859, the Collector's order was final.

We think that the objection must be allowed. The original suit was under the value of 100 rupees, and it is not denied that, had the Collector's order in appeal gone on the merits of the case, his decision would, under the Section above quoted, have been final. Now, the law makes no difference between decisions which are passed on the merits of a case, and those which dispose of appeals on preliminary objections. The same principle would apply to both, and prevent a Civil Court from taking cognizance of a case in which a Collector's order is declared to be final.

It is urged on the other side that Section 15 of the Act of Parliament, for establishing the High Court (24 and 25 Vic., c. 104), gives that Court a superintendence over all Courts subject to its appellate jurisdiction, and that, therefore, as a Collector's Court is so subject, we have power to interfere in the present case. On this, we observe that the words of the Section obviously refer to the general appellate jurisdiction of the Court, and not to particular cases in which that jurisdiction is extraordinarily exercised, or to a superintendence which is placed by a distinct law in the Commissioners and Board of Revenue.

The appeal is, therefore, dismissed with costs.

The 12th December 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Jurisdiction (of Revenue Court)—Suit for rent—Intervenor.

Cases Nos. 121 and 623 to 636 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Moorshedabad, dated the 1st December 1864, reversing decisions of the Deputy Collector of that District, dated severally the 5th, 6th, 15th, and 20th August 1864.

The Nawab Nazim of Bengal (Plaintiff), *Appellant,*

versus

Mehdee Ali and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose, Unoocool Chunder Mookerjee, Obhoy Churn Bose, and *Gopeenath Mookerjee* for Appellant.

No one for Respondents.

A decree of the High Court deciding that a party who has obtained a kubooleut from a farmer can sue the farmer on the contract made by him, and that a third party cannot claim in such a case, does not affect the jurisdiction of the Revenue Courts to enquire and decree who is actually and *bonâ fide* in receipt of the rent and entitled to a decree under Section 77, Act X. of 1859.

In some of these cases, the special appellant, the Nawab Nazim, was plaintiff, and Mehdee Ali (the respondent) an intervenor; in others, Mehdee Ali was the plaintiff, and the special appellant, the intervenor. They are all suits for rents against individual ryots. The Deputy Collector decided in favor of the special appellant, on the ground that he is proved to be in receipt and possession of the rents; but the Lower Appellate Court held that, the High Court having already decided in a civil suit that Mehdee Ali was entitled to rents of the property of which the defendants are the ryots, the Deputy Collector should not have adjudged these cases with reference to previous possession.

The decree of the High Court referred to by the Lower Appellate Court simply decided that Mehdee Ali having obtained a *kubooleut from a farmer* had a right to sue the farmer on the contract made by him, and that the special appellant, the Nawab, could not intervene in such a case. The decree of the High Court did not determine the right and title to the property. The suit before it was a civil suit to set aside the decision of a Revenue Court dismissing the claim of Mehdee Ali against his farmer, on the ground that the special appellant (who had intervened under Section 77 of Act X. of 1859) had proved a previous receipt of rent from the property, although such rent was not received from the farmer himself. This decree does not affect the jurisdiction of the Revenue Courts to enquire and decide who is actually and in good faith in receipt of the rent of the land on the ground of previous receipt, and is, therefore, entitled to obtain a decree for the rents under the 77th Section.

In some of these cases, the ryots sued by the special appellant admitted his right, but it was and is within the power of Mehdee Ali to prove that they have paid him rents before.

By avoiding to bring directly a civil suit to prove and establish the right to the property, both the plaintiffs have caused much confusion and harassed the ryots. We cannot, however, uphold the decisions of the Lower Appellate Court, and we remand all these cases to that Court, in order that it may decide which of the two contending parties should, on the ground of previous possession and receipt of rents, obtain a decree for the rents in dispute. These suits must be determined according to the result of the enquiry into the question of the actual *bonâ fide* receipt of enjoyment of the rent; the right and title (if these do not apparently accompany such receipt and enjoyment of the rent) must be determined by a Civil Court.

The 22nd December 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Suit for rent—Intervenor (Failure of—to establish his claim)—Decision under Section 77, Act X. of 1859.

Case No. 1935 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 18th April 1865, affirming a decision passed by the Deputy Collector of that District, dated the 30th November 1864.

The Nawab Nazim of Bengal (Intervenor), *Appellant,*

versus

Puddo Lochun Mundul and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose, Onoocool Chunder Mookerjee, Obhoy Churn Bose, and *Umbica Churn Banerjee* for Appellant.

Baboos Kalee Mohun Doss and *Kalee Kishen Sein* for Respondents.

In a suit for rent in which a claimant intervenes under Section 77, Act X. of 1859, the mere failure of the intervenor to establish his claim does not entitle the plaintiff to a decree.

The finding of the Judge that the payment of rent to the intervenor was a payment to a person who was not legally competent to receive it is not necessarily inconsistent with an actual and *bonâ fide* receipt of the rent so paid. Whatever may be the legal title to the property, the decision under Section 77 must be in favor of the person who is in actual and *bonâ fide* receipt of the rent.

This special appeal is from the judgment of the Judge of Zillah Beerbhoom, affirming the Deputy Collector's judgment in a suit

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for arrears of rent brought by Nawab Syud Mehdee Ali Khan against Puddo Lochun Mundul. The plaintiff obtained a decree against the defendant, a ryot, for the sum of rupees 1-7-3, being the rent, for the first three months of the year 1271, of lands held by the defendant within the zemindary of Ghoredoho, of which the plaintiff alleged that he had assumed *khas* possession upon the expiration of the lease granted to the farmer Radhanath. The plaintiff's right to receive the rent was disputed, and such right was claimed by the Nawab Nazim, on the ground that he was in the actual and *bonâ fide* receipt and enjoyment of the rent of this land before and up to the time of the commencement of this suit; upon which the Nawab Nazim was made a party to the suit under Section 77 of Act X. of 1859. Having made the claimant a party to the suit, the Deputy Collector was bound by the express provisions of that Section to enquire into "the question of the actual receipt and enjoyment of the rent by such third person," and "to decide this suit according to the result of such enquiry."

It is certain that evidence was given to show the actual receipt of rent by the Nawab Nazim for several years before and up to the time of suit. It does not appear what other evidence (if any) was produced, or what weight was attached to the evidence given; because the Deputy Collector merely refers to his judgment in another similar case (No. 683) decided on the same day with the remark, "for the reason stated in the decision thereof, it is the plaintiff who is entitled to the rents in suit." In the suit No. 683, the plaintiff had given evidence to show that he had taken *khas* possession of the land, had obtained kubooleuts, and had actually received rent. If the evidence in both the suits, regarding possession of the land and receipt of the rent, was precisely the same and deserving of the same weight (which seems unlikely), the Deputy Collector should have made this to appear more plainly. The judgment of the Lower Appellate Court fully states the grounds of the decision of that Court. The evidence of the witnesses is described as "far too conflicting to afford any aid in coming to a decision." The Judge does not wholly discredit the evidence of the actual payment of rent to the Nawab, but he holds that the payment under the circumstances which attended it cannot avail either the ryot who paid, or the Nawab who received, the money, and did not constitute such a receipt and enjoyment of the rent as was contemplated by the 77th Section so as to entitle a claimant to a decree. The plaintiff's evidence of his possession of the lands and of the actual receipt of rent by him (if we are to suppose that he adduced any such evidence in this suit) is not alluded to by the Lower Appellate Court. The judgment of that Court proceeded chiefly upon decrees made in certain suits in the Civil Courts between the plaintiff and the Nawab, in which the latter had failed to establish his right to succeed by inheritance either according to Mahomedan Law or family custom to the property left by Ameeroonissa Begum, of which this zemindary of Ghoredoho was said to form a part. Those suits related to other lands, *viz.*, a putnee mehal called Rajbattee; but the Nawab claimed, or was deemed by the Judge to claim, by the same title, that is, as heir, the lands which were the subject of those suits and the lands the rents of which are now in contest. The Nawab's title by inheritance failing him, and the evidence of actual receipt of rent being insufficient to support his claim under the 77th Section, a decree was given for the plaintiff, the Judge concluding his judgment thus: "In my opinion, neither in equity nor by law, has the Nawab any claim to be put in possession of the estate or to its rents, and I, therefore, dismiss the appeal." The Nawab was a party to this suit only as a claimant under the 77th Section, and, in that character, he could not rely upon his mere right and title, whatever this might be, to the land, or to the rent, nor could he require from the Court an adjudication of any matter other than "the question of the actual receipt and enjoyment of the rent" * * * "before and up to the time of the commencement of the suit." His title, however clear, would avail him nothing as a claimant under that Section, unless he were also in actual receipt of the rent. On the other hand, the plaintiff's title, supposing him to show a perfect title, would not ordinarily in a suit of this description (a claimant intervening) support a decree in his favor, because the Court is bound by the express direction of the Legislature to decide according to the result of the enquiry into the question of the actual receipt of rent. Having failed to satisfy the Court of the matters required from a claimant who intervenes under the 77th Section to be established, the Nawab's claim fell to the ground, and it, therefore, became necessary to decide upon the plaintiff's right of suit. It was argued here on

his behalf that he was entitled to a decree upon the mere failure of the Nawab's claim; but the Nawab's failure does not of itself show that the plaintiff is entitled to a decree for rent. He cannot recover through the weakness of the case of the intervening claimant, or otherwise than by showing a right of suit in himself for the rent in question. It is with reference to the plaintiff's right to maintain this suit against the ryot, and perhaps also with reference to their bearing on the question of good faith arising under the 77th Section, that we are to understand the passages in the judgment relating to the disputed right to the property which the Begum Ameeroonissa is supposed to have left at her death. In the Judge's view, the Nawab's right to inherit having been negatived, and the plaintiff's right to the property having been ascertained, the rent sued for was decreed to the plaintiff.

It is to be regretted that the matters in contest between the Nawab Nazim and the Nawab Syud Mehdee Ali Khan have been allowed by them and their advisers to remain at issue and undecided ever since the death of the Begum Ameeroonissa. The result of this has been that the ryots of the disputed property and other persons have been greatly harassed, and the Courts occupied with much needless litigation. The present case is one of seventeen suits for rent brought against ryots by Syud Mehdee Ali Khan, in all of which the Nawab Nazim has intervened. We heard a few days ago special appeals in nearly as many other suits for rent of the same description, except that in some of them the Nawab Nazim was the plaintiff and Syud Mehdee Ali Khan the intervening claimant; and, during the argument of this case, we have been referred to many judgments of the High Court in other suits and proceedings of various kinds between these parties. The contest seems to be whether the Begum was the true owner of the property (which stood in the name of Syud Mehdee Ali Khan, or of his relatives), and whether the Nawab Nazim is entitled to it by inheritance or by family usage, and, further, whether Syud Mehdee Ali Khan has executed a deed of release or relinquishment of his rights in favor of the Nawab Nazim. Instead of proceeding forthwith to obtain an adjudication of these matters in dispute between them in a duly-constituted suit before a competent Court, it has seemed fitting to them to attempt to discuss these and the like questions in suits for rent against the ryots of the disputed lands or against farmers. In some of these suits, the Nawab Nazim and Syud Mehdee Ali Khan have each as plaintiff obtained a decree against farmers upon kubooleuts given by them, the Court holding in each of those cases that the farmer, having given kubooleut to the plaintiff, was bound by his contract whatever might be the state of the right and title to the property itself. The Nawab Nazim's claim by inheritance has, we have seen, been the subject of adjudication in one or more other suits in which some mouzahs or mehals, forming a portion of the whole property claimed by inheritance, were sued for. The alleged deed of relinquishment has never hitherto been the subject of a direct adjudication; but we have recently, in another special appeal heard by us, directed a remand for the purpose of obtaining a full trial and decision respecting the existence and effect of that document.

The decision in the suit between the present plaintiff and the farmer Radhanath, upon which the Deputy Collector relies, is not, for the reasons given by the Lower Appellate Court in its judgment in this suit, applicable to the present case. The farmer having executed a kubooleut to Syud Mehdee Ali Khan, the decree was based on that kubooleut. The Deputy Collector's other reasons seem applicable rather to the evidence in the suit No. 683 than to this suit. His statements, that the Nawab Nazim had never made any *khas* collection or rents, and that the plaintiff had entered into possession, had obtained a decree for a kubooleut, and had actually received some rent from the ryot, must have reference to that case. In the present suit, the Judge expressly refers to the evidence of actual receipt of rent by the Nawab Nazim, and would scarcely have left unnoticed the important facts mentioned by the Deputy Collector had they been in evidence in the suit before him in appeal. Both Courts refer to the decisions in the suits in which the Nawab Nazim had without success put forward against Syud Mehdee Ali Khan his alleged right to succeed by the Law of Inheritance, or by usage to the Begum's property. If the decrees in the suits referred to are considered as decrees adjudicating the plaintiff's right and entitling him to possession of the property for the rents of which the present suits are brought, they may be sufficient to authorize a decree in these suits for the plaintiff, notwithstanding that the Nawab Nazim may have shown an actual receipt of rent by him. But the suits referred to related, as we have seen, to other

lands, and it cannot be assumed that the decrees in those suits will also determine the contest between the litigants respecting other portions of the property supposed to form the Begum's inheritance.

If these decrees do not govern the present suits, it is to be considered whether the Nawab Nazim's claim to the rent under the 77th Section has been duly dealt with by the Lower Appellate Court. An actual receipt of rent has been, it would seem, shown to the Judge's satisfaction; but, the payment being made (the Judge says) to an incompetent person, it does not excuse the ryot. The Section requires a claimant to show that he has *actually and in good faith received* and enjoyed the rent. The finding of the Judge, that the payment was to a person who was not legally competent (entitled) to receive it, is not necessarily inconsistent with an actual and *bonâ fide* receipt of the rent so paid.

The Nawab Nazim, after the title of heirship, which, from the commencement of this dispute, he has relied on, has been determined against him with respect to one estate, may, notwithstanding that adverse decree, continue to receive the rents of other estates claimed by him as heir of the Begum. An actual receipt of rent under such circumstances may also be a receipt in good faith. And, in support of this view, it is said on the Nawab Nazim's behalf that the heirship has not yet been fully enquired into, and that the Nawab Nazim relies on an express recognition of his own right as heir, and on a relinquishment by the plaintiff of all right and title by virtue of the deed alleged to have been given by the latter.

The decisions of both the Courts are defective, and the case must be remanded to the Deputy Collector for trial. The question for enquiry is the alleged actual and *bonâ fide* receipt of rent by the claimant. Whatever may be the legal title to the property, the decision under the 77th Section must be in favor of the person who is in actual and *bonâ fide* receipt of the rent; and the decision in other suits between the litigants concerning other lands do not necessarily show that the Nawab Nazim's receipt of the rents of the lands, which are now in contest, was not a receipt in good faith.

In the other special appeals, Nos. 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1948, 1949, 1950, and 1951 of 1865, notwithstanding some circumstances of difference, the same remand order may be made. In one case (No. 1947) the Deputy Collector relied upon evidence showing that the actual possession and receipt was with the plaintiff. We think that this case may also be remanded with the others to the Court of first instance.

The 15th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Suit for rents of lands situate in different Sub-Divisions.

Case No. 408 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of East Burdwan, dated the 7th December 1865.

Chunder Kant Chuckerbutty (Defendant), *Appellant,*

versus

Mrs. Elias (Plaintiff), *Respondent.*

Baboo Onoocool Chunder Mookerjee for Appellant.

Messrs. G. C. Paul, C. Gregory, and *R. E. Twidale* for Respondent.

Suit laid at Rupees 6,276-10-6-2-2.

A suit to recover the rents of lands situate in various sub-divisions was instituted and decided in the Court of the Collector of the District within which the sub-divisions lay. HELD that the Collector's Court had exercised its jurisdiction irregularly, as the suit should have been instituted in a Sub-Division Court; but that, as the Court had not acted wholly without jurisdiction, the proceedings (which were otherwise substantially right) could not be set aside on appeal.

THIS is a suit instituted under Act X. of 1859, in the Court of the Collector of East Burdwan, to recover rents due in respect of lands lying in the district of East Burdwan. The appellant contends that the suit has been improperly brought in the Collector's Court, and prays that the decree which was passed against him may, therefore, be reversed. The lands, for the rents of which the suit is brought, lie in various sub-divisions of East Burdwan, and the objection

taken by the appellant is that the respondent, instead of instituting the present suit (as directed by Section 20 of Act VI. of 1862 of the Bengal Council) in the Court of that sub-division in which the greatest part of the land is situate, and then, if she pleased, applying to the Collector of the District to withdraw it and try it himself, did not sue in any Sub-Division Court, but went to the Collector, and having obtained an order from him authorizing her so to do, at once filed her plaint in his Court. This, it is said, is an illegality, an assumption of jurisdiction on the part of the Collector, which vitiates all the subsequent proceedings.

No substantial injury has been done to the appellant by the course which the Collector has followed, because it is clear that, wherever the suit had been instituted, the plaintiff must have got a decree, the defendant having in fact no defence whatever on the merits. The decree appealed from is substantially right, and therefore cannot be reversed on appeal, unless the Collector acted without jurisdiction. If a mere irregularity has occurred, the judgment of the Lower Court ought not (under Section 350 of Act VIII. of 1859) to be interfered with. We think that this is a case in which, although the Collector has exercised his jurisdiction irregularly, he has not acted wholly without jurisdiction. No doubt, the suit ought in the first instance to have been preferred in the sub-division within which the greater part of the lands is situate. But if it had been so preferred, the Collector might have withdrawn the suit, and have tried it himself. He was guilty of an irregularity in the exercise of his jurisdiction: for, strictly speaking, he had no right to admit the plaint on his file except through the process of withdrawing it from a subordinate sub-division. Nevertheless, he had jurisdiction in the matter, if he had but exercised it regularly. The irregularity does not substantially affect the jurisdiction: the decree is in itself right on the merits, and therefore we decline to reverse it.

No other question is raised before us; but the parties agree that the respondents shall give up the 500 rupees of damages which have been decreed to them, and shall accept in lieu thereof interest on the rents from the date when they became due till payment, at the rate of 12 per cent. per annum. The decree will be altered accordingly, but in other respects the decree of the Lower Court is confirmed, and with costs.

The 15th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Presumption of uniform payment from Permanent Settlement—Evidence—Account Books (to corroborate oral testimony)—Hearsay Evidence (Admissibility of).

Case No. 2942 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 27th June 1865, affirming a decision passed by the Deputy Collector of that District, dated the 19th January 1865.

Rajnarain Roy Chowdhry (Plaintiff), *Appellant,*

versus

Mrs. Olivia Atkins (Defendant), *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

No one for Respondent.

To obtain the benefit of the presumption under Section 4, Act X. of 1859, the party pleading it must show a uniform payment for 20 years, and then it is for the opposite party to rebut that presumption by showing a variation since the Permanent Settlement.

Account-books are oral evidence to corroborate oral testimony.

Hearsay or mediate evidence is admissible when the absence of other evidence is not accounted for as to subjects which cannot from their very nature admit of the production of immediate evidence, or when it tends to explain an act done and forms part of a particular transaction.

In this case, plaintiff sued defendant for enhancement of rates of rent for two parcels of land, plaintiff alleging that defendant held them at inadequate *jummas*, and defendant, that the rents could not be enhanced, as they were fixed, and so protected by law.

The case was once before this Court,* and was remanded on the 27th of August 1864, with a view to defendant being allowed to prove, by accounts or otherwise, that she had paid a uniform fixed rate of rent for 20 years, it appearing to the High Court then that the evidence she had previously adduced could only suffice to show uniform payment for 17 years.

* Weekly Reporter, Vol. 1, page 45.

Upon this remand, the first Court found as a fact that defendant had by certain account-books for 1846 to 1857, and her *dakhilas*, "proved the payment of rent for 20 years at one uniform rate."

As the special appellant's pleader, in objecting to these account-books and to the entries in them, refers to the actual terms of the decision of the first Court, we think it advisable to extract the main portion of it for readier reference :—

"An entry, dated 3rd February 1848, "shews that ground-rent for 5 years, from "1844 to 1848 inclusive, was paid on that date "for the ground of one of the houses. This "shews that the annual *jumma* was rupees "1-4. Another entry of 1st May 1848, that "rupees 5-4 6 were for the years 1846 and "1847, being the rents for the ground on which "the larger house is erected. The account "gives rupees 2-13-3 as the annual rent "for this plot of land. The two *jummas*, "rupees 1-4 and 2-13-3, make a total of rupees "3-14, which defendant has paid up to date. "There is no reason to doubt the genuineness "of the entries in the account-book. We "find them in the body of the entries where "an interpolation would be easily detected. "Similar entries for ground-rent paid are "entered amongst the items of expenditure "for succeeding years; and I would con-"clude that defendant has proved in the ab-"sence of rent receipts for 1246, 1247, and "1248, that she had paid rent for those "years at the same rate as rents for the 17 "years, for which she has filed rent receipts. "The documentary evidence now before the "Court proves the payment of rents for 20 "years at one uniform rate."

The first Court gives a decree for the fixed rent claimed as for 3 beegahs 9 cottahs covered by defendant's deed of sale, dated 15th November 1816, and deed of gift dated September 1849, but, for 19 cottahs 15 chittacks in excess, declares defendant liable to have her rent enhanced at 20 rupees a beegah, as a fair and equitable rate.

On appeal, the Judge put in issue whether the land had been held at a uniform rent for 20 years, and whether, therefore, the legal presumption arose that it had been held at a uniform rent since the time of the Permanent Settlement, and then how far the presumption had been rebutted. The Judge on these issues remarks as follows :—

"The High Court found that there was direct evidence of uniform rent during 17 years, but disallowed the presumption of uniform rent during previous years. The defendant has now filed her private account-book, which shews that a uniform rent has been paid for one portion of land from 1844, and on the other portion from 1846. As regards the former, the 20 years are complete. As regards the latter, 2 years are wanting. I see no reason to doubt the genuineness of the account-book, and the plaintiff, appellant, in fact does not discredit it. Mrs. Atkins (defendant) has also deposed on oath that she paid the amount of rent noted. because the collecting sircar told her that was the amount paid by her predecessor, and I think that is good evidence to prove that no change was made at the time, and that the old rent continued. I find that a uniform rent has been paid on these lands 3b. 9c. for 20 years."

The Judge then states that, although the *jumabundee* of 1190 shows rupees 4-6-15-3-2 to have been paid *then*, that does not show of itself the amount of rent at the Permanent Settlement. The Judge finally allows 21 rupees a beegah for the excess area, and, with this modification, affirms the decision of the first Court.

In special appeal, it is urged—

1st. That the remand order of the Court did not require or allow the further evidence admitted on this occasion below, and that it was too late to admit it.

2nd. That the account-book is not evidence.

3rd. That the deposition of the defendant is hearsay, *viz.*, on what the collecting sircar told her of her predecessor's payments.

4th. That, by the Judge's finding, payment for 20 years has been proved only in respect to one of the parcels of land.

5th. That defendant's *dakhilas* show a variation.

6th. That the Judge has wrongly stated that this Court found uniform payment for 17 years.

7th. That the defendant's evidence was taken in plaintiff's absence, and she was not permitted to be cross-examined.

On the *first*, *sixth*, and *seventh* of these pleas, we remark that this Court, thinking that *primâ facie* there was even then evidence of uniform payment for 17 years, still held that such of itself was not sufficient to raise the presumption allowed by Section 4 of Act X. of 1859, and remanded the case in order that such *further* evidence as could be brought to show uniform payment for 20 years might be considered. These three pleas, therefore, are quite futile. We may add on the *seventh* plea that there is no proof

given of its truth, and it is, therefore, improperly put in.

On the *second* and *third* pleas, we observe that account-books are legal evidence to corroborate oral testimony which defendant herself gave in this case; and that her evidence, as to her own payments, is perfectly admissible, while that of previous rates and payments before her time was only available from what others, who had collected them, told her.

On the *fourth* plea, we find that in substance the Judge does not confine his finding to the fact that uniform payment was made for one plot only for 20 years. The Judge treats the two parcels as differently affected by different species of evidence. The pleader's statement on this point is incorrect, as the tenor of the judgment might have shewn him.

On the *sixth* plea, we remark that there is no such variation shewn as to rebut the presumption of 20 years' uniform payment of rent.

The rule of law is that, in order to obtain the benefit of the presumption contemplated in Section 4 of Act X. of 1859, it is for the party pleading it to show a uniform rate of payment for 20 years, and then it is for the opposite party to rebut that presumption by showing that there has been a variation since the Permanent Settlement.

As to the *first* of these two points, we are clearly of opinion that the account-book and defendant's deposition and *dakhilas* taken together clearly show that, for the first parcel, there has been a uniform payment for 20 years before suit.

As to the *second* plot, it is true the entries in account began in 1846, and this suit was brought on the 2nd July 1863. Hearsay evidence, it is true, is not receivable when there is better. But it is not denied that the present tenant has produced all the better evidence at her command, and nothing has been shewn to discredit her evidence as to the collecting sircar's statement having been made, or as to its being incorrect. And (Norton, page 63) there are certain subjects which cannot possibly, from their very nature, admit of the production of immediate evidence, such as relationship, character, *custom, prescription, and the like.* And hearsay evidence is, more or less, admissible when it tends to explain an act done, and forms part of a particular transaction.

We are then of opinion that, under the peculiar circumstances of this case, there is sufficient legal evidence to show uniform payment for 20 years for both plots of area 3-9.

We cannot conclude this judgment without stating that we think the pleaders' insinuations now of the falsity of the account-books, when no such plea was attempted in the petition of special appeal, was improper and uncalled for.

We dismiss this special appeal.

The 16th February 1866.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Enhancement—Onus probandi.

Case No. 2593 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 24th July 1865, affirming a decision passed by the Deputy Collector of that District, dated the 17th February 1865.

Goluck Chunder Roy and others (Defendants), *Appellants,*

versus

Mr. F. C. Sandes (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy and *Shib Chunder Mojoomdar* for Appellants.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondent.

Where a tenant claims a *mokurruree* tenure, not under Act X. of 1859, but under a judicial decree of 1792, if his title be established, the mere fact of his having been at some time forced to pay a rent larger than that due will not suffice to render him liable to enhanced rent for ever.

The *onus* is on a plaintiff to prove his allegation that the defendant abandoned a *mokurruree* tenure established by him, and accepted a variable tenure.

THIS is a suit to enhance the rent of a *jumma* from 100 or 114 rupees to upwards of 600 rupees. Defendant alleges that he holds the *jumma* at fixed rates paying rupees 100-13 per annum, and he relies on a decree of the Mal Adawlut of 1792, by which his *jumma* is declared to be *kaemee* and *mokurruree* at that rate, and on subsequent documents in corroboration of the same. The decree seems to have been procured from the public Archives, and its genuineness or validity does not seem to have been impeached. At any rate, the case has not now been tried on that issue. The only issue tried is whether the rent has been varied from the time of the

Permanent Settlement. The Deputy Collector repeatedly decreed the claim without duly hearing the defendant, and after repeated remands again decreed it on that issue. The Judge who heard the appeal on this last occasion dismissed it on the same ground. It appears that some years ago plaintiff brought a suit for a small portion of a year's rent (being under 100 rupees), on the allegation that the annual rent of the *jumma* was 114 rupees, and that suit was decreed on the ground that the books and accounts of plaintiff showed that rent had been collected at this rate for several previous years, and that, therefore, the same rate must be paid now. With respect to the old decree pleaded by defendant, the Deputy Collector observed that it could not avail defendant: for, if he had submitted to an increase to 114 rupees in past years, he must pay it now. No appeal on title was preferred to the Judge in that case, and the appeal preferred to the Collector was dismissed. The defendant also sued in the Civil Court to reverse the decree, but the plaint was rejected for want of jurisdiction. In the present case, the Courts below say that the result of the previous case is to show that defendant's *jumma* has varied since the Permanent Settlement; that it is, therefore, liable to enhancement under the ordinary rules: and they decree plaintiff's claim. In special appeal defendant urges that, while he admits that he cannot now claim the benefit of Act X., he in fact does not claim under Act X., but under an independent right judicially declared in 1792. He suggests that the variation, if real (which he denied), may have been caused by excess land or cesses. He says that, because he has been forced to pay more than he should have paid, he is not liable to enhanced rent for ever.

He adds that there has been no decision regarding an alleged plot of rent-free land; that there is also no decision regarding the extent of his mâl land on which he raised an issue; and that the rates are too high.

Respondent maintains the decision of the Court below regarding liability to enhancement, says that the land has been measured, and that defendant did not object to the rates.

It seems to us that, as defendant does not claim under Act X., but under a judicial decree of 1792, if his title be made out, the mere fact of his having been at some time forced to pay a rent larger than that due will not suffice to render him liable to enhancement. Such excess payments could only be evidence towards proving that he has abandoned his mokurruree holding, and accepted one at variable rates, *primâ facie* a very improbable thing. There are then two questions before us—*First*. Is the former decision in the rent-suit a pre-adjudication of title? We think that it is not. It seems to us that the Court then refused to look into the defendant's title, and merely decreed on the ground that the plaintiff's books showed that the plaintiff had in the few preceding years received at the rate of 114 rupees. That proceeding of the Deputy Collector was not treated at the time as involving title. The appeal was to the Collector, and not to the Judge. It is of the same effect as the decree for rent in a Court of Small Causes, and is not binding as a pre-adjudication on the title.

The *second* question would be whether the defendant has abandoned his mokurruree title, and we must remand the case to try—*1st*. Has defendant established his title of 1792? and, *secondly*, if he has, then has he abandoned that title?

On this latter issue, regard will be had to our ruling that the mere fact that at some time a larger sum was collected is not conclusive. The larger sum may have been collected by duress, on account of illegal cesses, or on account of excess land. Plaintiff must satisfy the Court, looking to all the facts and circumstances of the case (and remembering that on this point the *onus* is on plaintiff), that the defendant really did voluntarily abandon the mokurruree tenure established by him and accept a variable tenure instead. The questions regarding the rent-free land, quantity of land, and rates of revenue, must also be distinctly tried, if it is necessary to do so after disposing of the other issues.

The 20th February 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Lease for building purposes—Enhancement.

Case No. 2772 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 7th August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 29th September 1864.

Baboos Kishen Kishore Ghose, Unoocool Chunder Mookerjee, Obhoy Churn Bose, and *Gopeenath Mookerjee* for Appellant.

No one for Respondents.

A decree of the High Court deciding that a party who has obtained a kubooleut from a farmer can sue the farmer on the contract made by him, and that a third party cannot claim in such a case, does not affect the jurisdiction of the Revenue Courts to enquire and decree who is actually and *bonâ fide* in receipt of the rent and entitled to a decree under Section 77, Act X. of 1859.

In some of these cases, the special appellant, the Nawab Nazim, was plaintiff, and Mehdee Ali (the respondent) an intervenor; in others, Mehdee Ali was the plaintiff, and the special appellant, the intervenor. They are all suits for rents against individual ryots. The Deputy Collector decided in favor of the special appellant, on the ground that he is proved to be in receipt and possession of the rents; but the Lower Appellate Court held that, the High Court having already decided in a civil suit that Mehdee Ali was entitled to rents of the property of which the defendants are the ryots, the Deputy Collector should not have adjudged these cases with reference to previous possession.

The decree of the High Court referred to by the Lower Appellate Court simply decided that Mehdee Ali having obtained a *kubooleut from a farmer* had a right to sue the farmer on the contract made by him, and that the special appellant, the Nawab, could not intervene in such a case. The decree of the High Court did not determine the right and title to the property. The suit before it was a civil suit to set aside the decision of a Revenue Court dismissing the claim of Mehdee Ali against his farmer, on the ground that the special appellant (who had intervened under Section 77 of Act X. of 1859) had proved a previous receipt of rent from the property, although such rent was not received from the farmer himself. This decree does not affect the jurisdiction of the Revenue Courts to enquire and decide who is actually and in good faith in receipt of the rent of the land on the ground of previous receipt, and is, therefore, entitled to obtain a decree for the rents under the 77th Section.

In some of these cases, the ryots sued by the special appellant admitted his right, but it was and is within the power of Mehdee Ali to prove that they have paid him rents before.

By avoiding to bring directly a civil suit to prove and establish the right to the property, both the plaintiffs have caused much confusion and harassed the ryots. We cannot, however, uphold the decisions of the Lower Appellate Court, and we remand all these cases to that Court, in order that it may decide which of the two contending parties should, on the ground of previous possession and receipt of rents, obtain a decree for the rents in dispute. These suits must be determined according to the result of the enquiry into the question of the actual *bonâ fide* receipt of enjoyment of the rent; the right and title (if these do not apparently accompany such receipt and enjoyment of the rent) must be determined by a Civil Court.

The 22nd December 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Suit for rent—Intervenor (Failure of—to establish his claim)—Decision under Section 77, Act X. of 1859.

Case No. 1935 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 18th April 1865, affirming a decision passed by the Deputy Collector of that District, dated the 30th November 1864.

The Nawab Nazim of Bengal (Intervenor), *Appellant,*

versus

Puddo Lochun Mundul and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose, Onoocool Chunder Mookerjee, Obhoy Churn Bose, and *Umbica Churn Banerjee* for Appellant.

Baboos Kalee Mohun Doss and *Kalee Kishen Sein* for Respondents.

In a suit for rent in which a claimant intervenes under Section 77, Act X. of 1859, the mere failure of the intervenor to establish his claim does not entitle the plaintiff to a decree.

The finding of the Judge that the payment of rent to the intervenor was a payment to a person who was not legally competent to receive it is not necessarily inconsistent with an actual and *bonâ fide* receipt of the rent so paid. Whatever may be the legal title to the property, the decision under Section 77 must be in favor of the person who is in actual and *bonâ fide* receipt of the rent.

This special appeal is from the judgment of the Judge of Zillah Beerbhoom, affirming the Deputy Collector's judgment in a suit

for arrears of rent brought by Nawab Syud Mehdee Ali Khan against Puddo Lochun Mundul. The plaintiff obtained a decree against the defendant, a ryot, for the sum of rupees 1-7-3, being the rent, for the first three months of the year 1271, of lands held by the defendant within the zemindary of Ghoredoho, of which the plaintiff alleged that he had assumed *khas* possession upon the expiration of the lease granted to the farmer Radhanath. The plaintiff's right to receive the rent was disputed, and such right was claimed by the Nawab Nazim, on the ground that he was in the actual and *bonâ fide* receipt and enjoyment of the rent of this land before and up to the time of the commencement of this suit; upon which the Nawab Nazim was made a party to the suit under Section 77 of Act X. of 1859. Having made the claimant a party to the suit, the Deputy Collector was bound by the express provisions of that Section to enquire into "the question of the actual receipt and enjoyment of the rent by such third person," and "to decide this suit according to the result of such enquiry."

It is certain that evidence was given to show the actual receipt of rent by the Nawab Nazim for several years before and up to the time of suit. It does not appear what other evidence (if any) was produced, or what weight was attached to the evidence given; because the Deputy Collector merely refers to his judgment in another similar case (No. 683) decided on the same day with the remark, "for the reason stated in the decision thereof, it is the plaintiff who is entitled to the rents in suit." In the suit No. 683, the plaintiff had given evidence to show that he had taken *khas* possession of the land, had obtained kubooleuts, and had actually received rent. If the evidence in both the suits, regarding possession of the land and receipt of the rent, was precisely the same and deserving of the same weight (which seems unlikely), the Deputy Collector should have made this to appear more plainly. The judgment of the Lower Appellate Court fully states the grounds of the decision of that Court. The evidence of the witnesses is described as "far too conflicting to afford any aid in coming to a decision." The Judge does not wholly discredit the evidence of the actual payment of rent to the Nawab, but he holds that the payment under the circumstances which attended it cannot avail either the ryot who paid, or the Nawab who received, the money, and did not constitute such a receipt and enjoyment of the rent as was contemplated by the 77th Section so as to entitle a claimant to a decree. The plaintiff's evidence of his possession of the lands and of the actual receipt of rent by him (if we are to suppose that he adduced any such evidence in this suit) is not alluded to by the Lower Appellate Court. The judgment of that Court proceeded chiefly upon decrees made in certain suits in the Civil Courts between the plaintiff and the Nawab, in which the latter had failed to establish his right to succeed by inheritance either according to Mahomedan Law or family custom to the property left by Ameeroonissa Begum, of which this zemindary of Ghoredoho was said to form a part. Those suits related to other lands, *viz.*, a putnee mehal called Rajbattee; but the Nawab claimed, or was deemed by the Judge to claim, by the same title, that is, as heir, the lands which were the subject of those suits and the lands the rents of which are now in contest. The Nawab's title by inheritance failing him, and the evidence of actual receipt of rent being insufficient to support his claim under the 77th Section, a decree was given for the plaintiff, the Judge concluding his judgment thus: "In my opinion, neither in equity nor by law, has the Nawab any claim to be put in possession of the estate or to its rents, and I, therefore, dismiss the appeal." The Nawab was a party to this suit only as a claimant under the 77th Section, and, in that character, he could not rely upon his mere right and title, whatever this might be, to the land, or to the rent, nor could he require from the Court an adjudication of any matter other than "the question of the actual receipt and enjoyment of the rent" * * * "before and up to the time of the commencement of the suit." His title, however clear, would avail him nothing as a claimant under that Section, unless he were also in actual receipt of the rent. On the other hand, the plaintiff's title, supposing him to show a perfect title, would not ordinarily in a suit of this description (a claimant intervening) support a decree in his favor, because the Court is bound by the express direction of the Legislature to decide according to the result of the enquiry into the question of the actual receipt of rent. Having failed to satisfy the Court of the matters required from a claimant who intervenes under the 77th Section to be established, the Nawab's claim fell to the ground, and, it, therefore, became necessary to decide upon the plaintiff's right of suit. It was argued here on

his behalf that he was entitled to a decree upon the mere failure of the Nawab's claim; but the Nawab's failure does not of itself show that the plaintiff is entitled to a decree for rent. He cannot recover through the weakness of the case of the intervening claimant, or otherwise than by showing a right of suit in himself for the rent in question. It is with reference to the plaintiff's right to maintain this suit against the ryot, and perhaps also with reference to their bearing on the question of good faith arising under the 77th Section, that we are to understand the passages in the judgment relating to the disputed right to the property which the Begum Ameeroonissa is supposed to have left at her death. In the Judge's view, the Nawab's right to inherit having been negatived, and the plaintiff's right to the property having been ascertained, the rent sued for was decreed to the plaintiff.

It is to be regretted that the matters in contest between the Nawab Nazim and the Nawab Syud Mehdee Ali Khan have been allowed by them and their advisers to remain at issue and undecided ever since the death of the Begum Ameeroonissa. The result of this has been that the ryots of the disputed property and other persons have been greatly harassed, and the Courts occupied with much needless litigation. The present case is one of seventeen suits for rent brought against ryots by Syud Mehdee Ali Khan, in all of which the Nawab Nazim has intervened. We heard a few days ago special appeals in nearly as many other suits for rent of the same description, except that in some of them the Nawab Nazim was the plaintiff and Syud Mehdee Ali Khan the intervening claimant; and, during the argument of this case, we have been referred to many judgments of the High Court in other suits and proceedings of various kinds between these parties. The contest seems to be whether the Begum was the true owner of the property (which stood in the name of Syud Mehdee Ali Khan, or of his relatives), and whether the Nawab Nazim is entitled to it by inheritance or by family usage, and, further, whether Syud Mehdee Ali Khan has executed a deed of release or relinquishment of his rights in favor of the Nawab Nazim. Instead of proceeding forthwith to obtain an adjudication of these matters in dispute between them in a duly-constituted suit before a competent Court, it has seemed fitting to them to attempt to discuss these and the like questions in suits for rent against the ryots of the disputed lands or against farmers. In some of these suits, the Nawab Nazim and Syud Mehdee Ali Khan have each as plaintiff obtained a decree against farmers upon kubooleuts given by them, the Court holding in each of those cases that the farmer, having given kubooleut to the plaintiff, was bound by his contract whatever might be the state of the right and title to the property itself. The Nawab Nazim's claim by inheritance has, we have seen, been the subject of adjudication in one or more other suits in which some mouzahs or mehals, forming a portion of the whole property claimed by inheritance, were sued for. The alleged deed of relinquishment has never hitherto been the subject of a direct adjudication; but we have recently, in another special appeal heard by us, directed a remand for the purpose of obtaining a full trial and decision respecting the existence and effect of that document.

The decision in the suit between the present plaintiff and the farmer Radhanath, upon which the Deputy Collector relies, is not, for the reasons given by the Lower Appellate Court in its judgment in this suit, applicable to the present case. The farmer having executed a kubooleut to Syud Mehdee Ali Khan, the decree was based on that kubooleut. The Deputy Collector's other reasons seem applicable rather to the evidence in the suit No. 683 than to this suit. His statements, that the Nawab Nazim had never made any *khas* collection or rents, and that the plaintiff had entered into possession, had obtained a decree for a kubooleut, and had actually received some rent from the ryot, must have reference to that case. In the present suit, the Judge expressly refers to the evidence of actual receipt of rent by the Nawab Nazim, and would scarcely have left unnoticed the important facts mentioned by the Deputy Collector had they been in evidence in the suit before him in appeal. Both Courts refer to the decisions in the suits in which the Nawab Nazim had without success put forward against Syud Mehdee Ali Khan his alleged right to succeed by the Law of Inheritance, or by usage to the Begum's property. If the decrees in the suits referred to are considered as decrees adjudicating the plaintiff's right and entitling him to possession of the property for the rents of which the present suits are brought, they may be sufficient to authorize a decree in these suits for the plaintiff, notwithstanding that the Nawab Nazim may have shown an actual receipt of rent by him. But the suits referred to related, as we have seen, to other

lands, and it cannot be assumed that the decrees in those suits will also determine the contest between the litigants respecting other portions of the property supposed to form the Begum's inheritance.

If these decrees do not govern the present suits, it is to be considered whether the Nawab Nazim's claim to the rent under the 77th Section has been duly dealt with by the Lower Appellate Court. An actual receipt of rent has been, it would seem, shown to the Judge's satisfaction; but, the payment being made (the Judge says) to an incompetent person, it does not excuse the ryot. The Section requires a claimant to show that he has *actually and in good faith received* and enjoyed the rent. The finding of the Judge, that the payment was to a person who was not legally competent (entitled) to receive it, is not necessarily inconsistent with an actual and *bond fide* receipt of the rent so paid.

The Nawab Nazim, after the title of heirship, which, from the commencement of this dispute, he has relied on, has been determined against him with respect to one estate, may, notwithstanding that adverse decree, continue to receive the rents of other estates claimed by him as heir of the Begum. An actual receipt of rent under such circumstances may also be a receipt in good faith. And, in support of this view, it is said on the Nawab Nazim's behalf that the heirship has not yet been fully enquired into, and that the Nawab Nazim relies on an express recognition of his own right as heir, and on a relinquishment by the plaintiff of all right and title by virtue of the deed alleged to have been given by the latter.

The decisions of both the Courts are defective, and the case must be remanded to the Deputy Collector for trial. The question for enquiry is the alleged actual and *bond fide* receipt of rent by the claimant. Whatever may be the legal title to the property, the decision under the 77th Section must be in favor of the person who is in actual and *bond fide* receipt of the rent; and the decision in other suits between the litigants concerning other lands do not necessarily show that the Nawab Nazim's receipt of the rents of the lands, which are now in contest, was not a receipt in good faith.

In the other special appeals, Nos. 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1948, 1949, 1950, and 1951 of 1865, notwithstanding some circumstances of difference, the same remand order may be made. In one case (No. 1947) the Deputy Collector relied upon evidence showing that the actual possession and receipt was with the plaintiff. We think that this case may also be remanded with the others to the Court of first instance.

The 15th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Suit for rents of lands situate in different Sub-Divisions.

Case No. 408 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of East Burdwan, dated the 7th December 1865.

Chunder Kant Chuckerbutty (Defendant), *Appellant,*

versus

Mrs. Elias (Plaintiff), *Respondent.*

Baboo Onoocool Chunder Mookerjee for Appellant.

Messrs. G. C. Paul, C. Gregory, and *R. E. Twidale* for Respondent.

Suit laid at Rupees 6,276-10-6-2-2.

A suit to recover the rents of lands situate in various sub-divisions was instituted and decided in the Court of the Collector of the District within which the sub-divisions lay. HELD that the Collector's Court had exercised its jurisdiction irregularly, as the suit should have been instituted in a Sub-Division Court; but that, as the Court had not acted wholly without jurisdiction, the proceedings (which were otherwise substantially right) could not be set aside on appeal.

THIS is a suit instituted under Act X. of 1859, in the Court of the Collector of East Burdwan, to recover rents due in respect of lands lying in the district of East Burdwan. The appellant contends that the suit has been improperly brought in the Collector's Court, and prays that the decree which was passed against him may, therefore, be reversed. The lands, for the rents of which the suit is brought, lie in various sub-divisions of East Burdwan, and the objection

admits that the landlord was entitled to demand, *viz.*, the old rates of rent; and we do not think that his having so done gives any ground for special appeal.

This case is, therefore, dismissed with costs.

The 26th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Purchase at sale in execution of decree—Enhancement.

Case No. 3036 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 20th July 1865, affirming a decision passed by the Deputy Collector of that District, dated the 26th May 1865.

Modhoosoodun Sircar (Defendant), *Appellant,*

versus

Umurnath Ghose (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee, Mohesh Chunder Bose, and *Nil Madhub Bose* for Appellant.

Baboos Mohendro Lal Shome and *Upprokash Chunder Mookerjee* for Respondent.

The purchaser of a zemindaree with notice of an alleged mokurruree tenure is entitled to enquire into the validity of such mokurruree, and to enhance the rents if the mokurruree is found really not to exist.

THIS is a suit under Act X. of 1859 for enhancement of rent. The defendant (who is the appellant before us) pleaded that he held on a mokurruree tenure, and that therefore his rent could not be enhanced. The plaintiff obtained a decree, both of the Lower Courts finding the mokurruree lease, which was set up, to be not proved.

In appeal, it is contended that the plaintiff had no right to sue the defendant at all, inasmuch as the plaintiff purchased the zemindary subject expressly to the defendant's mokurruree lease. The plaintiff's title is through a purchase of the rights, &c., of the zemindar at a sale in execution of a decree against him. In the notice of the sale issued by the Court which was about to sell those rights, and in the bill of sale subsequently granted by the Court to the purchaser, the fact of the existence of the defendant's mokurruree is distinctly stated. It is on this ground urged that the plaintiff having purchased with notice of the alleged mokurruree, purchased subject to it, and cannot now disturb it, or call upon the defendant to prove it. We are, however, clearly of opinion that, although the plaintiff may have purchased with notice of the defendant's claim, he is fully entitled to enquire into its validity, and to enhance the rents if he finds that the mokurruree does not really exist. The plaintiff now possesses whatever rights the judgment-debtor had; and if the mokurruree was not valid and binding as against the judgment-debtor, as little can it be valid or binding as against the plaintiff.

It is further contended before us (the question apparently was not raised in the Lower Courts) that the present suit is barred by a decree of the Moonsiff of Tumlook in a former suit in which the validity of this mokurruree pottah was upheld. But the proceedings in that suit cannot now be pleaded as an estoppel. The validity or otherwise of the defendant's mokurruree title was not distinctly in issue or fully gone into, and there is no distinct and conclusive finding as to it.

The appeal is dismissed with costs.

The 3rd March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Written Statements (Time for filing)—Notice on Defendants (Time for serving)—Careful supervision of.

Case No. 1653 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 7th April 1865, affirming a decision passed by Mr. F. Wyer, Assistant Collector of that District, dated the 26th December 1864.

Lokhenath Thakoor (Defendant), *Appellant,*

versus

Sobanath Misser (Plaintiff), *Respondent.*

Baboo Greesh Chunder Ghose for Appellant.

Baboo Tarucknath Sein for Respondent.

Reasonable time should be given to a defendant to file his written statement. Attention of the Lower Courts called to the necessity of carefully seeing themselves that due and reasonable time is given in all cases for the service of notices on defendants.

THE special appellant, who was defendant in the Court of first instance, pleads that the summons from the first Court was served upon him at his house nearly a day's journey from the Court, only one day before the date fixed for his appearance; that he, by a petition through his mookhtear, asked the first Court to grant him time for filing his written statement; that he informed that Court (by that petition) that he could not prepare this document properly until he had taken back and examined certain documents filed by him in another case (which was specified and set forth in that petition); that this request was not granted by the first Court; *lastly*, that his complaint regarding this matter was not duly considered by the Lower Appellate Court.

The special appellant further pleads that both the Lower Courts have decreed the case of the plaintiff without duly seeing that the evidence produced by plaintiff is sufficient to justify a verdict for him, even if defendant made no defence.

Notice is taken by the Lower Appellate Court of a petition filed by the special appellant asking for time, but that petition is not with the record sent to us. It is perhaps with the record B, which the appellant should have specially asked to be sent for. In the absence of that record, we are unable to find how long before the date fixed for the appearance of the defendant the summons was served upon him, and how far is his residence from the Court.

If the summons were served upon the special appellant with such little time for preparation as he pleads before us, he was clearly entitled to further time, that is, to reasonable time to file his written statement, even irrespective of the necessity or otherwise of taking back certain documents stated to be necessary and filed in another case. We further hold that, if the statements of the special appellant with regard to the contents of his petition be true, there was no ground for refusing the reasonable time asked for by special appellant from the first Court. We also find that the special appellant is right in his second plea.

We accordingly remand the case to the Court of first instance, with the order that, if the summons were served upon the defendant less than two clear days before the date fixed for his appearance, he should be allowed further time to file his statements; and that, even if he fail to file that in time, or if the special appellant be not found entitled to obtain any time for filing his statements, the case of the plaintiff should be decreed after trying his evidence in the presence of the special appellant.

We take this opportunity to call the special attention of the Courts below to the urgent necessity there is that they should *carefully themselves see* that due and reasonable time is given in all cases for the *service of notices* in order that the Courts themselves may not be made the instruments of fraud and injustice by means of those processes, the vigilant superintendence of the issue and service of which properly and justly is one of their most important duties.

The 5th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Rent (of attachment land)—Collections by Sezawal—Liability of Tenant.

Case No. 358 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by Mr. W. Peterson, Assistant Collector of Durbhanga, dated the 10th August 1865.

Jhoomuck Chowdhry (Defendant), *Appellant,*

versus

Mr. G. Anderson, *locum tenens* of the Manager-General of Durbhanga (Plaintiff), *Respondent.*

Mr. C. Gregory and *Moonshee Ameer Ali Khan Bahadoor* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

A plaintiff who has attached the lands of a tenant, and has collected the rents due by a sezawal, would, ordinarily, not be entitled to claim from the tenant the difference between the collections made by the sezawal and the actual rents.

THIS is a suit for rent for two years, and it must be remanded to the Deputy Collector who tried it.

The plaintiff asks for the rents due under a lease for the years 1270 and 1271 at 5,920 rupees a year. The reply of the defendant is to the effect that for those two years a sezawal collected on behalf of the plaintiff, and that the defendant is not liable for the rents during that period. The Court has given a decree for the rents of 1270, and not for the "deficient collections" of the sezawal of 1271.

It appears that the agreement, under which the defendant holds the lease, has not been filed, although it is important to know under what terms or conditions the defendant obtained a lease of the property.

The Deputy Collector seems to us to have misunderstood the purport of the decision of the late Sudder Court of the 24th of April 1862, which does not apply to the case before us.

The case reported at page 737 of the decisions of the Sudder Court for 1857, 30th of April, seems much more in point.

As a general rule, we should say that a plaintiff who had attached the lands of a tenant, and had collected the rents due by a sezawal, would not be entitled to claim from the tenant the difference between the collections made by the sezawal and the actual rents.

There may be something exceptional in the present case, of which we cannot judge, until the lease or agreement of the defendant, appellant, has been produced.

The Deputy Collector will call on the plaintiff to produce that lease, and he will then find whether there is anything in the conditions which renders the defendant liable for the period in which he was not in possession, and for which rents were collected by the sezawal. If there be no separate stipulation to this effect, we do not think that the plaintiff can recover for such period as the sezawal was collecting.

But the sezawal, it appears, was only appointed towards the end of Chyet 1270. The Deputy Collector must then find whether the defendant collected any portion of the rents due for 1270, in the months which preceded Chyet 1270, when the sezawal was appointed; and if he made any collections during those months, or if he wilfully neglected to make such collections when he might have made them, it seems to us that the defendant would be liable to the plaintiff for that portion.

The Deputy Collector will again take up the case without delay, and will receive any documents, or take any evidence that may be necessary to the elucidation of the above two points, *viz.*, the terms of the lease and the collections in the first part of 1270. He will then return the record to this Court, with his finding recorded with reference to our remarks.

The case is remanded to him under Section 354 of Act VIII., and it will still be retained on the files of this Court.

The 8th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement—Fair and equitable rents.

Case No. 2627 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 15th June 1865, affirming a decision passed by the Deputy Collector of that District, dated the 30th March 1865.

Jeeun Lal Jha (Defendant), *Appellant,*

versus

Kaleenath Jha and others (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Mr. R. E. Twidale for Respondents.

In a suit for enhancement, the rent demanded must be proved to be fair and equitable, even if the tenant has no rights of occupancy.

THE plaintiff, in his notice for enhancement served upon the special appellant, having stated that he was paying less than the neighbouring rate, the Courts below had no occasion to decide that the plaintiff could demand from the appellant any amount of rent he liked.

The rent demanded must be proved to be fair and equitable. It is that alone which the plaintiff is entitled to receive from the special appellant, even if the latter be proved not to have acquired rights of occupancy.

We do not think any question regarding this right was raised by the plaintiff, or should be tried in this case.

We remand the case to the Court of first instance to try the case of the plaintiff as brought by him, and not to decree any enhanced rates against the special appellant until the plaintiff succeeds in establishing the allegations inserted in his notice.

The 9th March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble J. P. Norman, *Judge.*

Limitation—Legal disability—Section 11, Act XIV. of 1859, not applicable to suits for rents.

Case No. 2026 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Behar, dated the 21st April 1865, affirming a decision of the Collector of that District, dated the 21st February 1865.

Dinonath Panday *alias* Bundoo Panday (Plaintiff), *Appellant,*

versus

Roghoonath Panday (Defendant), *Respondent.*

Baboo Roopnath Banerjee for Appellant.
No one for Respondent.

Section 11, Act XIV. of 1859 (allowing a deduction on account of legal disability in computing the period of limitation), cannot be used for the purpose of altering the limitation prescribed by Act X. of 1859 with regard to rents.

IT appears to us that the principle of the decision of the Full Bench which has been referred to (2 W. R., Act X. Rulings, p. 21) is applicable also to the present case. It was held in that case that Section 14 of Act XIV. of 1859 did not apply to suits for rent under Act X. of 1859; and it also decided that the time given by Section 32 of Act X. of 1859 was not reduced by Clause 8, Section 1 of Act XIV. of 1859, the ground being that the two Acts were separate Acts as far as limitation was concerned; and that the limitation Clauses of Act X. were not affected by Act XIV. of 1859. We, therefore, think that the provisions of Section 11 of Act XIV. cannot be used for the purpose of altering the limitation which is

given in Act X. of 1859 with regard to rents. It can hardly be supposed that the Legislature, in passing Act XIV. of 1859, would have introduced into it provisions as to disability, affecting the limitation Clauses of Act X. of 1859, which had not been introduced into that Act when it was passed. It could scarcely have been the intention of the Legislature that, if a person was an infant at the time his rents became due to him, he should be allowed three years after the attainment of his majority for the purpose of suing his ryots for rent due, inasmuch as such a provision would in some cases give him a right to sue for his rents eighteen or twenty years after they became due.

The appeal will be dismissed, but without costs, as there is no pleader on the other side.

The 12th March 1866.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Registration (Effect of—under Section 27, Act X. of 1859)—Transferable Tenures—Custom (Litigation a proof of).

Case No. 2062 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 27th May 1865, reversing a decision passed by the Deputy Collector of that District, dated the 2nd March 1863.

Huro Mohun Mookerjee and others (Defendants), *Appellants,*

versus

Ranee Lalun Monee and others (Plaintiffs), *Respondents.*

Baboo Mohendro Lal Shome for Appellants.

Baboos Oopendur Chunder Bose and *Kedarnath Chatterjee* for Respondents.

The order of a Deputy Collector under Section 27, Act X. of 1859, requiring the zemindar to register the transfer of a tenure, though not appealed from to the Judge, is necessarily nullified by the order of the Judge in the zemindar's suit for rent in which the Judge held that the tenure was not transferable according to the custom of the country, and gave the zemindar a decree for rent against the original tenant.

Litigation is a test, but not the sole proof, of the existence of a custom.

In this case, the zemindar brought an action for rent against his tenants, Gopal Dey and others. Huro Mohun Mookerjee, the special appellant, intervened, alleging that he had purchased the tenures from the ryots, and was liable for the rent, adding that he had instituted a suit to have his name registered in the zemindar's books, and had tendered the rent to the Collector.

The two suits were disposed of by the Deputy Collector together, on 2nd May 1863. That officer held that the sale by Gopal Dey and others to Huro Mohun being established, the latter was entitled to have his name registered. He, therefore, under the provisions of Section 27 of Act X. of 1859, directed the name of Huro Mohun to be registered, and dismissed the zemindar's suit for rent against Gopal Dey and others. An appeal was preferred to the Judge by the zemindar from the order dismissing his claim for rent, and the Judge held that, as the tenure was not a mokurruree, it was not transferable without the consent of the zemindar, and he, therefore, gave a decree for rent against Gopal Dey and others, excluding the intervenor, Huro Mohun.

A special appeal was preferred by Huro Mohun, and the case was remanded by the High Court with directions to the Judge to determine whether the tenure, either by the terms of the pottah, or by the custom of the country, was of a transferable nature. He was also required to consider the effect of the registration under Section 27 of Act X. of 1859.

This case came up before the Judge with another special appeal, No. 2043, remanded by the High Court, which involved a similar question, *viz.*, whether the tenure was transferable or not. That case had been remanded for local investigation as to the

custom of the country in regard to such tenures.

The Judge, after taking evidence in case No. 2043, held that the tenure was not transferable, according to the custom of the country, without the consent of the zemindar; and applying the evidence recorded, and the argument used in that case to this, he ruled that, as the tenure was not transferable, the order passed by the Deputy Collector directing the zemindar to register the name of the purchaser was illegal and of no force against the plaintiff zemindar, and accordingly he reversed the order of the Deputy Collector dismissing the zemindar's claim for rent, and gave him a decree against the parties whom he had made defendants.

A special appeal is preferred on the following grounds: *1st*—That the Judge has virtually set aside the Deputy Collector's order, under Section 27 of Act X. of 1859, though no appeal was before him, and the order was final. *2ndly*—That the argument and evidence used in the other case were not applicable to this, and should not have been made use of. *3rdly*—That, even on the evidence accepted by the Judge, he is legally wrong as to what constitutes a local custom.

On the *first* point, we think that, whether an appeal from the Deputy Collector's decision, under Section 27 of Act X. of 1859, were preferred or not, the question as to the right of the tenant to make the transfer necessarily arose in the suit preferred by the zemindar, when a third party intervened; and any order passed in appeal, if opposed to that passed by the Deputy Collector, would necessarily affect the order regarding registration, and render it a nullity though not set aside in express words. It was impossible in this case to separate the two questions, *viz.*, the zemindar's right to recover rent from his recognised tenant, and the right of the tenant to transfer his holding without the sanction of the zemindar, and as the purchaser intervened and was a party to the suit, and had full opportunity to argue his case, and was fully heard, we do not see that any injustice has been done to him by the course prescribed by the Judge, if the Judge's finding as to what constitutes a local custom be legally correct. We do not think that the special appellant can take advantage of the order of the Deputy Collector, requiring the zemindar to register the special appellant's name, passed on the same date as the judgment appealed against in the present case, and relating to the same property. The question in that case was virtually in appeal in this, though no regular appeal had been preferred.

The *second* objection is not tenable, for we find from the Judge's decision that the intervenor, special appellant, is the appellant in case No. 2043, and that his vakeel admitted that the decision in that case would govern this.

We come, then, to the *third* point, as to what constitutes a local custom. It has been urged that the Judge holds that, before a custom can be uniform, there must have been litigation, and the claim have been unsuccessfully resisted; that this view underlies the whole of the Judge's reasoning; that, if litigation were necessary to establish custom, how could any custom be proved when a case came up for the first time; the Judge admits that there have been innumerable cases of sales, but he gets rid of them by saying that there was no unsuccessful resistance.

What the Judge says, as we find from a reference to his judgment in case No. 2043, is that "a custom is not proved to be invariable unless it be shown to be resisted "unsuccessfully, for the mere fact of one "zemindar or any number of zemindars "having, after such sales, accepted the "purchaser as a tenant, and not objected to "such sale, is not in itself a consent to the "custom; but, if it be proved that, whenever "the zemindar has objected, his objections "have been overruled and successfully resisted, "then such custom may be considered "invariable." No doubt, as the Judge says, successful resistance to the objections of the zemindar would be a proof of the existence of the custom, but it would be only one proof; and we do not think the Judge intends to go beyond this, and to say that a custom cannot be shewn to be invariable unless there has been litigation. Litigation is a test of the existence of a custom, but not the sole proof. If then we strike these words from the judgment, we find that the Judge considers the evidence adduced to be insufficient to prove either the antiquity or invariableness of the custom. He has given his reasons for discrediting that evidence, and with his estimate of it we cannot interfere. Accepting, therefore, this finding, we dismiss the special appeal with costs.

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The 14th March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Time for Appeal—Limitation—No deduction for pendency of suit in wrong Court.

Case No. 3105 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 17th July 1865, reversing a decision passed by the Deputy Collector of Howrah, dated the 26th April 1864.

Modhoo Soodun Mojoomdar (Plaintiff), *Appellant,*

versus

Brojonath Koond Chowdry and others (Defendants), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboo Mohendro Lal Seal for Respondents.

Under Section 161, Act X. of 1859, when read together with Section 333, Act VIII., it is in the discretion of a Judge to allow an appellant a deduction for the time during which the appeal was before a Court without jurisdiction.

In computing the period of limitation as to suits under Act X. of 1859, no deduction is allowed for pendency of suit in a Court without jurisdiction.

THE plaintiff in this case, a ryot, on the 15th Chyet 1268, or in March 1862, was illegally ejected from his land by his zemindar, and on the 12th April sued in the Revenue Court to be restored to possession. On the 21st May 1862, the plaintiff's suit was dismissed on the ground of want of jurisdiction. Subsequently, on the 17th September 1862, he brought his suit in the Moonsiff's Court, and on appeal on the 18th November 1863, the Principal Sudder Ameen rejected his suit, the Civil Court having no jurisdiction in the matter. On the 8th March 1864, that is, two years after the original cause of action, plaintiff again filed a suit, that now before the Court, in the Revenue Court, and obtained a decree on the 26th April 1864. From that order, an appeal was preferred by defendants to the Collector. Subsequently, however, on the 14th March 1865, the High Court, under Section 35 of Act XXIII. of 1861, set aside the Collector's decision, and left the parties at liberty to proceed according to law, and on the 13th April 1865 defendants appealed to the Judge, who, on the 17th July, dismissed plaintiff's suit, on the ground that the suit was not instituted within one year from the accruing of the cause of action, and, therefore, under Section 30 of Act X. of 1859, plaintiff was out of Court under the Statute of Limitation.

Plaintiff now appeals specially, urging, *first*, that the Judge acted erroneously in hearing the appeal from the Deputy Collector's order, dated the 26th April 1864, more than thirty days or one month having elapsed from the date of that decision to the date of the appeal; and, *secondly*, that the Judge was also wrong in holding that his suit was barred; that, as he was entitled to a deduction of the period during which the suit was wrongly before the Civil Court, he was clearly within time.

We think that, under Section 161 of Act X. of 1859, when read together with Section 333 of Act VIII. of 1859, it was quite within the discretion of the Judge to allow appellant a deduction for the time during which the appeal was before a Court which had not jurisdiction in the matter, and consequently see no reason to object to his hearing of the defendants' appeal

As to plaintiff's objection, that the Judge has erred in declaring his suit not brought within time, and that he is entitled to a deduction for the whole period during which his first suit was before the Courts, we do not think it valid. The High Court has ruled that suits under Act X. of 1859 are governed by its special rules of limitation, and not by the general law, Act XIV. of 1859. It seems clear that no Section of Act X. of 1859 contains any words corresponding with those of Section 14 of Act XIV. of 1859, by which the time is allowed to be deducted during which suits against the same parties and for the same subject-matter are pending in a Court without jurisdiction; it follows that that rule is inapplicable to suits under Act X., and as the plaintiff's second suit was instituted nearly two years after the accruing of his cause of action, he is clearly, on this reading of the law, out of Court. His special appeal is, therefore, dismissed with costs.

The 20th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Ejectment—Right of action—Joint liability for Kists.

Case No. 2346 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 15th June 1865, reversing a decision passed by the Deputy Collector of that District, dated the 28th April 1865.

Sreeram Biswas (Defendant), *Appellant,*

versus

Juggurnath Doss Mohunt (Plaintiff), *Respondent.*

Baboo Umbica Chunder Banerjee for Appellant.

Baboo Pearee Lal Roy for Respondent.

A suit for ejectment does not lie before the end of the Bengal year.

Semble.—A suit lies under Clause 4, Section 23, Act X. of 1859, in respect of a joint liability for *kists* accruing due after the purchase, either from the date of the sale or from the date of the confirmation of the sale.

THIS was a suit instituted on the 22nd of March 1865, for the recovery of the rent of 1271 for 12 beegahs 1 cottah of land, and for ejectment of the ryot under Section 78 of Act X. of 1859. The plaint also alleged that the entire amount of a decree for the rent of 1270 had not been paid.

The amount claimed in the schedule to the plaint was, however, only rupees 21-12-2, being the amount of 15 annas of the rent of 1271 with interest, less a small sum which had been paid.

The defendants are Shurbanundo, the original ryot, and Sreeram who had purchased portions of the jote at sales under decrees of the Civil Courts, *viz.*, 6 beegahs, the sale-certificate bearing date the 8th Aughran, and 5 beegahs, the sale-certificate bearing date the 10th Chyet.

The plaintiff got a decree in the first Court against Shurbanundo for the rent. But the Deputy Collector, holding that Sreeram was not liable for the rent, because he had not taken the crops, dismissed the suit against him, and declared that he should not be ejected.

On appeal, the Judge gave a decree for the rent and ejectment against both parties.

Sreeram appeals.

We think it clear that the suit must be dismissed so far as regards the prayer for ejectment.

Under the 21st Section of Act X. of 1859, it is enacted that, when an arrear of rent remains due at the end of the Bengal year, &c., the ryot may be ejected from the land in respect of which the arrear is due.

The present suit was instituted on the 22nd of March, before the end of the Bengal year, and, therefore, before the right to eject had arisen. Our decision on the point is in accordance with that of Savi *versus* Chand Shikdar, Marshall's Reports, page 348.

As to the decree for the rent of 1270, the plaintiff did not prove that the amount of the decree was still due; and the decree in the present suit does not specify how much remained due. It does, however, show that a portion of the rent of 1271 was actually paid.

As regards the question of liability of Sreeram to pay rent, it is clear that he is not personally chargeable for any *kist* which accrued due prior to his purchase. In respect of any joint liability with Shurbanundo for *kists* accruing due after the purchase (as to which, *see* Section 27 of Act X.) either from the date of the sale-certificate (*see* Section 259 of Act VIII. of 1859), or perhaps from some earlier period, such as the date of the confirmation of the sale, he might, no doubt, have been sued under Clause 4, Section 23 of Act X. But the rent being under rupees 100, the appeal in such case would have lain to the Collector under Sections 153 and 155, and not to the Judge. And, therefore, neither the Judge nor this Court in appeal from him has any jurisdiction to take up this case as if it were a suit under Clause 4, and give a modified decree for the amount of such *kists* against Shurbanundo and Sreeram jointly.

The result is that the appellant must succeed. As to the claim of the ejectment for the non-payment of the rent of 1271, the suit is dismissed as having been brought before any cause of action had arisen.

The appellant Sreeram will get his costs in all the Courts with interest. Our decision does not affect the decree of the first Court as against Shurbanundo.

The 20th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Time for appeal from order of Deputy Collector.

Cases Nos. 779 to 782 of 1865 under Act X. of 1859.

Miscellaneous Appeals from an order passed by the Collector of Tipperah, dated the 31st August 1865, reversing an order passed by the Deputy Collector of that District, dated the 22nd April 1865.

Kalee Kishore Paul (Plaintiff), *Appellant,*

versus

Monee Ram Singh (Defendant) and others (Objectors), *Respondents.*

Baboo Baneenath Bose for Appellant.

No one for Respondents.

According to Section 152, Act X. of 1859, the appeal from an order of a Deputy Collector must be presented within 15 days. The Collector has no power to extend the time for appeal, as provided by Section 333, Act VIII. of 1859.

WE must reverse the order of the Collector in these four cases. The law, Act X., Section 152, is clear. The appeal must be presented to the Collector within 15 days of the decree of the Lower Court. The law does not empower the Collector to extend the time in the manner provided by Section 333 of the Civil Court. The appeal to the Judge was without law, and the transfer of the case from the Judge to the Collector in July, much more than 15 days after the decision of the Deputy Collector in April, cannot save the case or keep alive the appeal.

The order of the first Court decreeing the plaintiff rents in these four cases must be restored, and the decision of the Collector overruled with costs.

The 21st March 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction—Suit for Ejectment (directly or indirectly by Landlord).

Case No. 3179 of 1865 under Act X. of 1859,

Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 11th September 1865, affirming a decision passed by Baboo Ram Coomar Bose, Deputy Collector of that District, dated the 30th June 1865.

Golam Koodsee Chowdry (Defendant), *Appellant,*

versus

Kishoree Bewah (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Roopnath Banerjee* for Appellant.

Baboos Pearee Lal Roy and *Sreenath Banerjee* for Respondent.

A party aggrieved by an order of a Deputy Collector passed under Section 25, Act X. of 1859, may sue under Clause 6, Section 23, whether he was illegally ejected directly by the landlord, or indirectly by him through the Deputy Collector.

THE defendants, who are the farmers of a Government khas mehal, obtained the assistance of the Collector under Section 25 of Act X. of 1859 to eject the plaintiff, as a cultivator not having a right of occupancy, he having been placed on the land by a farmer whose interest limited by time had expired, and who could not confer any right beyond that period. The plaintiff, then, under Clause 6, Section 23 of Act X. of 1859, brought a suit in the Revenue Court to recover the occupancy of land from which he had been illegally ejected by the person entitled to receive rent for the same. The defendant pleaded, *firstly*, that the suit was inadmissible under Clause 6, Section 23 of Act X. of 1859, he having been ejected under Section 25 of the Act; and, *secondly*, that, as plaintiff's husband took the land from

a temporary farmer of Government, whose term has expired, plaintiff's right to hold has expired also.

The Deputy Collector was of opinion that, as orders under Section 25 were summary orders, and as the question now raised could only be tried judicially by a Revenue Court, he had jurisdiction in the case; and on the merits he was of opinion that plaintiff's husband had been in possession, and his ancestors before him, for more than 40 years. He, therefore, gave plaintiff a decree, and, on appeal, the Judge affirmed the Deputy Collector's decree.

Defendant now appeals specially, urging, *first*, that the suit is not cognizable in the Collector's Court; and, *secondly*, that plaintiff being a tenant under the farmer whose limited lease has expired, can have no rights as against him.

On the *first* point of objection, we observe that the order of the Collector passed under Section 25 is not a judicial, but is a mere ministerial, act; consequently any person aggrieved by it can have recourse to a regular judicial enquiry, and the terms of clause 6, Section 23 of Act X., seem to meet the present case and to give the Revenue Courts exclusive jurisdiction over it. But it has been contended before us that the party suing under that Section must be illegally ejected by the person entitled to receive rent from the land; and, as in the present instance the plaintiff was ejected by the Collector, the Section will not apply. This reasoning, we think, is not correct; but we are of opinion that the words of the law are sufficiently wide to include, not only cases in which the tenant is illegally ejected by the direct act of the landlord, but those in which he is illegally ejected by the Collector moved by the landlord, in other words by the indirect acts of the landlord. On the *second* objection, we note that the Lower Courts have found that the plaintiff's husband and his ancestors have been on the land for 40 years, and it is not suggested that the property in which the land is situated was held in farm before 1842, that is, five and twenty years ago. In the absence, therefore, of any proof to the contrary, it must be presumed that before this year the property was held by the owner of the land, whoever this was, and, if so, plaintiff's tenancy did not originate with the farmer, and the objection taken does not legitimately arise. We decline, therefore, to give any opinion regarding it. The special appeal is dismissed with costs.

The 22nd March 1866.

Present:

The Hon'ble W. S. Seton-Karr and J. B. Phear, *Judges.*

Measurement (Restraint of right of—under Act VI., 1862, B. C.).

Case No. 3283 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 28th August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 14th June 1865.

Kebul Kishen Doss (one of the Plaintiffs), *Appellant,*

versus

Jaminee (Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboo Otool Chunder Mookerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondent.

The abandonment to a grantee of all rights of measurement as against the ryots with a view to resumption of lands within the talook does not apply to a measurement of the talook itself as against the grantee, and does not amount to a restraint of the right of measurement under Act VI. of 1862, B. C.

THIS was a suit by the ijaradar for measurement of certain mouzahs in the possession of the defendant.

The plaintiff's right to measurement is indisputable "unless (to use the words of Act VI. of 1862, Bengal Legislature) he is "restrained from doing so by express en-"gagement with the occupants of the "lands." To show such an express engagement, the defendant sets up a sunnud purporting to be more than 40 years old, and to have been granted by a predecessor of the plaintiff's zemindar. On the other hand, the plaintiff denies the existence of such a sunnud altogether, and gives some evidence

to show that it is not in the hand-writing of any one who would have been likely to have drawn it up or engrossed it at the date which it bears. The Court of first instance found the sunnud to be a fabrication. The material part of the judgment of the Lower Appellate Court runs as follows:—

"The sunnud, which the plaintiff asserts "to be spurious, bears a date of 40 years "and upwards; it was not in the defend-"ant's power to bring witnesses to prove "the execution of the sunnud of such long "standing; but, considering the very long "time that she and her ancestors have been "in possession, paying rent at a uniform "rate, it may be presumed that the sunnud "is a genuine one. Had it not been so, "long ere this some one of the ijaradars "of the mehal would have challenged de-"fendant's rights to hold the land at the "rent she has paid for so long. This they "do not appear to have done, nor have any "attempted to make a measurement of the "land. It appears to me that the present "ijaradar whose lease commenced only in "1271 has instituted this suit for the pur-"pose of cancelling the sunnud in question, "and assessing, at a higher rate, land "which it is shown has been held for up-"wards of 20 years at a uniform rate. I "cannot agree with the Deputy Collector "in the decision passed by him, and, there-"fore, reverse it, and decree the appeal with "costs."

We cannot gather from these words whether the Judge considered the authenticity of the sunnud to have been established or not. Certainly he does not disclose to us any evidence which would be sufficient in law to support an affirmative conclusion. But, be this as it may, we have carefully considered the terms of the alleged sunnud, and we are of opinion that they do not amount to a restraint of the plaintiff's right of measurement under Act VI. of 1862 of the Bengal Legislature. The clause relied upon at most is an abandonment to the grantee of all rights of measurement as against the ryots with a view to resumption of lands within the talook, and does not apply to a measurement of the talook itself as against the grantee. No other express restraint is suggested. Therefore, the plaintiff is entitled to a decree. The decision of the Lower Appellate Court is wrong in law, and must be reversed, and the decision of the first Court upheld with all costs.

The 23rd March 1866.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Suit for enhanced rent—Plea of lakheraj as to portion of land.

Case No. 3344 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 31st August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 30th January 1865.

Beebee Ashrufoonissa and another (Defendants), *Appellants,*

versus

Umung Mohun Deb Roy (Plaintiff), *Respondent.*

Baboos Nil Madhub Bose and *Nil Monee Sein* for Appellants.

Baboos Mohendronath Shome and *Kadernath Chatterjee* for Respondent.

Some *primâ facie* proof of an ostensible rent-free holding, and not a bare allegation by defendant of a rent-free holding, is necessary to bar a plaintiff in a suit for enhanced rent, where the defendant admits a tenancy for one part of the claim, but merely alleges a rent-free holding for the other.

It is urged that the question of the lakheraj portion of the land should have been altogether excluded from the consideration of the Courts in this case, under the ruling of the Full Bench of 1st of June 1863, page 523 of Marshall's Reports. But we think the circumstances of the present case are such that the ruling in question does not fairly apply. In that case, it was found, on full enquiry, that some 11 beegahs 7 cottahs were held, and had been held by the defendant as ostensibly lakheraj, and the Full Bench decided that this portion of the claim should not be decided in the suit then appealed.

But in the suit before us, the Judge has found that there is nothing whatever to connect any rent-free lands with the documents relied on, and the Judge shows that this plea was never thought of by the defendant till a late stage of this protracted litigation. The case seems to us much more analogous to that decided on the 3rd of August 1865 by a Divisional Bench (page 178, Weekly Reporter, Volume III.) in which reference was made, as in the present appeal, to the above-mentioned Full Bench ruling, and in which it was ruled that the Full Bench decision was not in point. It could never have been the intention of the Full Bench

that a bare allegation of a defendant, of rent-free holding, was to bar the plaintiff. The meaning must have been that there should be some *primâ facie* proof of an ostensible rent-free title in some portion of the land for which rent was sought. Were this not so, any plaintiff might be at once barred, or might lose half his rents, because a defendant who admitted tenancy for one part of the claim had chosen simply to allege a rent-free holding for the other.

In any view, the Judge has, affirming the decision of the Deputy Collector, found that the defendants have not shown any connection between the lands sued for, and their mere allegation of a rent-free holding in certain portions, and has decreed the plaintiff's claim.

We see no reason for reversal or alteration of his order, and we dismiss this appeal with costs.

The 23rd March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Recusant Witnesses (how proceeded with).

Case No. 3134 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. Richardson, Officiating Additional Judge of Jessore, dated the 11th July 1865, affirming a decision passed by Baboo Saba Pershad Sandyal, Deputy Collector of that District, dated the 30th January 1865.

Sreemutty Saroda Dossee and others (Defendants), *Appellants,*

versus

Rajah Buroda Kant Roy (Plaintiff), *Respondent.*

Baboos Doorga Doss Dutt and *Tara Prosunno Mookerjee* for Appellants.

Baboo Ubhoy Churn Bose for Respondent.

Case of recusant witnesses who were ordered to be proceeded with under Section 168, Act VIII. of 1859 (by attachment and sale of their property), and to be tried by the Criminal Authorities under the Penal Code.

THE special appellant pleads that the lands for the rents of which she is sued in this case do not exist; that she has failed to obtain possession of any such lands, though she had sent words to the servants of the plaintiff to point out the lands; that she had, to prove this allegation, summoned several *amlahs* of the plaintiff who would not appear, and the *ex-parte* decree for rents obtained against the tenant of these supposed lands who had by gift passed over to the special appellant the supposed lands of this imaginary jote along with his other properties, does not show that the said donor had possession of any lands, or had ever actually paid rents for the lands in dispute.

The record simply shews that a few witnesses were examined by the plaintiff regarding the alleged possession of the lands in dispute by the special appellant, but their depositions do not clearly show any such thing, and the Lower Courts do not rely upon this evidence.

We further find that several *amlahs* of the plaintiff were summoned on behalf of

the special appellant, and it is admitted that their property was attached.

What happened afterwards does not appear, and is not made known to us by the pleaders on both sides.

We are not satisfied with the investigation of this case, and direct that the Lower Appellate Court should proceed under Section 168 of Act VIII. of 1859, which looks to the *sale* of the property of the recusant witnesses in order to realize such fine as the Court may have under that Section imposed itself. Further, if no order has already been passed under the law, the Court may now order these witnesses to be tried by the Criminal Authorities as provided for in the Penal Code.

It is not the object of Act VIII. of 1859 that witnesses should, as they have done in this case, frustrate the action of the Court to cause attendance.

The plaintiff should be called to prove by more direct and satisfactory evidence that the special appellant holds the lands for the rents of which she is sued in this case, and, if necessary, an Ameen should be sent to enquire into the fact of the alleged possession of the special appellant.

The Lower Appellate Court should assist the special appellant in her attempts to find out the truth of this disputed fact, and the *onus* of proving this is, however, first to be laid on the plaintiff.

We, accordingly, remand the case for re-trial with the above remarks.

The 27th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Wrongs and Remedies—Section 106, Act X. of 1859.

Case No. 3552 of 1865.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 17th August 1865, affirming a decision passed by the Moonsiff of that District, dated the 7th April 1865.

Fukeer Chand Aych (Plaintiff), *Appellant,*

versus

Rokeemunissa and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Ramesh Chunder Mitter for Respondents.

Any man aggrieved is entitled to some redress. Thus, a person, who did not appear as third party in a rent-suit, is not debarred from all remedy under Section 106, Act X. of 1859, if he has been really wronged.

BOTH the Courts are wrong in simply applying Section 106 of Act X. of 1859. It is true that the plaintiff did not appear as third party in the rent-suit, but the law nowhere says a person who does not appear shall not have a remedy if he is wronged. It is a general rule of law that any man being aggrieved shall have some means of redress. The case must be remanded to the first Court to be tried on its merits, whatever those merits may be.

The 5th April 1866.

Present:

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

Suit for arrears of rent at enhanced rate—Former suit to contest notice of enhancement—Limitation (Section 32, Act X. of 1859)—Rights of occupancy—Estoppel—Fairness of rates (when to be raised).

Cases Nos. 2818 to 2820 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Officiating Judge of Dacca, dated the 15th August 1865, modifying a decision passed by the Deputy-Collector of Manickgunge, dated the 26th April 1865.

Puddo Lochun Bhadooree (one of the Defendants), *Appellant,*

versus

Chundernath Roy (Plaintiff) and others (Defendants), *Respondents.*

Baboos Issur Chunder Chuckerbutty and *Poorno Chunder Mookerjee* for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

The dismissal of a former suit to contest a notice of enhancement on the ground of protection as a mokurureedar holding under a pottah, is a sufficient confirmation of the enhancement to take the present suit for arrears of rent at the enhanced rate out of the operation of the proviso in Section 32, Act X. of 1859.

Where a zemindar has dealt with the defendant as a ryot having a right of occupancy, the failure of the ryot in a former suit to establish a higher position may reduce him to, but cannot deprive him of, the *status* attributed to him by the zemindar.

The ryot's omission to object in the former suit to the fairness of the rates does not preclude him from raising the objection in the present suit.

In these cases there are three objections raised by the special appellant:—

1st.—That the suit as to part of the arrears claimed was barred by limitation under the proviso contained in the latter part of Section 32, Act X. of 1859.

2nd.—That the sufficiency of the grounds of enhancement stated in the notice, and incidentally the fairness of the rates had not been enquired into.

3rd.—That, in the case No. 2819, the Judge has omitted to notice and adjudicate on the plea that part of the land was the defendant's debuttur.

On the *first* of these points, we must remark that the ryot, special appellant, on being served with notice, came into Court, and questioned it on the ground that, as a mokurureedar holding under a pottah, he was absolutely protected, and on no other. His suit was dismissed, and this, we think, was a sufficient confirmation of the enhancement to take the case out of the operation of the proviso.

On the *second* point, we find that the Judge considers the ryot, by setting up in the former suit a mokurruree pottah to have disentitled himself from claiming the benefits of a right of occupancy, and for the respondent it is contended before us that the ryot, by his plaint in the former suit to dispute the notice, has abandoned specific objections to the enhancement itself as to the rates assessed. It was, no doubt, held by a Division Court in the case of Gooroo Doss, 2, Weekly Reporter, page 200, that a ryot, who had set up a false mokurruree, could not, on the failure of that allegation, be allowed to fall back on his rights as a tenant with a right of occupancy. But if we entirely concurred in that decision, we could not apply it to the present case, as the pottah was set up, not in the proceedings now before us, but in a distinct suit brought by the ryot. In the present case, the plaintiff, zemindar, has dealt with the defendant, as with a ryot having a right of occupancy, and the failure to establish a higher position reduced the ryot to the *status* which the zemindar attributes to him.

And as to the respondent's argument, we quite admit, and would, indeed, insist, that all the pleas under which a ryot can resist a notice of enhancement, may fitly, and ought to be advanced and considered in the suit, which, under Section 14, he brings to dispute the notice. But a decision of this Court, Marshall, page 185, recognizes the ryot's right to raise in such a suit only the question of his title to exemption, leaving the fairness of the rates to be tried, as here, in a suit for arrears of rent at the enhanced rate. The matters comprised in this plea ought, therefore, to have been enquired into by the Lower Appellate Court. And the subject of the third objection which was raised in the appeal to the Judge, namely, as to the debuttur, ought also to have been enquired into.

We, therefore, set aside the judgment of the Zillah Court, and remit the case for a new trial on the points indicated.

the special appellant, and it is admitted that their property was attached.

What happened afterwards does not appear, and is not made known to us by the pleaders on both sides.

We are not satisfied with the investigation of this case, and direct that the Lower Appellate Court should proceed under Section 168 of Act VIII. of 1859, which looks to the *sale* of the property of the recusant witnesses in order to realize such fine as the Court may have under that Section imposed itself. Further, if no order has already been passed under the law, the Court may now order these witnesses to be tried by the Criminal Authorities as provided for in the Penal Code.

It is not the object of Act VIII. of 1859 that witnesses should, as they have done in this case, frustrate the action of the Court to cause attendance.

The plaintiff should be called to prove by more direct and satisfactory evidence that the special appellant holds the lands for the rents of which she is sued in this case, and, if necessary, an Ameen should be sent to enquire into the fact of the alleged possession of the special appellant.

The Lower Appellate Court should assist the special appellant in her attempts to find out the truth of this disputed fact, and the *onus* of proving this is, however, first to be laid on the plaintiff.

We, accordingly, remand the case for re-trial with the above remarks.

The 27th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Wrongs and Remedies—Section 106, Act X. of 1859.

Case No. 3552 of 1865.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 17th August 1865, affirming a decision passed by the Moonsiff of that District, dated the 7th April 1865.

Fukeer Chand Aych (Plaintiff), *Appellant,*

versus

Rokeemunissa and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Any man aggrieved is entitled to some redress. Thus, a person, who did not appear as third party in a rent-suit, is not debarred from all remedy under Section 106, Act X. of 1859, if he has been really wronged.

BOTH the Courts are wrong in simply applying Section 106 of Act X. of 1859. It is true that the plaintiff did not appear as third party in the rent-suit, but the law nowhere says a person who does not appear shall not have a remedy if he is wronged. It is a general rule of law that any man being aggrieved shall have some means of redress. The case must be remanded to the first Court to be tried on its merits, whatever those merits may be.

The 5th April 1866.

Present:

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

Suit for arrears of rent at enhanced rate—Former suit to contest notice of enhancement—Limitation (Section 32, Act X. of 1859)—Rights of occupancy—Estoppel—Fairness of rates (when to be raised).

Cases Nos. 2818 to 2820 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Officiating Judge of Dacca, dated the 15th August 1865, modifying a decision passed by the Deputy-Collector of Manickgunge, dated the 26th April 1865.

Puddo Lochun Bhadooree (one of the Defendants), *Appellant,*

versus

Chundernath Roy (Plaintiff) and others (Defendants), *Respondents.*

Baboos Issur Chunder Chuckerbutty and *Poorno Chunder Mookerjee* for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

The dismissal of a former suit to contest a notice of enhancement on the ground of protection as a mokurureedar holding under a pottah, is a sufficient confirmation of the enhancement to take the present suit for arrears of rent at the enhanced rate out of the operation of the proviso in Section 32, Act X. of 1859.

Where a zemindar has dealt with the defendant as a ryot having a right of occupancy, the failure of the ryot in a former suit to establish a higher position may reduce him to, but cannot deprive him of, the *status* attributed to him by the zemindar.

The ryot's omission to object in the former suit to the fairness of the rates does not preclude him from raising the objection in the present suit.

In these cases there are three objections raised by the special appellant:—

1st.—That the suit as to part of the arrears claimed was barred by limitation under the proviso contained in the latter part of Section 32, Act X. of 1859.

2nd.—That the sufficiency of the grounds of enhancement stated in the notice, and incidentally the fairness of the rates had not been enquired into.

3rd.—That, in the case No. 2819, the Judge has omitted to notice and adjudicate on the plea that part of the land was the defendant's debuttur.

On the *first* of these points, we must remark that the ryot, special appellant, on being served with notice, came into Court, and questioned it on the ground that, as a mokurureedar holding under a pottah, he was absolutely protected, and on no other. His suit was dismissed, and this, we think, was a sufficient confirmation of the enhancement to take the case out of the operation of the proviso.

On the *second* point, we find that the Judge considers the ryot, by setting up in the former suit a mokurruree pottah to have disentitled himself from claiming the benefits of a right of occupancy, and for the respondent it is contended before us that the ryot, by his plaint in the former suit to dispute the notice, has abandoned specific objections to the enhancement itself as to the rates assessed. It was, no doubt, held by a Division Court in the case of Gooroo Doss, 2, Weekly Reporter, page 200, that a ryot, who had set up a false mokurruree, could not, on the failure of that allegation, be allowed to fall back on his rights as a tenant with a right of occupancy. But if we entirely concurred in that decision, we could not apply it to the present case, as the pottah was set up, not in the proceedings now before us, but in a distinct suit brought by the ryot. In the present case, the plaintiff, zemindar, has dealt with the defendant, as with a ryot having a right of occupancy, and the failure to establish a higher position reduced the ryot to the *status* which the zemindar attributes to him.

And as to the respondent's argument, we quite admit, and would, indeed, insist, that all the pleas under which a ryot can resist a notice of enhancement, may fitly, and ought to be advanced and considered in the suit, which, under Section 14, he brings to dispute the notice. But a decision of this Court, Marshall, page 185, recognizes the ryot's right to raise in such a suit only the question of his title to exemption, leaving the fairness of the rates to be tried, as here, in a suit for arrears of rent at the enhanced rate. The matters comprised in this plea ought, therefore, to have been enquired into by the Lower Appellate Court. And the subject of the third objection which was raised in the appeal to the Judge, namely, as to the debuttur, ought also to have been enquired into.

We, therefore, set aside the judgment of the Zillah Court, and remit the case for a new trial on the points indicated.

The 5th April 1866.

Present:

The Hon'ble L. S. Jackson and G. Campbell, *Judges.*

Right of Suit (by Assignee).

Case No. 2863 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. G. Bright, Officiating Judge of East Burdwan, dated the 9th May 1865, affirming a decision passed by the Deputy Collector of that District, dated the 6th March 1865.

Binode Beharee Mookerjee (Plaintiff), *Appellant,*

versus

Beer Narain Roy and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Banee Nath Bose* for Appellant.

No one for Respondents.

An *ex-parte* decree for rent against *A* was sold by *B* to *C*. The decree having been subsequently set aside on *A's* application, *B* petitioned the Court to substitute *C* for himself as plaintiff, but the Court was of opinion that *B* having sued as landlord, and the relation of landlord and tenant not subsisting between *A* and *C*, the suit could not be carried on. HELD on appeal that there was no rule of law prevailing in Bengal which forbade the Assignee from carrying on the suit.

WE think the decision of the Lower Appellate Court is erroneous. The Maharajah had at first obtained an *ex-parte* decree for rent, and sold his rights thereunder to the special appellant, whom he moved the Court to substitute in his place for the purposes of execution.

The defendant having applied to the Court to set aside the *ex-parte* decree, and his application having been granted, the Maharajah petitioned again, stating that he had sold to the special appellant his right to the rent for that year, comprising his whole rights of suit in this case, and the Court was again prayed to substitute the special appellant for the Maharajah, the original plaintiff.

The Judge now holds that the Maharajah having sued in his capacity of landlord, and the relation of landlord and tenant not subsisting between the special appellant and the defendant, the suit could not be carried on.

But we are of opinion that no rule of law prevailing in Bengal forbids the Assignee from carrying on the suit.

We, therefore, must reverse the decision of the Lower Appellate Court, and remit the case to be adjudicated on its merits.

The 5th April 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Ejectment—Right of Suit in Civil Court.

Case No. 3549 of 1865.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 29th August 1865, affirming a decision passed by the Moonsiff of that District, dated the 11th January 1864.

Tara Chand Dutt (Plaintiff), *Appellant,*

versus

Oafunissa Bibee and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

A plaintiff ousted by the real defendant is not barred from suing in the Civil Court until the real defendant and the zemindar defendant settle any dispute between them by a suit under Act X. of 1859.

THIS case is remanded to be tried by the Principal Sudder Ameen on the merits, as it has been so tried by the Moonsiff. The view taken of the scope and object of Act X. of 1859 is quite wrong in law. The plaintiff, if ousted by the real defendants, must have a remedy, and it is no answer to his case to say that, until the real defendant and the zemindar defendant settle any dispute between them by a suit under Act X. of 1859, the plaintiff must be out of Court. Failing any such other suit between the parties alluded to, the plaintiff would be literally left without redress.

Remand to Appellate Court for trial on the merits.

The 5th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Presumption of uniform payment from Permanent Settlement—Consolidation of tenures—Plea of holding for long time—Period of possession by Ryot's vendor—Proof of Dakhilahs.

Cases Nos. 27 and 28 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Beerbhoom, dated the 11th September 1865, reversing decisions passed by the Deputy Collector of that District, dated respectively the 18th and 26th April 1865.

Kazee Khoda Newaz (Plaintiff), *Appellant,*

versus

Nubo Kishore Raj and others (Defendants), *Respondents.*

Baboos Juggodanund Mookerjee and *Mohendro Lal Shome* for Appellant.

No one for Respondents.

The consolidation of several tenures into one cannot deprive a ryot of the benefit of the presumption under Section 4, Act X. of 1859.

A plea of holding at a uniform rent for a long time, without stating in terms the existence of the tenure from the time of the Permanent Settlement, entitles a ryot to the same presumption.

In cases of saleable tenures, the period of possession by the ryot's vendor is included in the 20 years mentioned in the same Section.

When the payment of rent is not a matter directly in dispute, and dakhilas are produced by the ryot to show that he is entitled to the same presumption, and are not denied by the landlord, the tenant is not required to prove them, but admission is legally presumed from non-denial.

In these two cases, the Lower Appellate Court has found that the fact of the uniform payment for upwards of 20 years is proved.

The plaintiff, special appellant, argues in both the cases that the defendant should not obtain any benefit of the presumption under Section 4 of Act X. of 1859, because he has not pleaded that the tenures now held by him existed at the time of the Decennial Settlement; that the time of the possession of a portion of these lands by the vendors of the defendant previous to his purchase should not be calculated as part of the period of 20 years, and that the *dakhilahs* have not been proved by witnesses. Moreover, in the first case, it is pleaded by the special appellant that the *dakhilahs* do not show any uniform payment at all, and in the other, that a new *pottah* being taken in 1261, the defendant cannot plead the benefits of Section 4, Act X. of 1859.

With reference to the first of these two last pleas, it is clear that the Lower Appellate Court has found as a fact, and we convinced ourselves of the correctness of the finding by examining the *dakhilahs*, that the receipts filed sufficiently show the uniform payment required. Out of a long series of years, there are no *dakhilahs* for one year, and for the other years we see that they show a uniform payment, except for two or three years for which all the *dakhilahs* not being produced, the rent paid, when calculated by the *dakhilahs* produced for these years, appears to be less than the rent paid for the years preceding or following these *few* years. The rent, however, of these preceding and following years is, as has already been noticed, exactly or all but exactly the same as it is for other years, for which the entire *dakhilahs* are produced.

With reference to the second of the last two pleas, it is clear that the fact of the defendants holding one of the tenures at a uniform payment from the time of his predecessor, is proved; and it is found that the defendant purchased, and so added to it from time to time, saleable tenures held also from before at a uniform rent; further, that defendant, from the time of his purchases of these additional tenures, paid only the former rents for them, and that the *jumma* agreed to be paid, when in 1261 all the tenures were formally consolidated into one tenure, corresponds with the total of the rents so payable before by the defendant. Under these circumstances, the consolidation of several tenures into one can in no way deprive the defendant of the benefit of the presumption of Section 4 of Act X. of 1859.

As to the other pleas of the special appellant taken by him generally in both the cases, it is clear that the defendant had pleaded the existence of all tenures at uniform rents of continuous long standing, and had relied upon Section 4; facts which, in several cases, have been held to be suffi-

cient to entitle a ryot to the benefit of Section 4, although he may not have stated in so many words that the tenure existed from the time of the Decennial Settlement. We have not to look to the letter of a pleading, but to the substance, and to the real intention of the party putting his case.

It has also been decided by this Court that, in cases of saleable tenures, the possession by the vendor of the ryot in possession when the suit is brought, would be included in the calculation of the 20 years required, because it is but one and the same tenure continued.

Further, it has been decided here that, when the payment of rent is not a matter directly in dispute, and *dakhilahs* are produced by the ryot to show that he is entitled to the presumption of Section 4, and these receipts are *not denied* by the landlord, the tenant is not required to prove *them*, but, by the non-denial, admission is legally presumed.

We, accordingly, see no reason to interfere, and reject both the special appeals without costs, as nobody appears for the respondents.

The 6th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement—Ameen's report—Proof of rates.

Case No. 3287 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 25th August 1865, reversing a decision passed by the Collector of that District, dated the 24th November 1864.

Gudadhur Banerjee (Plaintiff), *Appellant,*

versus

Nund Lal Biswas and others (Defendants), *Respondents.*

Baboos Jugodanund Mookerjee and *Banee Madhub Banerjee* for Appellant.

Baboo Rajendurnath Bose for Respondents.

In a suit for enhancement, the first Court deputed an Ameen to enquire into the rates, and on his report gave a decree to the plaintiff; but the Lower Appellate Court disallowed the Ameen's report on the ground that by itself it was not good evidence of neighbouring rates, and reversing the decision of the first Court, dismissed the suit for want of proof.—HELD, on special appeal, that the Lower Appellate Court should have attached greater weight to the Ameen's report, or at least have allowed an opportunity to the plaintiff to adduce his proof of rates.

THE Lower Appellate Court considers that it was not proper for the Court of first instance to depute an Ameen to enquire into the rates, and not to notice that the special appellant, the plaintiff, upon whom lay the *onus* to prove the rate at which the enhanced rates were to be decreed to him, had not, as called upon to establish it, given any proof on this point. It further disallows the report of the Ameen on this point, on the ground that by itself it is not good evidence of neighbouring rates. On these grounds, the Lower Appellate Court has reversed the decision of the Court of first instance in favor of the special appellant, and dismissed his case for enhancement against the defendant for want of proof.

We fear that owing to defective investigation, justice has miscarried in this case. The Lower Appellate Court should have attached greater weight to the report of the Ameen, based as it was upon evidence taken upon the spot, than it has done; and if it considered it necessary that the plaintiff should have filed his proof of rates in Court, the Lower Appellate Court should, with reference to the proceedings of the Court of first instance, whose order for deputing an Ameen to enquire into that very subject of rates may reasonably have led the special appellant to believe that evidence on this point is no longer required from him in Court, have allowed an opportunity to the special appellant to adduce his proof either before it or in the Court of first instance.

We further find that the Court of first instance had proceeded, besides the report of the Ameen, upon another evidence of Pergunnah rates fixed by a public officer some years ago; and as the present rates would not ordinarily be lower than the rates so fixed in times gone by, this rate, so fixed, was not bad evidence to proceed upon in the absence of proof of higher rates furnished by the special appellant.

We accordingly remand the case to the Lower Appellate Court for re-trial, with reference to the above remarks.

The 6th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Jurisdiction—Ejectment (by Zemindar collusively through ryot)—Right of occupancy (in case of transfer of tenure with consent of Zemindar).

Case No. 3198 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. Abercrombie, Officiating Judge of Dacca, dated the 22nd August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 29th April 1865.

Huro Chunder Goho and another (two of the Defendants), *Appellants,*

versus

Mr. A. D. Dunn, Manager of the estates of the late Luckhee Debia Chowdhrain (Plaintiff), *Respondent.*

Baboo Gopal Lal Mitter and *Chunder Madhub Ghose* for Appellants.

Baboo Jugodanund Mookerjee for Respondent.

When a party in possession has been ejected by a ryot on the strength of a pottah collusively granted by the zemindar, the latter is the real ejector within the meaning of the law, and is alone liable; and the case is cognizable under Act X. of 1859.

Where the zemindar consents to the transfer of a tenure from one ryot to another, the possession of both must be considered to be continuous, and the right of occupancy to date from the time of the first holder.

THIS was a suit by the special respondent (acting as guardian to a minor son of one Luckhee Debia, deceased), on behalf of the Court of Wards, to recover possession of a certain factory, together with jote lands purchased by Luckhee Debia from Messrs. Lamb and Forbes in 1267, B. S., of which factory and lands the ryot defendants, under cover of a pottah granted to them by the zemindar, dispossessed him in 1271 B. S.

The defence was that the Revenue Courts had no jurisdiction to try the suit, and that the zemindar's pottah gave the defendants a good title to the land.

Both Lower Courts decreed plaintiff's case.

It is now urged specially on behalf of the zemindar before us: (1) That the Collector had no jurisdiction; (2) That the Lower Court was wrong in absolving the ryot defendants from liability; and (3) That no right of occupancy accrued to the special respondent, Luckhee Debia having purchased the property in 1267 only.

We see no reason to interfere. The Lower Court has found on the evidence that the real author of the ejectment was the zemindar, and that the grant of a pottah to the ryot defendants was a mere colorable transaction to shift the responsibility from the zemindar's shoulders. This view of the case acquires considerable strength from the fact that it is the zemindar only who has appealed to this Court. The ryots, who are the alleged possessors of the jotes under a pottah, have not appeared to defend their rights. However this may be, we are quite clear that in the present case, where the party in possession has been ejected by a ryot on the strength of a pottah collusively granted by the zemindar, the latter is the real ejector within the meaning of the law, and that the case was cognizable under Act X. of 1859.

This finding disposes of the 2nd ground of appeal also, for, as the Lower Court found that the ryots were only the nominal ejectors, it was quite right to absolve them from liability and to give a decree against the real delinquent.

With regard to the 3rd objection, we observe that, under the circumstances of this case, a right of occupancy must be held to have accrued to the special respondent. The Lower Court has found on the evidence that the zemindar consented to the transfers by Lamb and Forbes, and had taken rent without demur from the ryot, who was at different times in possession under these transfers. In the eye of the law, therefore, the possession would be considered to be continuous, and the right of occupancy to have been long since acquired and to date from the time of the first holder, a period extending over 30 years.

In no point of view, therefore, do we think that the application can be sustained, and we, accordingly, dismiss the special appeal with costs.

The 6th April 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Presumption of uniform payment from Permanent Settlement—Possession of Pottah dated 1167.

Case No. 2889 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 31st July 1865, modifying a decision passed by the Deputy Collector of that District, dated the 23rd February 1865.

Huronath Roy and others (some of the Plaintiffs), *Appellants,*

versus

Kumola Kant Chuckerbutty and others (Defendants), Radhanath Roy and others (Objectors), and Kalee Prosunno Roy (Plaintiff), *Respondents.*

Baboo Obhoy Churn Bose for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

There is nothing in the fact of a ryot being in possession of an ancient pottah dated 1167, which he found among the title-deeds under which his predecessor appeared to be in possession, and of the genuineness of which he could probably have no means of judging to prevent him from claiming the benefit of Section 4, Act X. of 1859.

THERE are no grounds whatever for this appeal. The ryot respondent appears to have purchased his tenure in or about the year 1249, and amongst the title-deeds under which his predecessor appeared to be in possession was an ancient pottah dated 1167, of the genuiness of which he could probably have no means of judging. In answer to the suit for enhancement, the pottah was set up for the defence, and also the fact that he had paid a uniform rent from the time of his purchase.

We think there is nothing in the fact of the respondents being in possession of a pottah of this nature to prevent him from claiming the benefit of Section 4 of Act X. of 1859; it appears to us to be the very case which that Act was intended to protect.

A former decision of this Court, dated the 7th of January 1865, is cited. But that case must have either turned upon the ground that the party producing the pottah was presumably the party who had concocted it, or more probably still on the ground that the pottah was dated subsequent to the Decennial Settlement, and, therefore, the ryot in setting it up raised a presumption which was inconsistent with the provisions of Act X. of 1859.

In endeavouring to ascertain the quantity of land held by the ryot, the appellant appears to have trespassed upon the lands of some adjoining owners who seem to have been admitted as intervenors; but these intervenors have not appeared before us, and we offer no opinion as to their rights.

The appeal is dismissed with costs and interest as against the defendants, respondents.

The 7th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Suit for rent—Section 77, Act X. of 1859—Appeal.

Case No. 3206 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 1st July 1865, affirming a decision passed by the Deputy Collector of that District, dated the 31st May 1865.

Syud Jeshan Hossein (Plaintiff), *Appellant,*

versus

Narain Doss and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Mohendro Lal Shome and *Sreenath Banerjee* for Respondents.

Where a plaintiff and the zemindar claim rent for the same land from the same tenant, the case comes under Section 77, Act X. of 1859, and the point to be decided is who was in *bonâ fide* receipt and enjoyment of the rent up to the commencement of the suit. But, if the Deputy Collector wrongly goes into and decides questions of title which do not arise on the pleadings, the appeal lies to the Judge. If the Judge should refuse to hear the appeal, and the plaintiff goes to the Collector, the Collector, instead of deciding that plaintiff has not

proved his receipt of rent, should remand the case to his Deputy to try the right issue, for the plaintiff is legally entitled to two judicial opinions as to whether he was or was not in receipt of the rent up to the commencement of his suit.

THIS was a suit under Act X. of 1859 for arrears of rent due in the years 1269, 1270, and 1271 B. S. The plaintiff claimed as representative by purchase of the rights of one Bhuttoo, which he alleged to be a 3 dam 16 c. share of the entire estate.

The defendant (Narain Doss) replied that Bhuttoo's share was less than that claimed, that part of that land was not held by him (defendant), but by third parties, Teeka and Babooram, and that for the rest he paid rent to an ijaradar.

The Deputy Collector, before whom the suit originally came, went into the question regarding the amount of plaintiff's share, and decided that the deed of sale under which he claimed was a forgery. He refused to take up the case under Act X. at all.

The Judge held that the suit came properly under Section 77 of Act X. of 1859, and should have been heard on appeal by the Collector; but, as no question of title was necessarily involved, he declined to hear the appeal himself, although the Deputy Collector had proceeded on that ground in disposing of the case.

It appears from the record that, although the ijaradar himself did not appear, the zemindar did, and admitted that he received rent immediately from the defendant through the ijaradar. The suit was, therefore, one in which two parties, *viz.*, the plaintiff and the zemindar, claimed rent for the same land from the same tenant, and came under Section 77 of Act X. of 1859. The point to be decided was, who up to the time of the commencement of the suit was in *bonâ fide* receipt and enjoyment of that rent. And we think that the Deputy Collector was wrong in going into and deciding questions of title which did not arise on the pleadings.

But, having so decided them, the Judge ought to have taken up the case on appeal. It has been ruled by a Division Bench of this Court, Punchanun Koor and others, appellants, 3 Weekly Reporter, page 154, that, where a Deputy Collector, in trying a claim under Section 77 in a suit for rent under 100 rupees, goes beyond the scope of the law, and, instead of merely deciding who is in the *bonâ fide* receipt of rent, goes into questions of title, and decides the right to receive such rent, the appeal lies to the Judge, and not to the Collector, and the Judge, instead of remanding the case for trial on the right issue, is bound, under Section 353, Act VIII. of 1859, to determine the case finally if the evidence enable him to do so.

Therefore, both the Judge and the Deputy Collector were wrong.

It appears further from the record that, after being refused a hearing by the Judge, the plaintiff did go to the Collector, who decided that he (plaintiff) had not proved his receipt of rent. This decision was, however, irregular, as the order appealed against proceeded on an entirely different matter. The Collector ought to have remanded the case to his Deputy, and have directed him to try the right issue, for the plaintiff had by law the right to two judicial opinions on the question as to whether he was or was not in receipt of the rent up to the commencement of his suit.

As all the orders passed in this suit have been irregular, we must remand it for retrial to the Court of first instance, the proper issue being, of course, whether plaintiff can prove, either by himself or through his vendor, his receipt and enjoyment of the rent. Should either of the parties be dissatisfied with the Deputy Collector's order, the appeal will lie, not to the Judge, but to the Collector.

The Full Bench decision of the 26th May 1865 (Syud Hameedoodeen, appellant, 3 Weekly Reporter 21), quoted by the Judge, does not apply to this case, inasmuch as the Deputy Collector did not confine his attention (as shown above) to the actual receipt, but went into the question of the right of receipt, and the Full Bench decision refers to the first case only.

Costs will follow the result.

The 7th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Enhancement—Rule of proportion.

Case No. 2252 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 16th May 1865, affirming a decision passed by the Deputy Collector of that District, dated the 9th January 1865.

Azim Mullick (one of the Defendants), *Appellant*,

versus

Gunga Dhur Banerjee (Plaintiff), *Respondent*.

Baboo Romanath Bose for Appellant.

Baboos Unnoda Pershad Banerjee and *Hem Chunder Banerjee* for Respondents.

In a suit for a kubooleut at enhanced rents, if the rents of the adjacent lands have already been adjusted and enhanced, the enhancement of the defendant's holding will depend on the rates paid by those adjacent lands supposing them to be of the same kind, and not on any doctrine of proportion which will only apply where no adjustment has taken place.

THIS was a suit for a kubooleut at enhanced rents. The defence was that the land was held at an uniform rate of rent from before the Permanent Settlement, and was not liable to enhancement.

The Deputy Collector decreed the plaintiff's suit, and fixed the rates of rent after enquiry into those paid for adjacent lands. But this enquiry did not satisfy the Judge, and the case was remanded in appeal on the tenant objecting to the principle on which the rates had been fixed.

The Deputy Collector made the further enquiry ordered, and again fixed the rates as before, and the Judge has confirmed his order.

It is now urged in special appeal—

(1) That the Judge has taken no notice of the plea of a 20 years' payment of unvarying rates of rent before the institution of the suit; and

(2) That, in settling the rate of rent, the decision of the Full Bench of this Court in the case of Thakooranee Dossee, June 1865, should have been followed.

With regard to the first objection, we observe that the point was not taken by the special appellant in his original appeal to the Judge. He came up on the question of rates only, and urged that the Deputy Collector had no right to alter a Collector's jummabundee, and that the report as to the rate was not evidence against him. He altogether gave up his claim to have held either directly from before the Perpetual Settlement, or to receive the benefit of that presumption from having paid an unvarying rate of rent for upwards of 20 years. It is contended, indeed, that the mention of the jummabundee, which was only a counterpart of the ancient rates, shows that special appellant took up the objection; but we find from the Judge's decision that the only point raised in connection with the jummabundee was that the landlord had no power to raise rates fixed by the Collector. There was no mention made of long payment at an unvarying rate, or any plea of non-liability to enhanced rates raised upon it.

With regard to the rates fixed, we observe, in the first place, that the Judge's decision was passed before the Full Bench judgment in the case of Thakooranee Dossee was published; but, even were the case otherwise, it is clear that the ruling laid down in that judgment cannot apply to the present case. Here we have it in evidence that the rents of the adjacent lands had already been adjusted and enhanced, so that the enhancement of the special appellant's holding would depend on the rates paid by those adjacent lands, supposing them to be of the same kind, and not on any doctrine of proportion, which would only apply to lands where enhancement was originally sought, and where there existed no data in adjacent lands for determining the proper rate of rent—in short, where no adjustment had taken place.

In no point of view, therefore, do we see ground for special appeal in this case, and we therefore reject the application with costs. The same order governs special appeal No. 2253.

The 10th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges*.

Rents of Ijara—Liability of purchaser placed in possession.

Case No. 396 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Assistant Collector of Komercolly, dated the 31st October 1865.

Rajah Indoo Bhoosun Deb Roy (Plaintiff), *Appellant*,

versus

Chunder Coomar Roy (Defendant), *Respondent*.

Baboos Unnoda Pershad Banerjee and *Dwarkanath Mitter* for Appellant.

Baboo Sreenath Dass for Respondent.

Suit laid at Rs. 19,783-11-4½.

The purchaser of an ijara who has been formally put into possession after a contest in the most regular

manner, whether he collects rents from the ryots or not, is liable to the zemindar for the rents of the ijara.

THE facts out of which this case arises are briefly these:—The plaintiff is zemindar of a share in Pergunnah Nasruthshahee, within which Messrs. Willis and Earle had the concern of Belnaberia and an ijara of certain mouzahs. Messrs. Willis and Earle failed, and the defendant purchased the said concern and the ijara. The plaintiff now sues the defendant for the rents of the said ijara for certain periods of the years 1270 and 1271, as having purchased the same, and as having been formally placed in possession of his purchase.

The Deputy Collector has dismissed the suit entirely, holding that the defendant is not shown to have collected the rents from the ryots, although he gave a receipt for possession, and that he was not really and practically in possession during any portion of 1270 or 1271.

We have heard both parties fully, and we are quite clear that the plaintiff is entitled to a decree of some kind. The defendant, after his purchase, obtained possession from the Collector in Aswin 1270, and lost the same again by a counter order from the Collector in Jyestho 1271, or May 1864. The plaintiff by that order was re-placed in possession, but lost the same again in consequence of an order from the Judge of the 28th of August 1864, corresponding with Bhadro 1271, after which the defendant continued in possession until the end of the Bengali year.

The question before us simply is, whether the defendant was in possession of the lease, in law, or in fact, for the two periods above mentioned of the years 1270 and 1271.

We have read the evidence which led the Deputy Collector to the conclusion that the defendant never was in possession, and never collected any rents, but we come thereon to an entirely different conclusion. Independently of the evidence of the plaintiff's witnesses to collections made on the part of the defendant, the evidence of Chunder Koomar Mojoomdar, a witness of the defendant, and a ryot on the ijara, clearly shows that the rent due from him to the defendant was treated as a set-off for the rent of other lands which he had to receive.

We, moreover, think it extremely improbable that a person possessed of the knowledge, power of management, influence, and resources of the defendant, would neglect to collect rents from a property of which he had been put formally in possession by the Revenue or Judicial Authorities, after a contest, in the most regular manner.

Against the above evidence, which leads to inferences in favor of the plaintiff, we cannot set any ineffective attempts to gain rents shown by cases instituted on the part of the plaintiff, but very soon struck off. And we observe that the plaintiff has deducted from his claim the rents which he was enabled to collect for the period of his temporary possession.

But we are prepared to go further, and to say that, in law, the defendant was in possession, was bound to collect, and had ample means for collecting, and that the plaintiff is not to suffer by any neglect on the defendant's part, even if we could be persuaded that he had never received any portion of the rents. Even without the evidence, we should be disposed to hold the defendant legally accountable to the plaintiff, under the circumstances of his purchase and his two successful applications for possession. The reasoning of the Deputy Collector on this part of the subject is based on a misapprehension of the rights and liabilities of the parties.

Under these circumstances, then, we give the plaintiff a decree for rents at the rate claimed by him, after his own deductions for the precise period extending from the 18th of Aswin 1270 to the end of Bysack 1271, and for the period extending from the 15th of Aswin 1271 to the end of Choitro in the same year. Interest is also decreed on the principal to be calculated as above. The claim for 3,936 rupees, as damages under Act VI. of 1862, Bengal Council, is not pressed, and is not given.

Costs to the plaintiff in proportion in both the Courts.

The 10th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Suit for kubooleut at enhanced rents—Plea of exemption—Issues for trial—Decree (to plaintiff).

Case No. 3382 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the Twenty-four Pergunnahs,

under Act X. of 1859, these pottahs have been pronounced to be genuine, and that, therefore, Section 2, Act VIII. of 1859, and the doctrine of *res adjudicata*, apply; *secondly*, that the Lower Court has overlooked the receipts of rent filed by the special appellant.

We entertain grave doubts whether the dictum of a Revenue Court under the provisions of Act X. with reference to the *bona fides* or otherwise of a pottah is in any way binding upon the Civil Court in a suit in which the *bona fides* of the pottah is put in issue. But in this case it is unnecessary for us to pronounce any opinion on that question, inasmuch as the decision of the Revenue Authorities shows that the *bona fides* of the pottah was not distinctly put in issue. The doctrine of *res adjudicata* is, therefore, wholly inapplicable.

We cannot say that the Lower Court did not consider the receipts filed by the special appellant. It is to be presumed that it did do so, inasmuch as the judgment is passed after review of the whole of the evidence, oral and documentary.

No point of law arising, we must dismiss this appeal with costs and interest.

The 11th April 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Dismissal of suit (Variance between allegation in plaint and proof no ground for)—Procedure.

Case No. 286 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of Chumparun, dated the 18th July 1865.

Maharajah Rajendur Kishore Sing (Plaintiff), *Appellant*,

versus

Karummun Sing and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Cally Prosonno Dutt* and *Moooshee Ameer Ali* for Appellant.

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Respondents.

A Court ought not to decide a case merely upon the ground of variance between the allegation in the plaint and the proof. Thus, if a plaintiff fails to prove a contract as alleged, the Court, instead of deciding that he cannot recover arrears on that contract, ought to find how much is due from defendant to plaintiff either for rent or interest and in respect of what premises.

THE Collector appears to have decided this case upon the ground of a variance between the allegation in the plaint and the proof. He says: "The plaintiff having failed "to prove the contract as alleged, he can-"not recover arrears on that contract." We think that the Collector ought not to have determined the case merely upon the ground of variance, but that he ought to have found how much was due from the defendant to the plaintiff, and also in respect of what premises, whether for the 21 mouzahs or the 24 mouzahs, or for how many. If, as appears from the judgment, he was satisfied that the contract included the 24 mouzahs, then he ought to have found what rent, if any, was due for those 24 mouzahs.

The case must go back to the Collector to try what amount is due from the defendant to the plaintiff either for rent or interest, and in respect of what premises.

We are informed that, since this decision of the Collector, there have been two decisions of the Civil Court. Whether the Collector is conclusively bound by those decisions, we do not at present determine, as our opinion will be extra-judicial.

The 13th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Rent—Kubooleut—Prima facie rent-free holding.

Case No. 78 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 14th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 3rd August 1865.

Nund Kishore Lal and others (Defendants), *Appellants.*

versus

Kureem Buksh Khan and others (Plaintiffs), *Respondents.*

Baboos Bama Churn Banerjee and *Upprokash Chunder Mookerjee* for Appellants.

Mr. R. E. Twidale for Respondents.

When there is a *primâ facie* rent-free holding, it must be set aside in some other suit before rent or a

kubooleut can be obtained under the provisions of Act X. of 1859.

THE Judge is clearly wrong. This was a suit for a kubooleut under Clause 1, Section 23, Act X. of 1859. The defendant has never held the position of a tenant of the plaintiff, but has for a long period held the land rent-free. There being a *primâ facie* rent-free holding, it must be set aside in some other suit before rent or a kubooleut can be obtained (Weekly Reporter, Volume I., pages 15 and 16, Mahomed Myanabool Huk, Plaintiff, Appellant, *versus* Mahomed Syud Khan, Defendant, Respondent, Trevor and Campbell, JJ., 10th August 1864). The present suit not being cognizable under Act X. of 1859, the appeal must be decreed, and the decision of the Judge reversed with costs bearing interest.

The 13th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Time for commencing suit against agent for fraudulent accounts.

Case No. 3229 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 29th April 1865.

Huree Mohun Goohoo and others (Plaintiffs), *Appellants,*

versus

Anund Chunder Mookerjee (Defendant), *Respondent.*

Baboos Otool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboos Kalee Mohun Doss, Nilmonee Sein, and *Kishen Dyal Roy* for Respondents.

Mode of computing the time for commencing a suit on the ground of fraud in the accounts of an agent under Section 33, Act X. of 1859.

SECTION 33 of Act X. of 1859 does not provide that an action, on the ground of fraud in the accounts of an Agent, should be brought within a year of the time when the accounts may be offered or produced or might have been taken over by the plaintiff, or within a year from any time at which, with proper diligence, it might be supposed that the plaintiff might have discovered the fraud complained of; but the law prescribes within a year from the time that the fraud comes to the knowledge of the plaintiff.

We, therefore, remand the case to the Lower Appellate Court to proceed to try the case with reference to the above remarks.

The 17th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Putnee Talook (Purchaser of—under Regulation VIII., 1819)—Right of Occupancy—Ejectment—Waivor.

Case No. 3375 of 1865.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 29th July 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th February 1865.

Woomanath Roy Chowdhry (Defendant), *Appellant,*

versus

Roghoonath Mitter (Plaintiff), *Respondent.*

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee* for Appellant.

Baboos Sreenath Doss and *Oopendur Chunder Bose* for Respondent.

The holder of a ryotee jote is protected by Section 6, Act X. of 1859, and has a clear right of occupancy against the purchaser of a putnee talook 15 years after his purchase.

Fifteen years' receipt of rent by the purchaser of a putnee talook sold for arrears of rent under Regulation VIII., 1819, held to be a waivor on his part of his right to evict the tenant under Clause 2, Section 11 of that Regulation.

THE defendant is the purchaser of a putnee talook brought to sale under the provisions of Regulation VIII. of 1819, and the plaintiff is an inferior holder whose jote or tenure in its entire terms has been declared not to be valid as against the right of the auction-purchaser by a decision of this Court, dated 30th July 1862. After the passing of this decree, the defendant in the present suit applied to the Collector under Section 25 of Act X. of 1859 in order to eject the plaintiff. This was granted on the ground that the plaintiff before us had not a right of occupancy as against the putnee talookdar, and the tenant now sues for possession of the jote or tenure, he not being liable to eviction from it, but only to an enhancement of the rent on it.

Marshall's Report 43.

The Lower Appellate Court found that the holding of the plaintiff was a ryotee holding, and that he, under Section 6 of Act X. of 1859, was entitled to a right of occupancy; that the eviction, therefore, under Section 25 of Act X. of 1859 was illegal, and that plaintiff was entitled to possession of his ryotee holding, though the auction-purchaser was at liberty to enhance his rent on any of the grounds stated in Act X. of 1859.

Defendant now appeals specially, urging that, under the decision of the High Court, dated 30th July 1862, he was entitled to evict the plaintiff from his tenure, and that the finding of the Judge that he is a ryot is erroneous, looking to the terms of the lease of 1844 propounded by him.

This Court in its decision of July 1862, as interpreted by itself on an application for review of judgment, merely held that, under Section 11 of Regulation VIII. of 1819, the holding of the plaintiff in this case, which the Court considered an intermediate tenure, could not stand as against defendant, an auction-purchaser; but it left the question as to whether the defendant could evict him, or simply enhance his rent entirely undecided, and that is the point which is in dispute in the present case.

We think it unnecessary in special appeal to determine whether the plaintiff's holding is a ryotee jote or an intermediate tenure, for, whether it be one or the other, we think he is not liable to eviction, but only to enhancement of rent. If it be the former, as defendant's purchase took place in 1246 B. E., he is now protected by Section 6 of Act X. of 1859, and has a clear right of occupancy as against the defendant. If, however, it be an intermediate tenure, then, considering that defendant purchased in 1246, B. E., that for 15 years he without objection received rents from the plaintiff at the old rates, and has subsequently only endeavoured to enhance the rate of rent to be paid by him, we think that, on the principle laid down by the Privy Council in the case of Ranee Surnomoyee *versus* Maharajah Sutesh Chunder Roy Bahadoor, he must be considered to have waived any right which he may have had under Clause 2, Section 11 of Regulation VIII. of 1819, to eject the plaintiff at the time of the purchase by him of the putnee talook. It is true that the case before the Privy Council refers to a sale for arrears of revenue under Regulation XLIV. of 1793, and the present to a sale for arrears of rent due by a putneedar under Regulation VIII. of 1819, but the principle involved in both cases is the same. In both laws, leases created by the out-going zemindar or putneedar stand cancelled or are to be considered cancelled from the date of sale; that is, those leases are voidable in both cases equally; but, besides this, the words of the two laws, to use the language of the Privy Council, seem to point to something to be done on change of ownership, not to something to be done after an indefinite lapse of time; and consequently, if the purchaser does not exercise the power of eviction which he undoubtedly has under Clause 2 of Section 11 of Regulation VIII. of 1819 within a reasonable time, but allows the tenant to continue in possession, we must, with the Privy Council in the analogous case, consider that he has acquiesced in that possession and waived his right to evict the tenant, and he can only enhance the rents of the tenures if they be liable to enhancement under the law in force. Under this view, we reject the special appeal with costs.

Sevestre's Reports, page 360, Volume VIII.

The 18th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Onus probandi—Amount of deductions claimed by defendant—Right of appeal—Dismissal for plaintiff's default as a witness—Settlement of issues—Admission by defendant.

Case No. 410 of 1865 under Act X. of 1859.

Regular Appeal from a decision passed by the Officiating Collector of Purneah, dated the 20th September 1865.

Lekhraj Roy and others (Plaintiffs), *Appellants,*

versus

Mr. W. Buckland (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Dwarkanath Mitter* for Appellants.

Mr. R. T. Allan for Respondent.

Suit laid at Rupees 10,557-15-3.

Where a defendant does not allege the plaintiff's knowledge as to the amount of deductions claimed by the defendant, and the plaintiff sufficiently admits the class and description of the deductions, the plaintiff need not be summoned under Section 64, Act X. of 1859, but the *onus* is on the defendant to prove the amount.

The right of appeal is not lost to a plaintiff whose suit is dismissed for default by reason of non-appearance as a witness, or when the appellant wants to prove that he should not have been summoned at all.

The prohibition under Section 64 against appeals from decisions of dismissal for default applies only to cases of dismissal before the settlement of issues.

In a case of default where a defendant admits liability, the case should not be dismissed, but should be decided according to the defendant's admission.

THE Court below first dismissed the case of the plaintiff, appellant, on the ground that his agent, when examined, was found not to be cognizant of all the necessary facts. It quoted Section 35 of Act X. of 1859 as authority for its so doing.

This decision was set aside by the High Court, and the case was remanded on the 19th April 1864, with the order that the Court below should, if necessary, summon the plaintiff under Section 64 of the same law.

After remand, the plaintiff was summoned by the Court below under Section 64 of Act X. of 1859, because the defendant represented by a petition, dated 10th of June 1864, that his lease contained conditions allowing the deductions claimed by defendant, and because the defendant had deposed on oath that this lease was given to him by the plaintiff in the presence of a third person (Bedford) now dead.

We may remark that this pottah was stated by the defendant to have been returned to the plaintiff with a view to a copy being retained in the plaintiff's office, but that neither that paper nor the kubooleut was forthcoming, plaintiff alleging that both of them were lost.

We remark that the defendant has not stated anything to shew the appellant's knowledge of the existence of the *amount* of these deductions, but simply that he (plaintiff) was aware of the right of the defendant to claim deductions of the *class and description* which defendant did claim. The Court below having, on the non-appearance of the plaintiff, proceeded against him under the Penal Code, he appealed to the High Court, and this Court, by its order dated 27th of June 1865, quashed all the irregular proceedings of the Lower Court, and directed it to proceed according to law, leaving each party the option of summoning his adversary as his witness, and stating that it did not intend to restrict the powers of the Lower Court to summon the plaintiff (if necessary) under Section 64 of Act X. of 1859.

The plaintiff then filed a petition, dated 31st of August 1865, stating that, though he was not legally bound to admit the right of the defendant to the *class* of deductions claimed by him, because the deductions were chiefly for losses incurred by the defendant from the neglect of his own agents, still he would allow them, on the amount in detail being duly proved and attested on oath.

The Court below, notwithstanding this admission, issued an order for the examination of the plaintiff. The examination was to be by a commission, if plaintiff could prove that he was sick, as his agent had alleged. But eventually, for want of proof of this alleged sickness, the Lower Court ordered plaintiff to appear in person.

As one ground for this order, the Court below remarked that the admission made by the plaintiff was insufficient without his personal appearance, as the amounts of the deductions claimed by defendant were still *unadjusted.* Now, we think that, as the defendant had never set forth the appellant's knowledge of the *amount* of the deductions,

and as the appellant had sufficiently admitted that deductions of a certain *class and description* would be made, it was for the defendant, who had made the outlay on account of which the deductions were claimed by him, to prove the *amounts*. The insisting upon the examination of the plaintiff for that purpose was, in our view, under the circumstances above stated, quite unreasonable.

As to the argument that the order passed under Section 64 of Act X. of 1859 against the plaintiff, on default, is not open to appeal, and that he could only apply for a re-hearing under Section 58 of the Code, we think it untenable. The plaintiff in this case appeals, not to show that he was *absent* and *could not* attend, but to show that he should not have been summoned at all to appear personally, as under the law he had no personal knowledge of the points to be adjusted, as to the *amounts* to be deducted. Further, when the petition alluded to above, admitting the right of defendant to deductions of a certain class, was filed by the appellant, the Court should not have exercised its discretion, as it did, unjudicially.

We think with the plaintiff that, with reference to Section 58, he cannot in this case be deprived of his rights to show that the proceedings of the Court below were arbitrary and improper. If the plaintiff had applied below under Section 58 as a mere matter of form, and his application had been refused, he would certainly have had a right to prefer an appeal to this Court.

The prohibition to hear appeals against decisions on default appears, further, to us to apply only to cases of dismissal made *before* issues are fixed, and not to orders passed *after* evidence has been put in on both sides.

It is also clear that Section 64 could only apply to an earlier stage, *viz.*, before issues are fixed, and was not intended to apply to the summoning of a plaintiff at the advanced stage in which the plaintiff in this case was snmmoned by the Court below.

The real character in which the plaintiff was summoned was that of a *witness*, and, had he not been so considered, the Court below would not have ordered at one time that he should, under certain conditions, be examined by commission. It has often been ruled in civil cases that, when a case is decided against a party for his non-appearance as a witness, the right of appeal is not lost to the said party, and it is not denied that Act VIII. is applicable on these points to suits under Act X. of 1859.

We, therefore, hold that, on more than one ground, the plaintiff has a right to appeal to us. Even if the plaintiff had been legally summoned under Section 64, we hold that the dismissal by the Court below of the entire case was not a just and proper exercise of its discretion.

When a defendant admits a liability and the plaintiff commits default, it is not fair to dismiss his *whole* case. It is upon this principle that, for cases coming under Section 55 of Act X. of 1859 and Section 114, Act VIII. of the same year, it is enacted that, when for any obstinate resistance to appear, it is necessary to *punish* a party, it is also provided that, when the defendant may have admitted his own liability, the entire claim of the plaintiff in suit *cannot* be dismissed, but the case should be decided according to the admission of the defendant. This case is one in which the above principle most fully applies.

We find that, even afer allowing the deductions claimed by the defendant, without requiring him (defendant) to prove the alleged amounts or the collateral facts connected with them, a balance would still remain due to the plaintiff.

But, as a matter of law, we hold that, after the plaintiff had admitted the right of the defendant to the *class* of deductions claimed, there was no further necessity for plaintiff to be summoned under Section 64 of Act X. of 1859, as before observed. There was nothing on the record to justify the proceeding taken against the plaintiff in the case.

It was for the defendant to depose to the truth of the particulars of the *amounts* of his demand of deductions. The plaintiff was not required at all to appear for that purpose. The plaintiff could not properly be so called on to prove the case of his opponent as to the details of amounts of which he was ignorant, and the knowledge and *onus* as to which lay solely and clearly on defendant.

We, accordingly, reverse the order of the Lower Court, and remand the case in order that the defendant may be called on to prove the amount of the deductions claimed by him. The plaintiff will then get a decree for the balance, if any, found due to him.

Remand accordingly.

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The 19th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Appeal—Suit for rent below 100 rupees.

Case No. 134 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 5th December 1865, reversing a decision passed by the Deputy Collector of that District, dated the 29th August 1865.

Issur Dutt Chobey (Defendant), *Appellant,*

versus

Mr. James Beckwith (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Mr. R. T. Allan for Respondent.

In a suit for rent below 100 rupees involving no question of the right to enhance or otherwise vary the jumma of the tenant, the appeal lies, not to the Judge, but to the Collector, under Section 155, Act X. of 1859.

THIS was a suit for arrears of rent under the provisions of Clause 4, Section 23, Act X. of 1859. The amount involved in this suit is Rupees 36-15.

No question of the right to enhance or otherwise vary the jumma of the tenant was raised in this suit. The appeal, therefore, did not lie to the Judge, but to the Collector, under Section 155 of Act X. of 1859.

The decision of the Judge, being without jurisdiction, is reversed, and that of the Deputy Collector restored. If in time, the special appellant may appeal to the Collector.

The appeal is decreed with costs and interest.

The 20th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Jurisdiction—Distraint—Damages.

Case No. 139 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 10th November 1865, reversing a decision passed by the Deputy Collector of that District, dated the 23rd December 1864.

Shaikh Rowshun and others (Plaintiffs), *Appellants,*

versus

Bholanath Doss (Defendant), *Respondent.*

Mr. J. S. Rochfort for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Where a distrainer acts without the authority of the superior holder, Section 143, Act X. of 1859, will not apply, but the acts of the distrainer are those of a trespasser for which he may be sued for damages in the Civil Court.

Nor will Act X. apply in a case where the distrainer is the agent of a person between whom and the defaulting tenant the relation of landlord and tenant does not subsist.

WE think that the Judge's view of the case is correct.

If the superior holder be Bungshee Buddun Day, as contended by the special appellant, then the provisions of Section 143, Act X. of 1859, will not apply, inasmuch as the distrainer Bholanath does not profess to have been empowered by Bungshee Buddun to distrain, and his acts, if wrongful, were the acts of a trespasser, for which he may or may not be liable for damages in a suit in the Civil Court.

If, on the other hand, as is contended by the special respondent, Bholanath is the agent of Kalee Koomar, then the relation of landlord and tenant not subsisting between the special appellant and Kalee Koomar, the provisions of Act X., which Act contemplates such relationship, will not apply at all, and the suit for damages must be brought in the Civil Court.

The appeal is dismissed with costs and interest.

The 24th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Right of suit (by co-sharer for his share of rent).

Case No. 2896 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 2nd August 1865, affirming a decision passed by Mr. T. T. Allen, Deputy Collector of that District, dated the 25th May 1865.

Ramjoy Singh (Plaintiff), *Appellant,*

versus

Nagur Gazee and others (Defendants), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

No one for Respondents.

A plaintiff, who, with his co-sharers, has given a joint lease to the defendant, is not competent to sue alone for his undivided share of the rent.

We are of opinion that the decision of the Lower Appellate Court is correct and ought to be affirmed. There is a decision, it is true, of this Court (Volume 1, Weekly Reporter, page 253) which rules that an action by one of several co-sharers for his portion of the rent will lie. We do not concur in that opinion, and we find that the decision of the Lower Appellate Court is in accordance with an earlier precedent of the late Sudder Court which is reported at page 4 of the Decisions of 1861 (Biroja Moyee Brahmomyee, Appellant). In that case it was held that a plaintiff, who, with her co-sharers, gave a joint lease to the defendant, was not competent to sue alone for her undivided share of the rent.

We think that that decision is correct in principle, and we, therefore, dismiss this special appeal, but without costs, no one having appeared for the respondent.

We may add that the defendant undertook to pay to the zemindars jointly—to make one payment and not several, and ought not to be harassed by several proceedings on account of the same rent.

The 24th April 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Property injured by illegal distraint—Damages.

Case No. 2717 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. E. G. Birch, Judge of Shahabad, dated the 8th August 1865, reversing a decision of the Deputy Collector of Arrah, dated the 27th April 1865.

Nonkoo Ram and another (Defendants), *Appellants,*

versus

Woojogur Roy and others (Plaintiffs), *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Where a suit has been brought, under Section 142, Act X. of 1859, on account of property damaged or destroyed by neglect of a distrainer, the Court is not competent to award damages for vexatious distraint. Such damages are properly awarded by the Collector under Section 138 in a suit to contest the distrainer's demand.

It appears to us that the judgment of the Lower Appellate Court is defective and erroneous. Plaintiff sued for damages done to his crop while it was under distraint at the suit of the defendant, such distraint having been previously declared by a decision of the Deputy Collector to have been illegal. Such a suit would lie, and damages might be awarded under Section 142 of Act X. of 1859. The Judge in his decision states: "Throughout it is clear that the defendants acted illegally in distraining the plaintiff's crop;" and then he goes on: "After consideration of the evidence on the record, I think that justice will be done if I award 200 rupees as damages."

From that it is clear that the Judge has awarded damages to the plaintiff on account of the defendant having illegally distrained his crop. Now, that was not the ground of the plaintiff's suit; and, if the plaintiff had any complaint upon that point, the time to award damages for such an injury was under Section 138, Act X., when the Deputy Collector directed the release of the distrained property, and not in the present suit.

It appears to us that the Judge ought to have distinctly enquired and found whether the defendant was liable to pay the plaintiff damages on account of any injury to the distrained property as described in Section 142. The suit will, therefore, be remanded to him in order that he may enquire and pass a decision on that point.

The 24th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Onus probandi—Plea of tender of payment—Interest.

Case No. 2636 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 24th August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 30th May 1865.

Ranee Shurut Soonduree Debia (Plaintiff), *Appellant,*

versus

The Collector of Mymensing, on behalf of Soorjokant Acharjee Chowdhry, minor (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Jugodanund Mookerjee for Respondent.

When a debtor pleads tender of payment as a ground for not being saddled with interest, the *onus* is on him to prove that he made such tender.

PLAINTIFF sued the defendant for the rents of 1271 from Bysack to Magh, claiming 2,256 rupees as principal, and 101 rupees as interest.

The defendant admitted the correctness of the claim, but pleaded tender of payment as a ground for the refusal, by the Court, of interest to the plaintiff.

The first Court remarks: "The difference is about interest. I could see my way much more clearly if plaintiff would produce any one to swear to the truth of the fact that no tender had been made, for I could then have decreed the case with costs and interest."

Plaintiff then appealed, urging that interest should be given to her. The Judge remarks that "had plaintiff applied to the Collector, he would certainly have got this arrear when due, if no denial was offered. The Courts are not bound to decree interest, and I decline to interfere."

Plaintiff now appeals specially, urging that when tender of payment was asserted by defendant as a ground for not being saddled with interest, it was for him, the debtor, to prove that he had made the tender; and in the absence of proof of tender, even if in all cases interest need not be awarded, still in such a case it should have been granted.

On perusing the judgments both of the Deputy Collector and the Judge, we have been struck with the careless mode in which the case has been decided. The Judge, moreover, with his judicial experience, should have known that it was for a debtor to pay his debts due at a fixed time, not for a creditor to seek payment; and that, when a debtor pleads tender of payment as a ground for not being saddled with interest, it is for him to prove such tender.

In the present case, the Collector, as agent of the Court of Wards, has made no attempt to prove the tender of payment; and he, therefore, is justly liable, on his own pleading, to pay that which, by a special plea which he has not proved, he attempted to avoid. Under this view of the circumstances, we think the law of the Judge altogether wrong, and that he was bound in law to decree to plaintiff interest. We, therefore, reverse the Judge's order, and decree to plaintiff interest on his claim with costs.

The 24th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement—Presumption of uniform payment of rent from Permanent Settlement—Onus probandi—Twenty years' payment of rent.

Case No. 3227 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 15th July 1865, reversing a decision passed by the Deputy Collector of that District, dated the 27th March 1865.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Bissambhur Mookerjee and others (Defendants), *Respondents.*

The Appellant present in person.

Baboo Taracknath Sein for Respondents.

Twenty years' payment of rent previous to suit must be proved by the ryot and clearly found by the Court before the ryot can have the benefit of the presumption contemplated by Section 4, Act X. of 1859.

THE Lower Appellate Court has decided the case with reference to Section 4, Act X. of 1859. But we do not find any such clear finding by the Lower Appellate Court of proof of the ryot having paid an uniform rate of rent *twenty years before suit*, as is required by law, so as to give the ryot the benefits of the presumption contemplated in Section 4, Act X. of 1859.

It is true that there are dakhilahs and pottahs of 1173-77, and 1181-1248 and 1254. But the rule of law is very clear, *viz.*, that uniform payment of rent 20 years previous to suit must be proved by the ryot, and found clearly by the Court before the ryot can have the benefit of that Section.

Now, it is under *that Section* that the Lower Appellate Court has decided this case; and therefore the decision, in order to be correct under that Section (4), ought to have been accompanied, by that with which it is not here accompanied, *viz.*, a clear finding that the ryot has proved an uniform payment of rent for 20 years *previous to suit*. If, on remand that be found, the ryot is entitled to the presumption of that Section unless the presumption be rebutted by the opposite party proving that the rent has varied after the Permanent Settlement.

We do not by this order preclude the Lower Appellate Court from finding (if the evidence should admit of it) that the tenure is proved, by evidence independent of that referred to in Section 4, Act X. of 1859, to be one protected from enhancement as existing before the Permanent Settlement.

We, accordingly, reverse the present order of the Lower Appellate Court, and remand the case to be re-tried with reference to the above remarks.

The 25th April 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Enhancement—Clause 1, Section 17, Act X. of 1859.

Case No. 203 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 4th November 1865, reversing a decision passed by the Deputy Collector of that District, dated the 28th July 1865.

Syud Sudurooddeen Mutwalee (Plaintiff), *Appellant,*

versus

Bhetoo Pulee and others (Defendants), *Respondents.*

Baboo Mohendro Lall Seal for Appellant.

No one for Respondents.

Under Clause 1, Section 17, Act X. of 1859, the enhancement of rent is not restricted to the rates of the pergunnah or of the village, but is to be according to the rates prevailing in the places adjacent.

THIS is a suit for a *kubooleut* at an enhanced rate of rent. The Lower Court has dismissed the case on the ground that it is not proved that there is any *nerick* of the pergunnah, or any fixed rate in the village in which the lands are situated.

We think this decision is wrong, and that the case must be remanded. Under Clause 1 of Section 17 of Act X. of 1859, the plaintiff is entitled to enhanced rent if the rate of rent paid by the defendants "is "below the prevailing rate payable by the "same class of ryots for lands of a similar "description and with similar advantages "in the places adjacent." There is no restriction as to the rates of the pergunnah or rates of the village; and the Court must look to the rates prevailing in the *places adjacent.*

The case is remanded accordingly to the Judge.

The 28th April 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover,

Judges.

Sale (in execution of decree in favor of shares in a Gantee tenure).

Case No. 3373 of 1865.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 21st July 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 28th April 1865.

Meetoonjoy Chowdhry (Plaintiff), *Appellant,*

versus

Khettur Nath Roy and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Unookool Chunder Mookerjee* for Appellant.

Baboo Otool Chunder Mookerjee for Respondents.

Where a decree-holder is only a sharer in a joint undivided estate, and the property sold is a share in a gantee tenure, the sale did not take place under Section 105, Act X. of 1859, but under Section 108, under which latter Section only the rights and interests of a defaulter can pass.

THIS was a suit to cancel a farming lease and to obtain khas possession of an 8 annas share of a gantee tenure comprising the villages of Sumta Deolee and Kamooa Chundee.

The ganteedar, it appears, fell into arrears, and his tenure is alleged to have been sold for those arrears under Section 105, Act X. of 1859. The plaintiff was the purchaser at the sale in execution, and, shortly after his purchase, sued some of the ryots on the estate for rent. He was opposed by the defendant in this suit, who intervened under Section 77 of Act X. of 1859, on the ground that he held a lease of the property from the defaulting ganteedar, and had always, from the date of his ijara, received and enjoyed the rents. The auction-purchaser was thrown out on this issue, and brings this suit to establish his right and to recover khas possession of his purchase from the ijaradar, on the ground that the sale under Act X., Section 105, gave him the property free of the defendant's incumbrance.

The defence was that, under the sale, only the rights and interests of the defaulting ganteedar passed, and that the auction-purchaser was bound by the acts of the former ganteedar.

The Court of first instance gave the plaintiff khas possession on the ground that the ijara was a collusive transaction; but the Judge, on appeal, took the opposite view, and dismissed the suit. Both Courts, however, agreed that the tenure itself was not sold, but only the ganteedar's rights and interests in it.

It is now urged before us specially that, the sale having taken place under Section 105 of Act X., the tenure itself passed, and not merely the defaulter's rights and interests; that the special respondent is a middle-man only, and has no claim to retain possession of the land.

Without going into the question as to whether the ijara lease was collusive or not, we have no doubt that this special appeal must be dismissed on other grounds. The original decree-holder was a shareholder only in the estate, and the property bought by the special appellant at the sale in execution was an 8 annas share of the gantee tenure. This being so, it is clear that the sale did not take place under Section 105 of the Act above quoted, but under Section 108; and under that Section only the rights and interests of a defaulter can pass. We observe, moreover, that the sale-certificate expressly mentions that these rights and interests only were to be sold; and that this was the decree-holder's view is clear from the fact that he carried out the provisions of Section 108 by selling the moveable property of the judgment-debtor before proceeding against the tenure.

The special appellant's pleader is not able to contest the fact that the original decree-holder was a sharer only in the estate, or that his client has bought anything more than a share in the gantee tenure; and we, therefore, hold that only the rights and interests of the defaulter were bought by the special appellant at the auction-sale, and that the special appellant cannot have khas possession of the land.

The special appeal is dismissed with costs.

The 28th April 1866.

Present:

The Hon'ble H. V. Bayley and Sumbhoonath Pundit, *Judges.*

Jurisdiction—Suit against creditor upon lease—Breach of contract—Redemption of property—Mesne-profits.

Case No. 3313 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 15th August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 28th April 1865.

Radha Kishore Sircar and others (Plaintiffs), *Appellants,*

versus

Jugurnath Roy Chowdhry and others (Defendants), *Respondents.*

Baboos Nuleet Chunder Sein and *Nil Monee Sein* for Appellants.

Baboo Onoocool Chunder Mookerjee for Respondents.

A granted a lease to *B* towards liquidation of his debts to *B*, on condition that *B* would pay *A's* rents to his landlord. On *B's* failure, *A* was obliged to pay the rents to the landlord, and now sues *B* for the rents so paid. HELD that such a suit would not lie in the Revenue Courts; but that *A's* remedy was by suit in the Civil Court, either for breach of contract or for redemption of his property after the liquidation of his debts, and also for mesne-profits if *B* has collected more than his dues.

THE special appellant cannot sue his creditor in the Revenue Courts as if for rents of a lease which was granted by him to the said creditor in the name of a third party for the payments of the debts of the special appellant. In this transaction it was also agreed that, out of the said rents fixed for the lease, the rents due to the landlord of the special appellant are to be paid by the creditor. The creditor having, however, failed to pay this rent, and thus having appropriated the entire rents of the lease and so failed in his contract, the special appellant, who was obliged to pay to his landlord, sued his creditor for these rents like an ordinary landlord in the Revenue Court.

The Lower Appellate Court holds that the action cannot lie in such a Court.

We agree with the Lower Appellate Court.

The special appellant is not without remedy. He may either sue for breach of contract in the Civil Court, or ask for redemption of his property when he sees that the creditor has paid himself all his dues; and, if he is found to have taken more than his dues, the special appellant may also sue for mesne-profits, if so advised.

We reject this special appeal with costs.

The 28th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Evidence (Production of—dependent on issues, and not pleadings)—Onus probandi (Suit to set aside sub-tenure on specific allegations of its temporary and extraordinary character, and of the absconding of the original holder).

Case No. 3101 of 1865.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 19th August 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 1st December 1864.

Huro Soonduree Debia and others (Defendants), *Appellants,*

versus

Ameena Begum (Plaintiff), *Respondent.*

Baboo Dwarkanath Mitter for Appellants.

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Respondent.

The issues fixed by the Court, and not the pleadings, ought to be the guide to the parties as to production of evidence.

In a suit to set aside a Neem Ousut Howalah sub-tenure, on the specific allegations of the temporary and extraordinary (*i. e.*, non-transferable) character of the tenure, where the defendant is in possession under a decision of the Revenue Courts passed under Clause 6, Section 23, Act X. of 1859, the *onus* is on the plaintiff to prove his specific allegation.

IN this case defendant is special appellant.

Plaintiff sued, as a purchaser of the rights of the superior landlord, to set aside an

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Ousut Neem Howalah sub-tenure claimed by defendant as purchased by her (defendant) from certain parties named Anund and Gooroo Doss; the last-named having (as it was alleged by defendant) purchased from Gholam Hossein, the original holder of the Neem Ousut Talook in dispute.

The plaintiff's allegations were :—

I. That the Neem Ousut in dispute was *not* of the ordinary character of these tenures, that is, permanent, and so transferable according to the custom of the country, but for a term of years, and so not transferable.

II. That Gholam Hossein had absconded, and consequently plaintiff, after his purchase in 1250, in 1255 took khas possession of it.

III. That, although defendant had got from the Revenue Court an order for possession under Clause 6, Section 23, Act X. of 1859, still that gave him no title, and the title was in plaintiff under the allegations above set forth; and hence plaintiff's suit.

Defendant denied these allegations, and pleaded her own and her vendor's title by purchase and the transferable character of the tenure as an ordinary permanent Neem Ousut Howalah transferable according to the custom of the country.

The first Court held that, as defendant was shewn, by the proceedings in the Act X. case above referred to, to be in rightful possession, no decree could be given for plaintiff in the Civil Court, but that the plaintiff must proceed in the Revenue Courts under Clause 5, Section 23, Act X. of 1859. None of the plaintiff's specific allegations were gone into, and the only issues fixed had reference (as far as we can understand them at all) to the sufficiency or otherwise of the allegations contradicting the allegations and facts upon which the defendant had been put in possession by the Revenue Courts under Clause 6, Section 23, Act X. of 1859. The first Court accordingly dismissed plaintiff's suit entirely, and plaintiff appealed.

The Judge on this appeal has held that the first Court had wrongly supposed that the Civil Courts should not try the case; that it was one of title, and should be tried by them; and the Judge then recorded: "As all the evidence the parties have to offer is with the record, I will now proceed to try the case upon its merits."

The Judge then, viewing the plaintiff as admittedly the superior landlord, as he was, considered that it was for the defendant alleging a sub-tenure to prove her (defendant's) right to such sub-tenure.

The Judge next held that the purchases of defendant and of defendant's vendor were not satisfactorily proved.

The Judge admits that certain chittahs of 1255 produced by defendant shew defendant's possession, but that they do not prove her title.

Upon this view of the defendant's case the Judge decreed plaintiff's suit.

Defendant appeals specially, urging two grounds :—

I. That, as the first Court nowhere laid down clear and proper issues, as it was bound by law to do, indicating in a sufficiently distinct manner what the parties were respectively to prove, the defendant had no right opportunity to put in all the evidence of her title and her vendor's title that she otherwise might and ought to have had.

II. That, as plaintiff's case was that this was an exceptional Neem Ousut Howalah, not transferable as such tenures ordinarily are, but temporary, and that it had lapsed by the absconding of Gholam Hossein, the plaintiff should have been called upon, under the legal rules of pleading, first to prove these allegations before the defendant in possession, under the order of a Revenue Court, should have had to prove her title in this case.

We consider both these objections valid. We certainly think the ambiguously vague issues of the first Court to be in no way sufficient to indicate that under them the parties were to prove their respective titles and specific allegations on the merits. The issues were, in fact, more indicative of the view of the first Court itself, that it could not try the case in the face of the decision of the Revenue Court under Clause 6, Section 23, Act X. of 1859. Indeed, the first Court in terms so decides, and referred the plaintiff to proceedings under Clause 5, Section 23, Act X. of 1859. It is no valid plea to state that defendant might have found out what she had to prove or disprove from the pleadings. The law directs the issues to be the guide to the parties as to production of evidence, and not the pleadings. In this state of things, we cannot concur with the Judge in saying that "all the evidence which the parties have to offer is with the record."

Moreover, we think on the second plea that, as the plaintiff made specific allegations of the exceptional character of this particular Neem Ousut Howalah, and as the defendant was in possession under orders

of the Revenue Courts passed under Clause 6, Section 23, Act X. of 1859, it was for plaintiff first to prove at least the specific allegation of the temporary and extraordinary character of the tenure and of the absconding of Gholam Hossein, which, plaintiff says, led to the lapse of the tenure.

We, accordingly, reverse the order of the Lower Appellate Court, and remand the case, directing that it be remitted to the first Court to fix the proper issues, and to require first from plaintiff proof of the two special and specific allegations made by him, on which he claims title in this suit, and then to proceed to re-try the case, and pass such decision as it may think just and proper. Costs to follow eventual result of the litigation.

Remand accordingly.

The 7th April 1866.

Present:

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Lease—Damages—Contract—Construction.

Application for Review of Judgment in Regular Appeal No. 328 of 1864 under Act X. of 1859.

Nawab Nazir Siddi Nazir Ali Khan, *Petitioner,*

versus

Bharut Chunder Roy, *Opposite Party.*

Messrs. R. V. Doyne and *G. C. Paul,* and *Baboo Ashootosh Dhur* for Petitioner.

Mr. J. S. Rochfort and *Baboos Onoocool Chunder Mookerjee, Unnoda Persad Banerjee,* and *Chunder Madhub Ghose* for Opposite Party.

The defendant held under a lease made in 1851 which provided that he should pay rent for certain lands "after holding them rent-free for a period of 12 years from 1852 to 1862;" the payment of rent to commence in 1863. Being in possession, he was sued for the rent for 1863.

HELD *by Campbell, J.,* that, in a suit for rent for 1863, the defendant might plead that he had not had 12 years' rent-free possession.

HELD *contra by Macpherson, J.,* that the defendant was liable for the rent of 1863, and that, if he had been out of possession during any part of the 12 years from 1852 to 1862, his remedy was by way of a suit for damages against his lessor or those who dispossessed him.

See this case reported 2 W. R., Act X. Rulings, p. 78.

Campbell, J.—THIS is an application for a review of judgment on the ground of misconstruction of the principal document, and also on this, that the defendant, having already obtained possession of the lands with wasilat and damages, cannot now set up any claim which was covered by his previous decree.

It seems to me that, in dealing with this case in this Court, we must proceed upon principles of the broadest equity, and that we are not bound by any specific rules regarding the construction or reformation of the document, for this reason, that there is, in fact, no system of law which we can take for our standard in strictly adjudicating a matter of this nature. I should, therefore, be very slow to admit any technical plea regarding the form, the effect of which would be that, whereas the plaintiff might obtain a decree against the defendant, the defendant might also, in another suit, obtain a decree against the plaintiff for the very same sum as damages, being that which he was forced to pay as rent for land producing nothing in consequence of the wrongful acts of the plaintiff Nazir Ali.

It also appears to me that, in the former suit, the question now in issue in this suit was not really put in issue and adjudicated. It is clear that the plaintiff, although he may have used the word "damages," gave particulars of his claim, and that in that suit he claimed only wasilat in respect of nett collections from the cultivated land, and not damages consequent upon the breach of contract respecting the jungle-land: especially he did not claim any specific damages on account of non-fulfilment of the terms of the contract in consequence of which he would be forced to pay rent for jungle-lands which he was prevented from bringing into cultivation.

Nor do I think, upon equitable grounds, that the plaintiff can be allowed so far to take advantage of his own wrong as to say, "I have in part broken the contract, therefore I will be rid of the whole." If the plaintiff's contention were to prevail, it seems to me that, practically, this would be the result, since plaintiff seeks to saddle the defendant with the enormous rent of 22,000 rupees per annum, which probably he would be unable to pay, having been deprived of the opportunity of bringing the land into cultivation. A decree for such a sum would

deprive him of the benefit of the decree for possession which he has already obtained, and utterly ruin him.

Looking, then, to the broad equity of the matter, I come now to the consideration of the contract between the two parties. It was a contract under which defendant was to obtain possession of certain uncultivated lands which he was to hold for 12 years rent-free, and after the 12 years had expired he was to pay rent for the whole area at the rate of 10 annas per beegah. The date during which the defendant was to hold rent-free was no doubt specified, but I consider whether, under the circumstances that it is now impossible literally to carry out the provisions of the contract, it is most in accordance with the spirit and essence of the contract that the provision for the 12 years' holding should be enforced, or whether the defendant should be treated as entitled to hold for certain particular years only, most of which had already passed before quiet possession was given. It appears to me that, taking this view of the case, the real essence of the contract was a 12 years' holding rent-free. A conditional contract of this kind is one, the character of which does not depend on years or dates, and the principles governing it would be the same whether it were made in 1790 or in 1860, namely that the party who leases uncultivated jungle-lands not yielding immediate profits should hold them for a certain number of years free of rent, to enable him to bring them under cultivation, and pay rent for them after the expiry of that period.

It does not appear to me that the spirit or essence of the contract in any way depended on particular dates, and in this dilemma, when the Court cannot enforce the contract literally, it should enforce it in the manner most in accordance with the intention and meaning of the parties at the time of making it.

I would consider the contract as a kind of contingent contract; that, in fact, the defendant contracted with plaintiff to this effect: "Provided you give me the land rent-free for 12 years from 1258 to 1269, I will pay rent in 1270." If, then, it is the case that the plaintiff did not, according to his part of the contract, give up the lands from 1259 to 1269, then the defendant cannot equitably be held to be bound to perform his counter-contract to pay rent in 1270.

We have not, in our judgment in this case, gone minutely into the question as to how far the plaintiff and how far the defendant was to blame for the long delay which occurred with respect to defendant's getting possession of the land; but I notice that the original 12 years did not expire till 1269, the year immediately previous to the suit for rent; and as it appears on the face of the proceedings that the plaintiff kept the defendant out of possession during a part of the 12 years at least, I do not think it necessary to consider how long the plaintiff kept defendant out of possession, and how far our judgment might have been affected by defendant's own *latches*, in respect to a portion of the time, as condoning the conduct of the plaintiff in not giving him possession. It is enough that, through the resistance of the plaintiff, the defendant has not yet had possession for 12 years. That being so, it seems to me that our judgment passed on the 16th of March 1865 was correct, and that, plaintiff not having fulfilled his contract in giving 12 years' rent-free possession, defendant is not liable to pay rent for 1270 upon the jungle lands.

It has been suggested by the Counsel for the petitioner that the defendant would take advantage of plaintiff's labor and capital expended in cultivating the jungle. Now, it is patent that defendant actually sued the plaintiff for a measurement, being, it appears, ready and willing to pay, as he has always paid, for the cultivated land for which also he obtained wasilat in the previous suit. Plaintiff does not now sue for rent of cultivated land; if that were so, there might be much equity in his favor. In fact, in this suit, plaintiff has sued to obtain from the defendant rents for the whole of the lands described as jungle lands, while he had prevented the defendant from enjoying quiet rent-free possession of those lands during a period of 12 years prior to this suit. To that I think that he has no right. I dismiss the application for review of judgment.

Macpherson, J.—In this case, on further considering our former judgment, as to which I may say that my mind has never been entirely free from doubt, I have come to the conclusion that the review prayed for ought to be granted.

It seems to me to be perfectly clear that, looking at the circumstances under which the case comes before us, there is no ground for contending that we have the power, under any principle either of law or equity, to interfere with the contract originally made so as in any way to vary or reform that contract. I think now, as on the first hearing of the appeal, that the parties are

bound by the agreement which they originally entered into, and that we cannot substitute a new contract in supersession of that agreement. On the former occasion I decided in favor of the defendant upon the ground that, according to the correct construction of the original contract, the rent-free possession which the parties contemplated was not possession for the specific years 1851 to 1862, but for 12 years *generally*, and, therefore, the defendant was not bound in any case to pay rent unless and until he had had possession rent-free for 12 years. If I now think that our judgment was wrong, it is because, having looked more carefully and strictly at the language used in the written agreement or pottah which the parties signed, I now am of opinion that that document, when rightly construed, does not bear the interpretation that we put upon it. The pottah fixes the rent for the cleared lands at 12 annas per beegah, and for the uncleared or jungle lands at 10 annas per beegah; and then we have the following provisions:—

"After holding the latter (the jungle "lands) rent-free for a period of 12 years "*from* 1851 *to* 1862, and offering to pay "rents for the lands covered with jungle "*from the year* 1863 *(corresponding to* "1270 *B. S.)*:" and again—"within six "months from this date, in your presence the "lands cleared and cultivated up to 1257" (the year prior to that in which the agreement was made) "shall be measured by an Ameen, "and whatever quantity of *basil* (or cul-"tivated) lands may be ascertained to exist "in excess of the aforesaid conditionally "settled jumma, you will pay rents for such "excess quantity at the said rate of 12 "annas, and if it be found less you will "obtain an abatement of the said condi-"tionally settled jumma at that rate. Out "of the aforesaid 42,600 beegahs, whatever "quantity of land may be ascertained in "your presence by a measuring Ameen to "have been cultivated up to 1257 B. S., of "such quantity at 12 annas a beegah, and "of the remaining jungle land *after* the "aforesaid 12 years rent-free holding, in "1270 B. S. at 10 annas a beegah a perma-"nent settlement will be effected with you." When we read these clauses together, and find that, while in the earlier part of the pottah, the term "rent-free for a period of 12 years from 1851 to 1862" is used, express reference is, in the latter portion of the pottah, made to those particular 12 years (inasmuch as the words used are "after the *aforesaid* 12 years' rent-free holding"), it seems to me that we must hold that the parties who entered into this agreement contracted for a rent-free holding during the particular years named, *i. e.*, from 1851 to 1862, and not for a rent-free holding of twelve years generally. I think we were wrong when we held that the defendant could not become liable for rent after 1862 unless he had had 12 years' previous possession. In my opinion, the pottah, when truly read, is a contract which, while it bound the grantor to permit the lessee to enjoy the lands rent-free for 12 years, at the same time bound the lessee to pay rent for these lands, in any event from 1270 or 1862.

Putting this construction on the pottah, I proceed to consider the position in which the parties stand before the Court as regards these jungle lands, to which lands alone the present application for review refers.

The defendant (the lessee) having got possession, was ousted after a few months, in April 1852, by one Terry. The grantor of the pottah—that is to say, Nazir Ali Khan, the petitioner for review—was not in any way responsible for that ouster. Nazir Ali Khan immediately brought a suit against Terry to recover possession, stating in his plaint that the defendant in this suit was under his pottah entitled to possession—thus admitting in Court the defendant's rights. In March 1853 Nazir Ali Khan effected a compromise with Terry, by which possession of the lands was restored to Nazir Ali Khan. The defendant did not then resume possession; but nine months afterwards, in December 1853, Nazir Ali Khan granted a fresh pottah of these same lands to one Nundololl Ghose, who was put in possession, and there remained till 1860, when the defendant sued Nazir Ali Khan and Nundololl jointly to recover possession under the pottah granted to him in 1851.

There is nothing upon the record to show that Nazir Ali Khan was in any way to blame for the defendant's being turned out by Terry: nor is there any evidence of wrong done by Nazir Ali Khan to the defendant, except such as is contained in, or may be gathered from, the fact of his granting the pottah to Nundololl. On the other hand, it is not shewn that the defendant ever sought to be restored to possession on the suit with Terry being compromised.

Nazir Ali Khan, it is to be observed, himself held these lands from Government, upon such terms that, if they were not clear-

ed within a certain number of years, his tenure would be forfeited.

Defendant having had no possession from the time he was dispossessed by Terry up to 1860, and Nazir Ali having treated the lands as his own, and granted a new pottah to Nundololl, the defendant was clearly absolved from any liability to Nazir Ali Khan under his original lease. But the defendant chose, in the end of 1860, to come forward and insist upon returning to his lease and getting possession of the land under it. He did so, knowing that he had been out of possession for more than 7 years, but knowing also that he had agreed to pay rent for the jungle-lands as from 1270 or 1862, that is to say, at the end of 12 years from the time when he was originally entitled to possession. Suing as he did in 1860 to recover possession after having been out for more than seven years, it was impossible for any Court, by any decree that could be made, to put him in precisely the same position which he would have been in had he never been out of possession. It was not a case in which a decree in the nature of a decree for specific performance could be given, because the position of all parties was wholly altered from what it was when the defendant was turned out in 1852. To restore the parties to their original position was a simple and absolute impossibility. The defendant, therefore, if he chose to take again to his original pottah, would necessarily have to return to his original liabilities under it, subject always to such compensation by way of damages as the Court might think fit to give him for any loss which he might have sustained through being dispossessed. A suit for damages was the only remedy open to the defendant, and in such a suit there is no doubt he might have been fully compensated for the loss he had sustained.

And the defendant knew that this was so, when he brought his suit in 1860 to recover possession; for, as a matter of fact, in that suit he prayed, among other things, for *wasilat* or mesne-profits, "together with damages and interest." It is true that no specific damages are alleged or claimed in his plaint, and that the amount to which the defendant was entitled was decreed by the Court solely with reference to the question of *wasilat* or mesne-profits, no case being gone into as to any other damages. Still the defendant did sue for damages; that was the proper form of remedy for him to seek; and, if he did not press his claim, or if the Court did not consider it established, his not having in fact got damages in that suit will not affect his legal position now under his lease, and cannot put Nazir Ali Khan in any worse position for the purposes of this suit than if the defendant had got a decree with damages fully compensating him. I do not think that, the defendant having insisted upon taking to his pottah again, Nazir Ali Khan can, equitably or otherwise, be debarred from enforcing the terms of the pottah against him, merely because the defendant has failed to recover certain compensation which he ought to have, or might have, recovered. It is not necessary for me to consider now whether or not, after what occurred in the suit in which the defendant was plaintiff, he can still recover from Nazir Ali Khan any further damages for the time during which he was kept out of possession. Looking at the circumstances under which he returned to his lease, and asked the Court to put him in possession, I think that he put himself in such a position that the only compensation which he could get was by way of damages. If he had raised the question of damages in his suit in a proper manner, and had given proof in the usual way of the damages sustained by him, whether by loss of rent or increased cost of clearing or cultivation, or injury generally to his tenure, he might have been fully recouped, and the Court would have been acting on recognised principles; whereas any attempt to give specific performance now, or to reform the original contract, or to determine the precise period from which the payment of rent under the circumstances which have occurred begins, must be based upon the most uncertain grounds and upon no known or recognised principle whatever.

On the whole, then, it seems to me that, the 12 years specified in the pottah having elapsed, and the contract being a contract to pay from 1270, the plaintiff in this suit is entitled to recover the rents of the jungle-lands. I think that our judgment of which a review is now sought is wrong, and that a review should be granted. But as there is unfortunately a difference of opinion between myself and Mr. Justice Campbell, our former judgment must stand. The 10th of the Rules of the 1st of May 1863, *as to applications for review of judgment*, declares that, when only two Judges who have passed a decision are present and hear an application for a review thereof, the re-

view will be granted only when both agree in the order for its admission. In accordance with that rule, the present application must be refused.

The 22nd May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Appeal—Suit for rent under 100 rupees—Intervenor.

Case No. 2928 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 12th August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 14th March 1865.

Chunder Kant Sircar (Plaintiff), *Appellant,*

versus

Beerbul Puramanick and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Anunt Ram Ghose* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

An intervenor under Section 77, Act X. of 1859, has a right of appeal to the Judge in a suit for rent under 100 rupees in which a question of title was determined by the Deputy Collector.

THE two grounds taken are—

1st.—That an intervenor under Section 77, Act X., has no right of appeal to the Judge in a case under 100 rupees;

2nd.—That the Judge was wrong, on the application of the special appellant for a review, in going into the whole merits of the case and reversing the decision of the Court of first instance.

On the first ground, we hold that, as a question of title was determined by the decision of the Deputy Collector, an appeal would lie to the Judge. There are several rulings of this Court to that effect.

On the second ground, the Judge having admittedly jurisdiction, the whole case and the parties were before him, and he was fully competent to decree or dismiss the appeal.

The appeal is dismissed with costs and interest.

The 4th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Rent—Abandonment of portion of jote.

Case No. 232 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 22nd November 1865, reversing a decision passed by the Collector of that District, dated the 8th August 1865.

Saroda Soonduree Debee (Plaintiff), *Appellant,*

versus

Hazee Mahomed Mundul (Defendant), *Respondent.*

Baboos Upprokash Chunder Mookerjee and *Mohendro Lal Seal* for Appellant.

No one for Respondent.

As long as a ryot retains possession of any portion of his jote, he is liable for the rent of the whole.

IT is quite clear to us, although no one appears for the respondent, that the decision of the Judge is wrong in law, and cannot stand. We know of no law or custom by which a ryot is justified in throwing up a portion of his jote, and in keeping just that portion which happens to suit his convenience, and which may be, as is pleaded in this instance, the very portion which confers value on the remainder of the jote, and one without which no fresh tenant will be found to enter on an engagement. In this instance, the ryot may either retain the whole, or he may throw up the whole, in conformity with the provisions of Act X. of 1859. But, as long as he retains any portion of the land, he is liable for the rent of the whole. Nor was the plaintiff bound to apply to the Collector to eject the ryot under such circumstances.

The case is remanded for the Judge to determine the rent for which the defendant is, and must be, held liable. The plaintiff, it is true, asks for a kubooleut and for an enhanced rent. The Court may, in such a case, order the tenant to pay rent or to give a kubooleut to the landlord for a certain rate of rent, being careful that, on the other hand, the ryot shall not be prevented from throwing up the whole of his tenancy, if he be so minded, provided he do so at the time and under the formalities prescribed by the law.

The Judge will pass a fresh judgment according to the above principles, and will determine what rent the defendant is to pay for the whole of the jote, of which we still hold him to be in legal possession, and for the rent of which he is legally accountable.

The 5th May 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges*.

Jurisdiction—Suit by zemindar against agent and sureties for money.

Case No. 3015 of 1865.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 22nd July 1865, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 1st August 1864.

Syud Woozeer Ali (Plaintiff), *Appellant*,

versus

Doorga Churn Roy and others (Defendants), *Respondents*.

Baboo Chunder Madhub Ghose for Appellant.

Baboos Hem Chunder Banerjee and *Umbika Churn Banerjee* for Respondents.

According to Section 24, Act X. of 1859, the Civil Court has no jurisdiction to try a suit by a zemindar against an agent and his sureties for money received by the agent in collection of the rents of the zemindary, even where it is pleaded that the agent received special directions from the zemindar for the disposal of the money, when it appears that the money never left the hands of the agent but was misappropriated by him.

This was a suit brought by a zemindar against his Naib and against his sureties for the recovery of certain sums collected by the agent from the estate, and afterwards misappropriated. It is alleged that false entries of monies paid to the zemindar's creditors were made in the books, whereas the sums in question were never so paid at all, but applied by the agent to his own uses. The suit was decreed by the Moonsiff, but afterwards dismissed on appeal by the Judge on the issue of limitation, and the zemindar now appeals specially.

There is, however, no occasion for us to go into the case on the point of limitation, as we have no doubt that the Civil Court had no jurisdiction to try the suit, and that the preliminary objection on this head urged by the special respondent must be allowed.

Section 24 of Act X. of 1859 expressly lays it down that suits by zemindars against any agent employed by them in the collection of rent or against the sureties of such agents for money received by such agents shall be cognizable by Collectors, and shall be instituted and tried under the provisions of Act X., and shall not be cognizable in any other Court.

The special appellant's vakeel endeavours to get over the effect of this Section by pleading that, under the circumstances, money collected by the agent, and specially ordered by the employer to be paid to a particular individual, as this was, must be considered as having been paid over to the principal by the agent and then given back to the latter for the performance of the special service required—to be, in short, an ordinary debt between these two individuals, the agent being, as agent, *functus officio* when he received special directions as to the disposal of the money.

This argument appears to us altogether unsound. Whatever arrangements may have been made by the zemindar for the payment of his creditors, and whatever might be the effect of those arrangements on the position of the agent *quoad* the sums paid, they can have nothing to do with this case, as they were never attempted to be carried out; the money never left the hands of the agent at all after having been received by him, but was misappropriated by him, although the zemindary-accounts were debited with the amount.

We have no doubt that the case comes properly within the purview of Section 24 of Act X., and that the Civil Court had no jurisdiction to try it. As, however, the Judge has thrown out the special appellant's case, though on different grounds, it will be sufficient for the purpose of carrying out the order now passed, that we dismiss this special appeal with costs.

The 5th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Enhancement (Exemption from)—Mourosee pottah without fixed rent.

Case No. 3633 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 28th August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 27th May 1865.

Taruck Chunder Nundee and others (Plaintiffs), *Appellants,*

versus

Modhoo Soodun Nundee and others (Defendants), *Respondents.*

Baboo Dwarkanath Sein for Appellants.

Baboos Romanath Bose, Kalee Prosunno Dutt, and *Tarucknath Sein* for Respondents.

A mourosee pottah in which the rent is not fixed as invariable does not protect the ryot from enhancement.

THE Lower Appellate Court thinks that the pottah produced by the special respondent, the ryot in this case for enhancement, having been filed and accepted before in a case instituted by the landlord of the special appellant, plaintiff, for ousting the said ryot under Section 25 of Act X. of 1859, and dismissed on the 3rd of March 1863, the genuineness of this pottah need not be tried over in this case.

The special appellant appeals and pleads that the Lower Appellate Court should re-try the pottah in this case, and that, even if the pottah be considered to be proved, its terms do not protect the ryot from enhancement.

We find that the pottah is a mourosee pottah, but the rent fixed in the lease does not appear to have been fixed and invariable. There are not in it any such words as these: "that the rent shall not hereafter be altered or increased" (*see* page 136 of the Sudder Decisions of 1859, and Note in page 140, Vol. I., S. S. Reports).

We also find that the first plea of the special appellant is right. We accordingly remand the case to the Lower Appellate Court to re-try it with reference to the above remarks.

The 5th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Right of occupancy—Ryots holding under pottahs granted for terms of years.

Case No. 3574 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 18th August 1865, affirming a decision passed by the Deputy Collector of that District, dated the 30th November 1864.

Kebul Muhtoon and others (Plaintiffs), *Appellants,*

versus

Sheikh Sunnoo and others (Defendants), *Respondents.*

Baboo Nursingh Chunder Mitter for Appellants.

Mr. R. E. Twidale and *Baboo Greesh Chunder Ghose* for Respondents.

A ryot, who holds for more than 12 years under pottahs granted only for terms of years, has no right of occupancy.

THE Lower Appellate Court has decided that, the special appellant having successively held under pottahs granted only for terms of years, he has no right of occupancy.

The special appellant appeals against this decision, and cannot show that his tenure or holding existed before the pottahs produced in this case.

Now, if the special appellant held only under these pottahs, he cannot, by holding under them for more than 12 years, acquire a right of occupancy.

If the original pottah was for a term of years, and the special appellant had, after the expiration of the term of the lease, held over on the same terms, and thus held altogether for 12 years, the case might have been different.

We accordingly see no reason to interfere, and reject the special appeal with costs.

h

The 9th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and

A. G. Macpherson, *Judges.*

Lease—Relinquishment—Section 19, Act X. of 1859.

Case No. 258 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 21st September 1865, affirming a decision passed by the Deputy Collector of that District, dated the 16th March 1865.

Kashee Singh (Defendant), *Appellant,*

versus

Messrs. P. Onraet and T. Grant (Plaintiffs), *Respondents.*

Baboos Kishen Succa Mookerjee and *Mohendro Lal Shome* for Appellant.

Mr. G. C. Paul and *Baboos Umurnath Bose* and *Bungshee Doss Seal* for Respondents.

A ryot, who has taken a lease in writing for a fixed term, cannot, under Section 19, Act X. of 1859, throw it up during its currency.

THE point to be decided in this case is whether a ryot, having taken a lease in writing of certain lands for five years, is entitled, under Section 19 of Act X. of 1859, to throw up his lease during its currency. It is admitted that the ryot (who is the appellant before us) has given the requisite notice. The only question is as to his right to relinquish.

The Lower Appellate Court has held that he was not entitled to relinquish, having specially contracted to hold for five years. In this ruling we concur. We think that Section 19 of Act X. does not apply to cases where the ryot has entered into a lease for a specific term. Act X. does not declare that all contracts made by ryots are to be subject to all the provisions of that Act; and, in the absence of any such declaration, we see no reason why we should hold that the case does not fall within the general principle that parties may enter into any contracts they please, so long as they are not contrary to any law; and that, if they do enter into special contracts allowed by law, they will be bound by the terms of those contracts. Section 13 of Act X. shows that ryots holding under special engagements cannot be enhanced. If the zemindars are to be held to their engagements so as not to be able to enhance, on what principle is it that ryots are not to be held to theirs, so as to prevent them throwing up their lands before the expiry of the term for which they have taken them? There is nothing in Act X. which leads to the conclusion that it was intended that a ryot, who takes a lease for five years certain, should not be bound by his agreement.

Mr. Paul, for the respondent, objects that the Lower Court is wrong (on a mixed question of law and fact) in holding that the appellant is a ryot. The Lower Court may be wrong in this; but we cannot now enter on this matter. The case was on a former occasion before this Court, and was then remanded merely that final orders might be passed by the Lower Court, this Court stating in its judgment that the Lower Court *had decided that the appellant was a ryot.* This Court having on that occasion deemed the question as to his being or not being a ryot to have been then decided, and the decision not having been then objected to, we cannot re-open it now.

The appeal is dismissed with costs.

The 10th May 1866.

Present:

The Hon'ble H. V. Bayley and W. S. Seton-Karr, *Judges.*

Jurisdiction—Trespass—Mention of Howala and Neem Howala.

Case No. 3455 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 27th July 1865, affirming a decision passed by the Sudder

Moonsiff of that District, dated the 16th December 1864.

Mr. Silvestre Barairo (Plaintiff), *Appellant,*

versus

Mr. F. H. Pellew, Secretary to the Government School, and others (Defendants), *Respondents.*

Baboo Khettronath Bose for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

The mere incidental and descriptive mention of such tenures as Howala and Neem Howala does not oust the jurisdiction of the Civil Court in cases of trespass and the like, nor does it vest the jurisdiction in the Revenue Courts under Clause 6, Section 23, Act X. of 1859.

Both the Courts are utterly wrong, and we are at a loss to conceive how the Judges, after reading the plaint, could have ever conceived that the suit was one cognizable under Section 23, Clause 6, of Act X. of 1859.

The case is clearly one for the removal of a nuisance, or against a trespass with nuisance, on the part of the defendants, as well as to set aside an award under Act IV. of 1840 unfavorable to the plaintiff. As such, it clearly fell within the cognizance of the Civil Court. The mention of Howala and Neem Howala was merely incidental and descriptive; and if such terms were to be taken to oust the Civil Courts of their jurisdiction in case of trespass and the like, one-half of the cases in Backergunge might be taken to fall under the cognizance of Revenue Courts which could not possibly decide such questions.

We set aside the decisions of both the Courts, and return the suit to the first Court for trial on the merits.

The 11th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Estoppel—Resumption suit.

Case No. 151 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 14th September 1865, modifying a decision passed by the Deputy Collector of that District, dated the 7th July 1865.

Joy Kishen Mookerjee (Plaintiff), *Appellant,*

versus

Kishen Gurain and others (Defendants), *Respondents.*

Baboo Pearee Mohun Mookerjee for Appellant.

No one for Respondents.

A decree in a resumption suit estops only the parties to that suit and those claiming under them.

It is contended that an *ex-parte* decree in a resumption suit estops the parties in whose favor the decree of the Lower Court in the suit now before us on appeal has been made, from disputing the plaintiff's rights as claimed. The *ex-parte* decree may of course be pleaded against the parties to the resumption suit and those claiming under them. But the persons, with reference to whom the question arises in this suit, were not parties (or the representatives of parties) in the former suit, and are in no way estopped by it.

The appeal is, therefore, dismissed.

b

The 12th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence (of variation of rent)—Zemindar's papers filed or attested by Gomastahs—Jumma Wasil Bakee papers.

Cases Nos. 408 to 417 of 1866 under Act X. of 1859.

Special Appeals from a decision passed by the Additional Judge of Hooghly, dated the 25th November 1865, reversing a decision passed by the Deputy Collector of Jehanabad, dated the 12th April 1865.

Gopal Mundul and others (Defendants), *Appellants,*

versus

Nobbo Kishen Mookerjee (Plaintiff), *Respondent.*

Baboo Huree Narain Roy for Appellants.

Baboos Mohinee Mohun Roy and *Tarucknath Sein* for Respondent.

A mere alteration in the rate of rent, on the part of a zemindar or person other than the tenant, will not prove a variation unless it be shown that the tenant submitted to or paid that varied and enhanced rate.

Zemindar's papers filed or attested by gomastahs are not conclusive proof of variation unless it can be shown, not merely that the jumma wasil bakee and similar papers show a varying rate, but that the ryot has paid at a varying rate.

Seton-Karr, J. (Macpherson, J., concurring).—ALL these cases must be remanded to the Judge. There are two material errors in law in the Judge's decision, which vitiate the same, and other parts of the judgment are defective.

The whole of the tenures, of which the zemindar now sues to enhance the rent, were admittedly covered by one potah. The Judge does not find with clearness whether he considers the said potah to be forged or unproven. The first Court finds that, under this potah, the land has been held at an unvarying rate from a time prior to the Perpetual Settlement. The potah was produced in some litigation in 1837 and 1839, and was acted on as genuine, although the liability of the tenure to enhancement was not then the exact question at issue.

The Judge is wrong in holding that the potah, if proved, is not hereditary. The terms of the potah, or, more correctly speaking, of the sunnud of 1197, are precise and definite, and they establish a tenure tenable by the holder at an unvarying rate. The pleader for the respondent admits that he cannot support the Judge's ruling on this point. The Judge is also wrong in holding that any action taken by Nundo Koomar, who unsuccessfully contested the possession of this property with the predecessors of the defendants in 1837, can alter the character of the whole jumma or rate, unless it be shown that the defendants acquiesced in his proceedings. Nundo Koomar, and, after him, Muddun Mohun Adhikaree, are said to have sold a portion of the tenure with an enhanced assessment thereon of 90 rupees. But a mere alteration in the rates on the part of a zemindar or person other than the tenant will not make out a variation unless it be shown that the tenant submitted to or paid that varied and enhanced rate. On the above two points, the Judge has committed an error in law. It is not shown, moreover, to which suit or portion of the whole tenure this alleged enhancement now applies, and it would seem that, after all, his portion has found its way back to some or other of the defendants, and it does not appear that this enhanced rate was ever received or paid.

The Judge must reconsider his judgment in all these cases. He says truly that it would be impossible to attest the authenticity of the potah by any direct evidence. He should, therefore, consider whether, looking to the circumstances of its alleged grant in 1791 or 1197, and to its production in the suit of 1837 and 1839, as well as to the results of that litigation, there is any reason to consider it a fabrication. At all events, he must clearly state whether he considers it genuine or false. If it be genuine, and if the zemindar should fail to

prove that the rate has ever been altered, it is obvious that the suits should be dismissed. The Judge alludes to the evidence of the gomastahs who filed or attested certain papers of the zemindar. Such papers, we need hardly observe, cannot incontestibly prove variations in a ryot's jumma, unless it can be shown, not merely that the jumma wasil bakee and similar papers show a varying rate, but that the ryot has paid at a varying rate. Otherwise, every ryot would be at the mercy of a zemindar or his agents. The Judge says that the witnesses attest these papers, but he does not say how he considers the ryots bound by them.

The Judge will pass an entirely fresh decision with reference to these remarks. It is admitted that one judgment will govern the whole, but the Judge should look at all the evidence filed in each individual case.

The 16th May 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Presumption of uniform payment from Permanent Settlement—Payment of 20 years' uniform rent to be proved, not presumed.

Case No. 3318 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 30th August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 8th May 1865.

Ram Kishore Mundul (Plaintiff), *Appellant,*

versus

Chand Mundul and others (Defendants), *Respondents.*

Baboo Gopal Lal Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

The fact of uniform payment of rent for 20 years, as required by Section 4, Act X. of 1859, must be clearly *proved*, and not *presumed* from any evidence, however strong, before the presumption of having held at the same rent from the time of the Permanent Settlement can arise.

THIS was a suit for enhanced rent for the year 1270 B. S., and for back rents for the two previous years at the old rates; the ground of enhancement being that the defendant paid a less rate of rent than that paid by neighbouring ryots for the same quality of land.

The defendant pleaded that he and his ancestors had held this land for generations past at an uniform rent of sicca rupees 38, and claimed the benefit of the presumption under Section 4, Act X. of 1859.

The Deputy Collector decreed for the plaintiff, but the Judge on appeal reversed that order, on the ground that the defendant might be presumed to have paid the same rent for 20 years, and so obtain the benefit of the higher presumption under Section 4; and also that, as the increased value of the land was due solely to the exertions of the ryot, the landlord had no claim to enhanced rent.

It is urged, in special appeal, that the evidence on which the Judge has based a presumption favorable to the defendant is hearsay only, and that, although it may prove that the jote was an old one, it does not prove that the same rent was always paid for it.

The Judge, we observe, has erred in supposing that the payment of 20 years' rent, as required by Section 4 of Act X., can be *presumed* from any evidence, however strong. The fact of such payment must be clearly *proved*, and then the presumption of having held at the same rent from the time of the Perpetual Settlement would arise. But in this case, we observe, there is direct evidence, not only of the fact of the jote being an ancient one, but of the uniform rate of payment. In order to ascertain the correctness of the special appellant's assertion that the evidence on which the Judge relied was hearsay only, we had that evidence read to us; and we think that, as the Judge believed it, he would have been fully justified in setting aside presumption altogether, and in holding it proved that the same rate of rent had been paid by the defendant and his an-

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cestors for the last 20 years. It is not our function to say whether that evidence was strong evidence or weak evidence; it was direct and legally sufficient evidence, and the Judge believed it.

As, therefore, we must reject this application, on the ground that the Judge's finding of an uniform payment of rent for 20 years is one on evidence, with which no interference in special appeal is possible, there is no necessity for our going into the second head of the special appellant's objection—the question of relative value not arising.

Dismissed with costs.

The 16th May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Jurisdiction—Limitation—Section 77, Act X. of 1859.

Case No. 3477 of 1865.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 9th September 1865, reversing a decision passed by the Sudder Ameen of that District, dated the 24th January 1865.

Kishen Coomar Shaha and others (Defendants), *Appellants,*

versus

Jeebun Singh and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellants.

Baboo Nubo Kishen Mookerjee for Respondents.

A party, who may fail in a case under Section 77, Act X. of 1859, to show enjoyment and receipt of rent at the time of suit, may still have a good right and title to possession capable of being duly declared by an independent action in a Civil Court for declaration of title and possession.

Limitation under the same Section bars a civil action not brought within a year to set aside a decision under that Section on the subject-matter of the then suit, *viz.*, a suit for rent or such matter as it is within the competency of the Revenue Court to decide; but does not apply to suits on matters of general proprietary title alone cognizable by the Civil Courts.

In this case, the special appellant urges, in regard to plot 1, that limitation bars the suit, because it was not brought within one year from the decision of a case under Section 77, Act X. of 1859, in which special respondent was held *not* entitled to rent. It is pleaded that thus, if special respondent is held by a competent Court *not* entitled to rent, he cannot by a civil suit, in which his claim for declaration of title and possession under it may be decreed, obtain those rents, and so virtually set aside the decision of the other competent Court to the effect that he is *not entitled* to rent.

We hold that a party who may not succeed, in a case under Section 77, Act X. of 1859, to show enjoyment and receipt of rent before the suit for rent, may still have a good title, and right to possession capable of being duly declared by an independent action in a Civil Court for declaration of title and possession under such title when decreed.

Otherwise, every party who could not prove receipt of rent would not only be *tied* to one year's limitation to sue for declaration of title to property and possession of it, but in fact the result would be that, where a party could be brought in under Section 77, Act X. of 1859, he would, on failing, then have no remedy on an allegation of independent title, exclusive and irrespective of such proof as receipt of rent might give.

Limitation under Section 77 bars a civil action not brought within a year to set aside a decision under that Section, which is and can only be a decision on the subject-matter of the then suit, *viz.*, a suit for rent, or such as it is within the competency of the Revenue Court to decide. The Section cannot impose a restriction as to suits on matters of general proprietary title on other grounds adduced in the Civil Courts which are by law constituted and declared to be the proper Courts to try this last class of suits on title.

In this view, we dismiss the special appeal with costs.

The 16th May 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Payment of cess included in rent.

Case No. 3323 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 31st

August 1865, reversing a decision passed by the Deputy Collector of that District, dated the 31st May 1865.

Dhalee Puramanick and others (Defendants), *Appellants,*

versus

Anund Chunder Tolanuttur (Plaintiff), *Respondent.*

Baboo Anund Gopal Paleet for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

All cesses being illegal when not specifically included in the contract under which the ryot pays rent, the mere payment of rent including a cess for 3 years cannot legalize an illegal impost.

THIS was a suit for arrears of rent due from Bysack to Aghun 1271 B. S. at the annual rate of Rupees 129-3.

The defendants admit holding at a yearly rent of Rupees 124-1, but object to the odd 5 rupees as an illegal cess called "Najai," which they were not bound to pay. They further object that one of the defendants had, before the suit, transferred his share of the jote to his wife, and was not therefore liable, and both plead payment of a part of the rent claimed.

The Judge reversed the decree of the Deputy Collector, which was in favor of the defendant, holding (1) that there was no proof of payment of any part of the rent; (2) that there was none of the alleged transfer to the wife; and (3) that, as the cess had been paid without demur for the past three years, it had become incorporated with, and must be treated as, rent.

The only point taken in special appeal is that the Judge's decision regarding the "Najai" cess is wrong in law.

The objection must, we think, be allowed. Setting aside the special appellant's pottah, on the authenticity of which no finding was come to by either of the Lower Courts, it is quite clear, from the evidence adduced by the special appellant himself, and by the jumma wasil bakee papers filed by him, that the 5 rupees were a "cess" not included within the ryot's jumma; and it is nowhere proved that any agreement was entered into by the parties as to its payment. The presumption would, of course, be against any payment in excess of the rent proper, as all "cesses," properly so called, are illegal, when they are not specifically included in the contract under which a ryot pays rent.

Taking this view of the case, we do not think that the mere payment of rent, including the "cess" for three years, would be sufficient to legalize what the Judge himself admits to be an illegal impost, and so far, therefore, we modify his decision. The costs will be assessed proportionately.

The 18th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Presumption of uniform payment from Permanent Settlement—Pleadings.

Case No. 3171 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. A. R. Alexander, Officiating Additional Judge of Hooghly, dated the 11th August 1865, affirming a decision passed by Baboo Gour Churn Doss, Deputy Collector of Jehanabad, dated 31st October 1864.

Gooroo Doss Mundul (Plaintiff), *Appellant,*

versus

Sheikh Durbaree and others (Defendants), *Respondents.*

Baboo Romanauth Bose for Appellant.

Baboo Gopeenauth Banerjee for Respondents.

Where a ryot has held at a fixed rent for 45 years, the absence of the specific allegation that he held at a fixed rate from the time of the Permanent Settlement does not deprive him of the right to rely on Section 4, Act X. of 1859, if he distinctly and in terms claims the benefit of that Section.

IN this case the plaintiff claimed to enhance the rents of a certain tenure. The defendant objected that the tenure in question had been standing first in the name of his sister, and, since that, that he and his brother had been in possession without any variation of rents for a very long time, and claimed to hold at a fixed rate under Section 4 of Act X. of 1859. It appears to have been proved that for a period of 45 years the rents have not been varied, and we think that the absence of the specific allegation that he held at a fixed rate from the time of Settlement does not deprive him of the right to rely on Section 4 of Act X., inasmuch as he distinctly and in terms claims the benefit of that Clause.

The appeal is dismissed with costs and interest.

The 19th May 1866.

Present:

The Hon'ble H. V. Bayley and W. S. Seton-Karr, *Judges.*

Plaint (Return of—with a view to its being filed in proper Court).

Case No. 45 of 1866 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Mymensing, dated the 18th December 1865.

Ranee Shurut Soonduree Debia and others (Plaintiffs), *Appellants,*

versus

Khemun Kuree Debia and others (Defendants), *Respondents.*

Baboo Gopal Lal Mitter for Appellants.

Baboo Nil Madhub Sein for Respondents.

Suit laid at Rupees 5,128-8-6.

Following the procedure of Act VIII. of 1859, a suit ought not to be dismissed, because it was instituted before the Collector, instead of a Sub-division Court, under Section 20, Act VI. of 1862 B. C., but the plaint should be returned to the plaintiff with a view to its being filed in the proper Court.

In this case the Lower Court has dismissed the plaintiff's suit, because it was instituted before the Collector, whereas, under Section 20, Act VI. of 1862 of the Bengal Council, it should have been instituted before the Deputy Collector of Jumalpore, a Sub-division, *viz.*, a competent Revenue Court in which the lands referred to in the case were situated.

The plaintiff appeals and urges—

I. That, by the decision of this Court in page 29, Weekly Reporter, Volume V., Act X. Rulings of 1866, a Collector is held not to be without jurisdiction in such a case, even where a suit ought to have been instituted in a Sub-division Court.

II. That, even if the Collector had not jurisdiction, the plaint should have been returned to plaintiff to be filed in the Sub-division Court, and the suit not dismissed, as it has been.

We think the *first* plea untenable. In the case cited, the jurisdiction was a doubtful one, and the lands were situated in various sub-divisions; and it was only held that in *that* case, under its *special* circumstances, the Collector was not wholly without jurisdiction, though he had exercised it somewhat irregularly.

The *second* plea is, however, we think, correct. The procedure of Act VIII. of 1859 is to be applied to cases in the Revenue Courts as far as it may be applicable.

Under Act VIII. of 1859, the Court might, in the exercise of a proper judicial discretion, return a plaint to be filed in the proper Court; and this procedure should, we think, be followed here.

We, therefore, amend the decision of the Court below, and order that the Lower Court return the plaint to plaintiff to be filed in the proper Sub-divisional Court. But, under the circumstances, we think all costs of this appeal should be on the appellant.

Order accordingly.

The 28th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation (Section 77, Act X. of 1859)—Suit on general title.

Case No. 387 of 1866.

Special Appeal from a decision passed by the First Grade Principal Sudder Ameen of Jessore, dated the 24th November 1865, reversing a decision passed by the Munsiff of that District, dated the 29th July 1864.

Shatto Ram Mojoomdar and others (Plaintiffs), *Appellants,*

versus

Anund Chunder Chatterjee and others (Defendants), *Respondents.*

Mr. J. S. Rochfort and *Baboo Bungshee Dhur Sein* for Appellants.

Baboos Romanath Bose and *Tarucknath Sein* for Respondents.

A person, whose right to rent has been refused under Section 77, Act X. of 1859, is not bound to sue on his general title within one year.

Seton-Karr, J.—I HOLD that Section 77 of Act X. of 1859 does apply to this case, in so far that the intervention was rightly admitted under that Section.

But the point pressed in special appeal is, that the limitation of one year, within which a person, whose right to rent is refused under that Section, must sue, applies only to civil suits where the rent is claimed, and that a person suing on his general title would not be bound to sue within one year. This has been already ruled. (*See* Weekly Reporter, Volume II., page 197, Civil Rulings; and Volume IV., page 21 of Act X.) It is true that, in this case before us, the extent of land regarding which the plaintiff now asserts his title, is identical in extent with that which formed the subject of the claim for rents by the plaintiff in the suit under Act X. In one of the cases cited (that of Volume II.), the extent of the land was not identical, but the civil suit was brought for a much larger area. It is true also that the effect of ruling that the limitation of one year only applies to civil suits for rent may not have been contemplated distinctly by the Legislature, and may make this Section 77 of little or no effect. But, looking to the words of the Section (77), I think they do bear out the contention of the special appellant; and, as there have been two rulings quoted to us which support this contention, and as I see no reason to dissent from the same, I would admit the appeal, and remand the case to the Principal Sudder Ameen.

The Principal Sudder Ameen will try the case on the merits of the plaintiff's title and on his alleged possession and dispossession at the date given or the 2nd Joisto 1270.

Remand accordingly.

Macpherson, J.—I concur in the order of remand. Following the two decisions (2 Weekly Reporter 197, Civil Rulings, and 4 Weekly Reporter 21, Act X. Cases) referred to, I think the suit is not barred, even if Section 77 of Act X. of 1859 applies to the case.

The 29th May 1866.

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

Suit for Kubooleut at enhanced rents—Tender of pottah.

Case No. 3521 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 12th September 1865, reversing a decision passed by the Assistant Collector of that District, dated the 13th May 1865.

Doorga Pershad Doss Chowdhry and another (Plaintiffs), *Appellants,*

versus

Kalee Kinkur Roy and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Greeja Sunkur Mojoomdar* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Khetturnath Bose* for Respondents.

In order to maintain a suit for enhanced rents, the previous tender of a pottah is not necessary.

THIS is a suit for a kubooleut at enhanced rates, or, in other words, to assess the tenant at higher rents than those hitherto paid. It is admitted that the relation of landlord and tenant has existed all along, and that the lessor tendered a copy or draft of the proposed pottah.

The Lower Appellate Court has, however, held that, as the plaintiff did not tender a complete and perfect pottah, his suit must be dismissed, and has dismissed it accordingly.

A special appeal is brought from this decision, and it is urged—

I. That in such a suit as this—*i. e.*, for enhanced rent—no tender of a pottah is required by law, Section 9, Act X. of 1859, not being applicable to such cases.

II. That the copy or draft tendered in this case was a sufficient tender.

We are clearly of opinion that this is substantially simply a suit to enhance rents, and, in such a case, the law does *not* require tender of a pottah.

We accordingly decree this appeal with costs, and remand the case to be re-tried with reference to the above remarks.

The 29th May 1866.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Appeal (from order setting aside sale in execution of decree).

Case No. 667 of 1865 under Act X. of 1859.

Miscellaneous Appeal from orders passed by Moulvee Abdool Kureem Khan and Baboo Brojokant Roy, Deputy Collectors of Backergunge, dated respectively the 31st July and 19th August 1865.

Nobbo Doorga Dossia and another (Objectors), *Appellants,*

versus

Goluck Chunder Sein and others (Plaintiffs) and others (Defendants), *Respondents.*

Baboo Onoocool Chunder Mookerjee for Appellants.

Baboos Unnoda Pershad Banerjee, Pearee Lal Roy, and *Kishen Dyal Roy* for Respondents.

An appeal does not lie from an order of a Deputy Collector setting aside a sale in execution of a decree under Act X, of 1859.

THIS is an appeal from certain orders by a Deputy Collector setting aside a sale in execution of decree under Act X. of 1859. We are of opinion that no such appeal will lie. The law, Section 151 of Act X. of 1859, is most clear and explicit upon the point. It is said that this Court has authority to interfere under Section 35, Act XXIII. of 1861. But that Section refers to jurisdictions exercised contrary to law by Appellate Courts. On the whole, after hearing what the appellants' vakeel has to state, we dismiss the appeal with costs.

The 5th June 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Enhancement—Evidence (of uniform payment for 20 years).

Case No. 489 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 2nd December 1865, affirming a decision passed by the Deputy Collector of that District, dated the 5th August 1864.

Huro Chunder Mookerjee (Plaintiff), *Appellant,*

versus

Mohesh Chunder Dhopa and another (Defendants), *Respondents.*

Mr. W. L. Mackenzie and *Baboo Mohendro Lal Seal* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

In suits for enhancement, it would not generally be sufficient for the ryot to swear that he has paid rent at a uniform rate for more than 20 years; he should prove such payments by *dakhilas* or other good independent evidence.

THIS suit was remanded by this Bench on the 10th August 1865. We directed the Judge to find, on good, sufficient, and irrefragable evidence, that the ryot, the special respondent, had held at the same rate for 20 years.

The Judge now relies upon the deposition of the defendant corroborated by the witness Sitaram, and holds that this evidence is sufficient in the total absence of any proof on the contrary from the plaintiff.

We cannot interfere with this finding in special appeal, though we consider that such evidence would be generally insufficient to raise a presumption under Section 4 of Act X. The Judge has chosen to rely upon it, and it cannot be said that it is not admissible and legal evidence.

We think it right to call the attention of the Judge to this case. In suits for enhancement, it would not generally be sufficient for the ryot to swear that he has paid rent at a uniform rate for more than 20 years; he should prove such payments by dakhilas or other good independent evidence.

Appeal dismissed with costs and interest.

The 6th June 1866.

Present:

The Hon'ble C. B. Trevor and F. A. Glover, *Judges.*

Abandonment of portion of claim—Section 7, Act VIII. of 1859.

Cases Nos. 2887, 2919, 2920, and 2922 of 1865 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Purneah, dated the 29th June 1865, affirming a decision passed by the Collector of that District, dated the 27th March 1865.

Meer Mahomed Soaduck Golestan and others (Defendants), *Appellants,*

versus

Mr. A. J. Forbes (Plaintiff), *Respondent.*

Messrs. R. V. Doyne and *C. Gregory* for Appellants.

Baboos Jugodanund Mookerjee and *Bungshee Doss Seal* for Respondent.

An auction-purchaser of a zemindary being entitled to be paid his rents in Azeemabad Rupees, and having sued for the same in Co.'s Rupees (the former coinage being more valuable than the latter), his omission to sue for the difference of value was held to be an abandonment of claim under Section 7, Act VIII. of 1859, and to bar his recovery of it in a fresh suit.

THE plaintiff in these suits, the zemindar, by auction-purchase, of Pergunnah Sooltanpore, in the district of Purneah, sued to recover the difference of value between Azeemabad Rupees, the coinage in which the jumma was fixed in the lease, and Company's Rupees, on the rent of his tenants' (the special appellants') holdings under the following circumstances.

It appears that, some years after his purchase of the zemindary, the special respondent sued his tenants for a kubooleut at enhanced rates of rent after notice. The tenants pleaded an "Istemraree Mokurruree" lease, and the holding was declared by the Civil Court not to be liable to enhancement. The zemindar then appealed to the High Court, but in the meantime, to save limitation in case the appeal failed, he sued to recover rent for the years 1268, 1269 and 1270 M. S. at the old rates, at which rates he got a decree, the ryots not objecting.

Shortly after this (December 7th, 1863), the appeal in the enhancement suit was heard by the High Court, and dismissed on the ground that the tenants had clearly established that their talook was an hereditary one, that they possessed a permanent and transferable interest in it, and had held it at one uniform rate of rent from a period long prior to the Decennial Settlement. The Court added that, as the original jumma was fixed in Azeemabad Rupees, the zemindar was entitled to the equivalent of the rent in Co.'s Rupees, if it were shown that he had sustained any loss by the ryots only paying the same number of Co.'s Rupees as they used to pay Azeemabad Rupees, and might, if so advised, sue for the difference. This he has now done; and the Judge, disbelieving the tenant's statement that the 2,599 Azeemabad Rupees were ever converted into 2,248 Co.'s Rupees, and finding from the Mint Master's certificate that the value of Azeemabad Rupees is greater than that of Co.'s Rupees to the extent of Co.'s Rupees 2-9-6 per cent., has given the zemindar a decree for the difference, following the decision of the Collector.

The tenants now appeal specially, and for them Mr. Doyne contends (1) that the uniform payment by the ryots to the zemindar of Co.'s Rupees 2,248 for a long series of years raises the presumption that this was the proper equivalent of the Azeemabad Rupees 2,599 entered in the Istemraree sunnud, and that the zemindar, by accepting it for nearly 40 years, had entered into an implied contract to accept it for ever; and (2) that the present suit for the balance of rent is a splitting of claims, and, in accordance with the provisions of Section 7, Act VIII. of 1859, will not lie.

The first objection appears to us untenable. The sunnud having been declared genuine and binding on the zemindar, the latter is clearly entitled to receive as rent the amount entered in it; and as the relative value of Azeemabad and Co.'s Rupees is a matter of fact susceptible of direct proof, there can be no presumption that Co.'s Rupees 2,248 was the equivalent of Azeemabad Rupees 2,599, in the face of the evidence that the latter coinage was more valuable than the former by Rupees 2-8-6 per cent. The Judge's decision on this point is one of fact with which no interference is possible in special appeal.

Then as to the long period during which the zemindar has received the Rupees 2,248 as the proper rent. The special respondent is, we observe, an auction-purchaser at a sale for arrears of Government revenue; he is not privy in estate to the former zemindars, and is not in any way bound by their acceptance of the lesser rates of rent, as there is no proof that this rate has been paid from before the Decennial Settlement. The lease states clearly that the tenants are to pay so many Azeemabad Rupees, and the landlord is undoubtedly entitled to demand from them either those Rupees or their equivalent in the current coinage of the day.

In principle, therefore, we agree with the Judge; but, so far as these particular suits are concerned, we think that the special appellant's second ground of objection is fatal to the zemindar's claim.

The suit for the rent of the years 1268, 1269, and 1270 M. S., brought by the zemindar, at the old rates, whilst the enhancement suit was pending in appeal, contained no reservation of any rights founded on a difference of coinage; it was in the clearest language (to make certain of the matter, the Court sent for and inspected the plaint) a demand for what the zemindar called the entire rent due for those years.

Now, it is quite clear that the special respondent, who purchased at auction so far back as 1851, knew that his rent was so many Azeemabad Rupees, and his having claimed in the rent suit only so many Company's Rupees as the entire sum due to him, supposing the sunnud to be upheld, shows that he either considered that sum all that was due to him under the sunnud, or that he was, under the circumstances, content to receive it as its equivalent. He had just the same facilities then for finding out the relative values of Azeemabad and Company's Rupees as he has now, and as he either omitted or abandoned the difference when he sued, or erred in his calculation, and claimed what the special appellants were willing to pay him as the entire sum due to him for rent, we think that he fairly comes within the purview of Section 7, Act VIII. of 1859, and has "omitted to sue" for a portion of his claim in the original suit, and cannot now recover it in a fresh suit. This decision, of course, only refers to the years 1268, 1269, and 1270 M. S.

The special appeals are therefore decreed, and the Judge's orders reversed with costs on special respondent.

The 6th June 1866.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Agent (Suspension of)—Limitation—Cause of action.

Case No. 2746 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 16th March 1865, affirming a decision passed by the Deputy Collector of that District, dated the 19th December 1864.

Maharajah Mahtab Chand Bahadoor (Plaintiff), *Appellant,*

versus

Judoo Mohun Mitter and others (Defendants), *Respondents.*

Baboos Juggodanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboo Chunder Kalee Ghose for Respondents.

The suspension of an agent by his principal is a determination of agency within the meaning of Section 33, Act X. of 1859.

The principal acquires no fresh cause of action against the agent from the date on which the agent admitted the amount which was due from him, and executed an agreement to pay it.

It is urged before us that the Lower Appellate Court has erroneously decided that the plaintiff's suit against his Naib for money collected as Naib is barred by limitation. The Judge finds as a fact that the Naib was suspended from his appointment more than one year from the date of institution of the suit. It is said that suspension is not a determination of the agency within the meaning of Section 33, Act X. of 1859. There is a precedent* in every way analogous to this ruling that such suspension is a determination of the agency. We see no reason to dissent from the view of the law then expressed.

* Muddun Mohun Roy, 27th January 1864, quoted in Chapman's Law of Landlord and Tenant.

It is then argued that the plaintiff obtained a fresh cause of action from the date on which the Naib admitted the amount which was due from him, and executed an agreement to pay it. No fresh cause of action under Act X. of 1859 can be thereby gained. That point also was ruled in the precedent above quoted.

Appeal dismissed with costs.

The 7th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Suits for rents of fisheries.

Case No. 3418 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dinagpore, dated the 7th September 1865, affirming a decision passed by the Deputy Collector of that District, dated the 28th June 1865.

Allum Chunder Shaha and others (Plaintiffs), *Appellants,*

versus

Bhurut Baboo (Defendant), *Respondent.*

Baboo Mohendro Lal Seal for Appellants.

Baboo Kishen Dyal Roy for Respondent.

Suits for the rents of fisheries are provided for by Clause 4, Section 23, Act X. of 1859.

THIS is a suit for arrears of rent on account of a certain julkur or fishery. The plaintiff claiming a higher rent than that received in previous years, the Judge dismissed the suit upon the ground that it was beyond the scope of the Rent Law. But suits for the rents of fisheries are clearly provided for by Clause 4, Section 23 of Act X. of 1859; and the suit having been brought, the Judge should have determined what was a fair and reasonable rent.

The case is remanded for trial.

The 7th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Limitation—Suit to recover possession—Section 77, Act X. of 1859.

Case No. 3177 of 1865.

Special Appeal from a decision passed by the Judge of the Small Cause Court of Backergunge, exercising the powers of a Principal Sudder Ameen, dated the 18th August 1865, affirming a decision passed by the Moonsiff of Pirizpore, dated the 17th February 1865.

Baro Bibee and others (Defendants), *Appellants,*

versus

Mahomed Ali Kazi and others (Plaintiffs), *Respondents.*

Baboo Shib Chunder Mozoomdar for Appellants.

Baboo Kishen Dyal Roy for Respondents.

Section 77 does not bar a suit by a plaintiff who has been shown not to have been in the actual receipt and enjoyment of rent. A suit for recovery of possession founded upon title may be brought by a person against whom a decision of the Revenue Court has been passed under the above Section, subject to the ordinary Law of Limitation.

THE plaintiff in this case sued for possession and to establish his title to 2 annas of certain *howladaree* right, claiming under a purchase made in the Bengali year 1266, alleging that he was ousted by the defendant, who intervened in an Act X. suit on the 12th January 1863. This suit was instituted on the 14th February 1864. He obtained a decree. The defendant appeals specially. The objection taken before us is that the suit, not having been brought within one year from the date of the decision of the Revenue Court in favour of the intervenor, is barred under Section 77, Act X. of 1859. But by two decisions of this Court (5 Weekly Reporter, page 85, and 4 Weekly Reporter, page 21, Act X. Decisions) it has been decided that Section 77 does *not* bar a suit by a plaintiff who has been shown not to have been in the actual receipt and enjoyment of the rents under Section 77. We think that a suit for recovery of possession founded upon title may be brought by a person against whom such a decision shall have been passed, subject to the ordinary Law of Limitation. Section 77 applies only to the rents of that particular year, and the determination of the question of actual possession. This appeal must, therefore, be dismissed with costs and interest.

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The 7th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Ejectment (of lessee of one of several co-parceners).

Case No. 2439 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 17th March 1865, affirming a decision passed by the Assistant Collector of Durbhangah, dated the 18th October 1864.

Luchmun Sahae Chowdry and another (Defendants), *Appellants,*

versus

Seami Jha (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Kissen Succa Mookerjee for Respondent.

A lessee of only one of several co-parceners cannot be legally ejected by any of the others as a trespasser.

THE plaintiff, as a ryot illegally ejected, sues to be restored to possession of his tenure under Clause 6, Section 23 of Act X. of 1859. He alleges that, being in possession as a sub-lessee (the pottah by the original lessee, Mr. Gale, bearing date in 1852), he was dispossessed on the 1st of August 1864 by the defendant, who took forcible possession of the land, coming upon it, and unyoking his bullocks which were at plough.

It appears that Narendun Thakoor, who granted the original lease to Mr. Gale, had only a 12 annas share. The title to the remaining 4 annas became vested in the defendant in 1862; but there is no evidence as to the mode in which the title devolved on him.

The plaintiff obtained a decree in the Lower Court restoring him to possession.

The appellant's vakeel objected before us that the lease, under which the plaintiff makes title, being by a 12-anna shareholder without the consent of the 4-anna shareholder, is void, and (citing the case of Ghunsyam *versus* Runjeet Sing, 4 Weekly Reporter, p. 39, Act X. Rulings) argued that a person who is the lessee of only one of several co-parceners can be legally ejected by any of the others as a trespasser. From the position as laid down in the decision quoted, we wholly and entirely dissent. In the first place, no suit for ejectment could properly be brought by one co-parcener alone. All must join, because, each having an equal right to possession, no single sharer could dispossess his co-sharer or a ryot claiming under him. If all joined, the suit must fail, because those who had joined in the lease to the ryots would be disabled from denying their own demise. *Secondly*, apart from any technical question as to the right of suit, the lease would be perfectly good to the extent of binding the shares of those co-parceners who joined in it. *Thirdly*, if the decision was law, any dissentient or quarrelsome sharer, by refusing to join in leases or pottahs, might make it impossible to let the joint estate to cultivators at all, and the consequence would be that the estate might revert to the condition of jungle.

In this case, the defendant has to make out a right to dispossess the plaintiff. *First*, then, the plaintiff's possession must be taken to have been lawful. He acquired it under the 12-anna shareholder, who had as much right to possession as the defendant. It is clear that the 4-anna shareholder could not justify the forcible dispossession of his co-sharer, or any one claiming under his co-sharer whose right to be in possession was as good as his own. *Secondly*, for all that appears to the contrary, the defendant's title may have accrued subsequent to 1259. It may well be that the defendant or his predecessors in estate may have received rents from, or otherwise recognized the tenancy of, Mr. Gale. If either supposition be correct (and neither appears to have been negatived by the defendant's evidence), the defendant would have been only entitled to rent, and could not treat the lease by the co-sharer as void.

We need not discuss the question whether, if one shareholder is wholly dispossessed by his co-sharers, he may not, if he can do so without a breach of the peace, take actual possession of a portion of the land equivalent to the extent of his own share, though, in so doing, he may dispossess the ryots whom his co-sharers have put into possession (*see* Littleton, Section 323, and the Commentary thereon by Lord Coke).

The decision of the Court below is clearly right on the facts as they appear before us, and, therefore, the appeal must be dismissed with costs and interest.

The 8th June 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Appeal—Section 77, Act X. of 1859—Costs.

Case No. 24 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 27th February 1865, reversing a decision passed by the Deputy Collector of Buddurgunge, dated the 6th September 1864.

Puddomohee Dossee and another (Plaintiffs), *Appellants,*

versus

Krishnendro Roy Chowdry (Defendant), *Respondent.*

Mr. T. Barrow for Appellants.

Baboo Isshur Chunder Chuckerbutty for Respondent.

The decision of a Deputy Collector, under Section 77, Act X. of 1859, for rent below 100 rupees, involving no question of title, was reversed on appeal by the Judge. On special appeal the Judge's decision was reversed as made without jurisdiction; but, as this point was not taken before the Judge, the reversal was made without costs in either Appellate Court.

THIS is a suit for the rents of a fishery. The piece of water is completely surrounded by land belonging to a zemindar, who intervened in the suit, and alleged that it was part of his zemindary, and occupied by the defendant as part of a jote within that zemindary.

The Deputy Collector tried the question under Section 77, and found that the plaintiff had actually been in receipt of the rents. The intervenor and ryots appealed to the Judge, who reversed that decision. The plaintiff appeals specially to this Court, and objects that the Judge had no jurisdiction, inasmuch as the question was one not involving any question of title, and the amount of rent only Rs. 2 and some odd annas.

We are of opinion that this objection is well-founded, and the decision of the Judge must, therefore, be reversed. But, as this point was not taken before the Judge, such reversal will be without costs, either in this Court or the Court below.

The 8th June 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Review of judgment—Appeal.

Case No. 397 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 23rd November 1865, reversing a decision passed by the Deputy Collector of that District, dated the 27th July 1865.

Laljee Mul (one of the Defendants), *Appellant,*

versus

Baboo Dhumput Singh (Plaintiff), *Respondent.*

Baboos Kalee Kishen Sein and *Greesh Chunder Ghose* for Appellant.

Baboo Romanath Bose for Respondent.

A Deputy Collector may entertain an application for review of a judgment of his predecessor.

In a suit by *A* against *B* and *C*, *A*, having obtained a decree against *B* only, appealed to the Judge to make *C* jointly liable with *B*. Meanwhile, on *B's* application for review of judgment, the decree against him was reversed. HELD that there was nothing illegal in this procedure.

THE Judge is clearly wrong in holding that the Deputy Collector, Mr. Mosely, was not competent to entertain an application for review of the judgment of his predecessor, Mr. Alexander.

The appeal which was pending before the Judge was the appeal of Dhumput, the zemindar. He was dissatisfied, because Mr. Deputy Collector Alexander absolved Mrs. Sheltis and made Laljee alone liable, and the object of his appeal was to make Mrs. Sheltis liable jointly with Laljee. In the meantime, Laljee applied for a review of the judgment against him; his application was entertained, and the result was that the decree against him was reversed.

There is nothing illegal in this procedure. The case will go back; the Judge will try the appeal on the merits.

The 8th June 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Suit to recover possession (by persons holding over after lease).

Case No. 348 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 26th October 1865, reversing a decision passed by the Deputy Collector of that District, dated the 17th July 1865.

Uma Kishoree Dassi (one of the Defendants), *Appellant,*

versus

Huro Gobind Shaha and others (Plaintiffs), *Respondents.*

Baboos Bungshee Doss Seal and *Sreenath Doss* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A plaint was held to disclose no cause of action under Clause 6, Section 23, Act X. of 1859, because the plaintiffs were neither farmers nor tenants, but persons holding over after the expiry of their lease, and consequently mere trespassers.

THE point taken by the defendants is that the suit, as brought by the plaintiffs, does not disclose a cause of action under Section 23, Clause 6, of Act X. of 1859. After reference to the plaint, we think this objection valid. The plaint merely states that the plaintiffs had had successive settlements made with them by Government, the last of which expired in 1270. The ouster complained of occurred in 1271, when, by their own account, the plaintiff's lease had expired, and when they were mere trespassers. The defendants are the purchasers of the zemindary rights from Government. The plaint, in our opinion, discloses no cause of action under the Section quoted, for the plaintiffs are, by their own showing, neither "farmers" nor "tenants," but persons holding over after the term of a lease had expired, and consequently, in the eye of the law, mere trespassers.

Verbal reference has been made to the Regular Appeals decided by us last year on the 29th July and 31st of August 1865, in the cases of the Talookdars of Pergunnah Bulda Khal, and reported in the Weekly Reporter; but we fail to see any analogy or resemblance between those cases and that now before us.

The plaintiffs, in our opinion, should at once have been put out of Court; and we have accordingly to reverse the decision, not only of the Judge who remanded the case, but of the Deputy Collector who dismissed it, simply on the point of limitation.

The special appeal is decreed, and the plaintiff's suit is dismissed with all costs.

The 9th June 1866.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal (from order rejecting application to set aside ex-parte judgment).

Miscellaneous Appeal from an order passed by the Deputy Collector of Backergunge, dated the 3rd April 1866.

Chuttur Narain Roy (Defendant), *Appellant,*

versus

Baboo Gopal Lal Tagore (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sein for Appellant.

No one for Respondent.

An appeal lies, under Section 13, Act VI. of 1862 B. C., from an order rejecting an application to set aside a judgment passed *ex parte* against the defendant.

THE appeal appears to have been erroneously rejected. It is not an appeal against an order rejecting an application for review of judgment. It is an appeal against an order rejecting an application to set aside a judgment passed *ex parte* against the defendant. Such an appeal is authorized by Section 13 of the Bengal Act VI. of 1862. The appeal must therefore be received.

The 8th January 1866.

Present:

The Hon'ble G. Loch, L. S. Jackson, and F. A. Glover. *Judges.*

Interest—Execution of decree.

Case No. 505 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Beerbhoom, dated the 22nd May 1865.

Sreeshteedhur Shahi (Decree-holder), *Appellant,*

versus

Woomeshnath Roy (Objector), *Respondent.*

Baboos Banee Madhub Banerjee and *Sreenath Doss* for Appellant.

Baboos Kishen Kishore Ghose and *Bama Churn Banerjee* for Respondent.

The judgment-debtor, in consideration of time being allowed him, promised, in open Court, through his vakeel, to pay interest to his creditor, although the decree did not specifically award interest. HELD by the majority (Glover, J., dissenting) that the debtor was bound by that promise, and that execution could issue as well for the sum decreed as for the interest promised.

Glover, J.—THREE objections are raised by the appellant's pleader in this case. He urges:—

(1) That interest has not been allowed on his costs;

(2) That the defences being all of a similar character in the execution of decree case, only one set of costs should have been awarded; and

(3) That, although the original decree did not specifically award interest, the judgment-debtors subsequently agreed to pay it in consideration of the sale in execution being postponed, and that, therefore, the Principal Sudder Ameen was wrong in not allowing execution to proceed in regard to interest as well as principal.

The two first points may be disposed of very shortly. It has been many times ruled by this Court that interest runs on costs as a matter of course, and the appellant is clearly entitled to them.

As the decree-holder chose to take out separate proceedings against the judgment-debtors, they were in their turn obliged to file separate petitions of objection, and, as the result was unfavorable to the decree-holder, I do not see why he should not bear the entire costs.

With regard to the *third* objection, I think that the Principal Sudder Ameen has come to a right conclusion, although I do not concur with his reasons for doing so. The wording of the *vakalutnamah*, under which the judgment-debtor's pleader is alleged to have agreed to pay interest, is broad enough, I think, to have authorized such promise. The debtors appoint the vakeel to try and get the execution-sale postponed, and agree to abide by whatever the latter finds it necessary to do in consequence. In giving such a power to their vakeel, the judgment-debtors must, of course, have been prepared to submit to some sacrifice. They must have known that a decree-holder with the day of sale fixed would not go back from his object without a *quid pro quo*, and that the only probable and reasonable way of getting the sale postponed was by an offer of "interest" during such interval. I have no doubt that the debtors expected such a result, and that the *vakalutnamah* gives their agent full power to make such an arrangement, and that they are bound by it.

But I do not think that the arrangement can be taken advantage of in this case. The decree gave the creditor a bare sum of money; no interest was allowed: and it seems to me that no subsequent arrangement between the parties can be incorporated into that decree, or made the subject of "execution." A new contract was entered into, by which, in consideration of the judgment-creditors postponing the sale, the debtors agreed to pay interest; and, if the latter now repudiate their vakeel's acts, and refuse to carry out their part of the contract, the decree-holder's remedy is in a fresh suit. He cannot, in my judgment, be allowed to alter the original decree by incorporating with it a claim which was expressly ignored when that decree was made.

Reference was made to a precedent of the Sudder Dewanny Adawlut, dated 8th September 1860, Baboo Bungsee Buddun Mitter, petitioner, page 252; but there is a difference, I think, between that case and this. There certain sums had been paid, and the question was whether they were to be credited to principal or interest, there being no mention of interest in the decree, but an allegation on the part of the creditor that the debtor had agreed to pay interest to secure the former's forbearance; and the order of the Court was that, if such agreement were proved, the monies paid should be credited as interest, and the decree executed for the full amount of the principal. It did not direct that execution

should proceed for the balance of interest due under the agreement; it left that apparently, as I would leave the interest in this case, to the future action of the parties. and merely decreed execution for the principal. If anything had been paid in this case, I should have considered it properly referable to the interest promised under the *vakalutnamah;* but, as the debtors repudiate the agreement, and have paid nothing, I think that the decree-holder must be satisfied with enforcing his decree for the principal, and must bring a fresh suit for the interest on the contract entered into between himself and the judgment-debtor's vakeel.

I would, therefore, dismiss this appeal with costs, except as regards the first objection, which should be given in favor of the appellant.

Loch, J.—The decree in this case awarded a sum of money without interest. The decree-holder took out execution. The judgment-debtor prayed for time, and promised, in consideration of time being allowed him, that he would pay interest. The execution was accordingly stayed, and the judgment-debtor defaulted. Again was execution taken out; again the same promises were made for the payment of interest in consideration for further time to enable the debtor to pay up; and again the debtor has repudiated his engagements, and failed to pay a farthing. All these arrangements for time and for payment of interest were made in open Court, and I see no reason why the decree-holder should not be allowed to take the benefit of the promise made by the debtor, there being no doubt that his vakeel had full power to act for him as he did. It has been urged that the Court cannot give more than is in the decree. In cases where mesne-profits or interest are claimed, which have not been awarded in the decree, the Court executing the decree cannot import anything into the decree; but, when the debtor, in consideration of the forbearance shewn by his creditor, agrees in open Court to pay him interest, so that the creditor should be no loser by his compliance with the request of the debtor for time, it appears to me that the creditor, after such promise made, is fully entitled to ask the Court to execute his decree for the principal with the interest due thereon from the date of such promise. It is said that he should bring a fresh action for the interest so promised. Surely, this is putting the decree-holder to a most unnecessary harassment. He has acted with forbearance and in good faith, and is equitably and legally entitled to recover what has been promised. He has the choice of fresh litigation to secure a small sum on account of interest promised to him as a consideration for his forbearance in executing his decree, or of giving up the small advantage which could, without difficulty, be realized on execution. Where parties have, for reasons of their own, agreed to certain modifications of, or additions to, a decree in the presence of the Court, there appears to me to be no reason why the decree should not be executed with its subsequent modification or addition; but when a decree-holder, without the consent of the other party, seeks to alter a decree, and asks the Court to give him something which the decree does not award to him, then clearly the Court must confine itself to the terms of the decree, and cannot go beyond. I would, therefore, reverse the order of the Court below, and allow execution to be taken for the principal with interest from the date on which the promise to pay interest was first made.

Jackson, J.—In this matter I concur with Mr. Justice Loch.

A decree having passed, whether by an arrangement between the parties, or by an adjudication of the Court for a sum certain, the plaintiff would be entitled, as a matter of course, to interest on that sum and upon the costs from the date of decree to the date of realization; and, if this were not inserted in the decree, the Court would at any time insert it on application.

In this case, the plaintiff having proceeded to take out execution of his decree, the judgment-debtor by his vakeel promised to pay such interest, and rendered it unnecessary for the Court to make any order. By that undertaking the judgment-debtor is, in my opinion, certainly bound.

The pleader urges that nothing is said of interest in the decree. No doubt, the decree is silent as to interest accruing before the decree, as it was excluded by the settlement between the parties; but interest upon the amount which the Court finds to be due, or for which the decree passes, however it be made up, and upon the costs allowed, is incidental to every decree; and it is absurd to say that a decree shall pass for a particular sum, and that the judgment-debtor may postpone payment as long as he pleases without payment of interest. On this point, therefore, as proposed by Mr. Justice Loch, the order of the Court below must be reversed.

The 9th January 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Jurisdiction—Revival of Execution—Reversal of Sale.

Case No. 539 of 1865.

Miscellaneous Appeal from an order passed by Mr. E. C. Lanec, Judge of Backergunge, dated the 17th June 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 31st March 1865.

Gour Monee Debia and another (Decree-holders), *Appellants,*

versus

Neel Madhub Gooho and others (Judgment-debtors), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

No one for Respondents.

Where an application for revival of execution of a decree has been admitted and acted upon without objection, and a sale takes place, and the debtor succeeds in setting aside the sale on the ground of irregularity, the Court executing the decree cannot, of its own motion, raise the question of limitation, nor can the debtor urge such a plea at so late a stage as after the reversal of the sale.

In this case, the petitioner, after Act XIV. of 1859 had come into operation, on the 8th July 1864, applied for the revival of the execution of a decree passed before the Act, more than three years after the case was last struck off the file for default. When this application was made, both parties, as well as the Court, seeing that the application was made within three years of the expiry of the year 1861, after which the new law came into operation, and mistaking that this "coming into operation" was "the passing of the Act" mentioned in Section 21 of the Act, thought this case to be guided by the old law, by which decree-holders were allowed twelve years for revival. It was perhaps owing to this mistake that no objection was taken to the application, and the execution was allowed to go on until some immoveable property of the debtor was sold. Proceedings were then successfully taken by the debtor to set aside this sale on the ground of irregularity, but not on the ground of the revival being *illegal.* After this reversal of the sale, the Lower Court, on the 31st March 1865, with reference to a decision of the High Court passed in another case applying limitation to the revival of an execution-case, dismissed this case on the ground that the application for revival, when made several years ago, was not in time."

Against this order the decree-holder appeals to this Court. We agree in the abstract point of law as decided by the Lower Courts, and think that the application was not made in time. We, however, hold that, where an application for revival has already been admitted and acted upon without any objection, and a sale takes place, and the debtor asks for and succeeds in getting the sale set aside only on the ground of irregularity, it is no longer proper for the Court executing the decree to introduce of its own accord the question of limitation, or in the power of the debtor to take up the plea at such a late stage as after the reversal of the sale of his property. There was, in fact, a waivor throughout. We would, therefore, in this view, reverse the order of the Lower Courts, and, decreeing the appeal, remand the case to the Court of first instance for proceeding with the execution.

The 24th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Jurisdiction—Cancelment of sale in satisfaction of decree—High Court (Powers of—as a Court of general supervision).

Case No. 346 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 24th February 1865, affirming an order passed by the Moonsiff of that District, dated the 8th June 1864.

Joy Ram and others (Purchasers of decree), *Appellants,*

versus

Bulwunt Singh (Judgment-debtor), *Respondent.*

Mr. J. S. Rochfort for Appellants.

Baboos Onoocool Chunder Mookerjee and *Kalee Prosunno Dutt* for Respondent.

A Moonsiff in charge of the current duties of the office of the Sudder Ameen acts without jurisdiction in cancelling a sale which has taken place in satisfaction of a decree; and the High Court, as a Court of general supervision, can declare the order of the Moonsiff null and void.

In this case, a Moonsiff, who was in charge of the current duties of the office of a Sudder Ameen, on the application of a judgment-debtor, cancelled a sale which had taken place in satisfaction of a decree.

On appeal by the decree-holder, who was also the auction-purchaser, the Judge held that, although the Moonsiff had acted without jurisdiction, there was no appeal against his order, and that consequently he saw no reason to interfere.

We are of opinion that, as a Court of general supervision, we are competent to declare the order of the Moonsiff, which was wholly without jurisdiction, to be null and void. The order is, therefore, reversed, and the original application of the judgment-debtor, impugning the legality of the sale, must be disposed of by a competent Court.

The 24th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Costs—Objections as to—when and how to be raised.

Case No. 562 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 25th July 1865.

Hureenath Banerjee (Judgment-debtor), *Appellant,*

versus

Doybo Chunder Banerjee (Decree-holder), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Woopendur Chunder Bose for Respondent.

An objection as to costs is a matter which should be raised in the shape of an application to amend or review the original decree, and, failing that, by way of regular appeal against the decree; but not in the execution of the decree.

The appellant is not represented by any pleader appearing for him. We have looked into the case, and find that the main objection preferred is in the matter of costs, which, it is contended, ought not to have been separately awarded to the decree-holder, who was (it is alleged) a mere *pro formâ* defendant.

However this may be, we think that the appellant's objection on the subject of costs is a matter which ought to have been raised in the shape of an application to amend or to review the original decree, and, failing that, by way of regular appeal against the decree; and that it could not be determined in the execution of the decree.

We dismiss this appeal with costs, and the same order applies to No. 561.

The 24th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Attachment—Striking-off of suit.

Case No. 566 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 16th August 1865.

Purbhoo Doss (Decree-holder), *Appellant,*

versus

Goma Bhujun Sing (Judgment-debtor) and others (Decree-holders), *Respondents.*

Mr. C. Gregory and *Baboo Khettur Mohun Mookerjee* for Appellant.

No one for Respondents.

An attachment cannot subsist when the suit has been struck off for neglect to pay in the tulubana for the service of the necessary sale-processes.

We think that the Judge was right. It is clear that the appellant, who had taken out attachment, neglected to pay in the tulubana for the service of the necessary sale-processes, and his case was removed from the file by the Principal Sudder Ameen, owing to the above neglect.

It is very clear that an attachment cannot subsist unless some suit is going on. In this case, the suit had been struck off, and no appeal was preferred by the appellant.

The direction of the Principal Sudder Ameen that the attachment was to hold good, notwithstanding that the suit had been struck off, was clearly illegal.

No attachment subsisting on the part of the appellant, when the proceeds of the sale were distributable, he was not entitled under the provisions of Section 270 of Act VIII. of 1859 to be paid first.

The appeal is dismissed without costs, respondents not appearing.

The 24th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Decree (Enforcement of)—Notice.

Case No. 668 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 7th August 1865.

Sham Chand Bysack (Decree-holder), *Appellant,*

versus

Mr. Lucas Theodore Lucas (Judgment-debtor), *Respondent.*

Baboos Unoocool Chunder Mookerjee and *Kalee Prosunno Dutt* for Appellant.

Mr. G. C. Paul and *Baboo Sreenath Doss* for Respondent.

The mere notice to a judgment-debtor of his decree-holder's intention to enforce his decree unless cause were shown by him is not a proceeding to enforce or keep in force the decree within the meaning of Section 20, Act XIV. of 1859.

THE appellant is the decree-holder. It appears that the original decree was passed in 1854. The application to revive the decree is dated in January 1865. The Judge held that the application was barred by limitation.

In appeal it is contended that, as a notice was issued, it must be held that legal steps were taken to keep the decree alive, and that the Judge's order is opposed to Section 21, Act XIV. of 1859.

On referring to the record, we find that the only step taken by the decree-holder between 1854 and 1865 was to move the Court of Backergunge to serve a notice on the judgment-debtor, through the Judge of Dacca, to show cause why the decree should not be enforced against him. This notice was not served on the judgment-debtor, but it is said that in his absence it was left at his usual place of residence in Dacca. The question is whether such a notice is such a proceeding to enforce or keep in force the original judgment as is contemplated in Section 20 of Act XIV. of 1859, by which Act this case is governed. We think not; the notice merely intimated to the judgment-debtor that it was the intention of the decree-holder to enforce his decree, unless cause were shewn. But, for the fact of more than a year having elapsed from date of decree, no notice at all would have been necessary, and the decree-holder would have done positively nothing. In this case an abortive attempt was made by him to give his judgment-debtor notice that it was his intention to enforce his decree. Nothing further was done to carry out that intention, and therefore no proceeding to enforce the judgment or to keep it in force was taken.

The pleader is unable to show us any ruling of this Court to the contrary. The order of the Judge is upheld; and the appeal dismissed with costs and interest.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Decree (Enforcement of)—Notice.

Case No. 554 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 22nd May 1865.

Girjanund Oopadhya (Decree-holder), *Appellant,*

versus

Chunder Binode Oopadhya (Judgment-debtor), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Kishen Kishore Ghose and *Greeja Sunkur Mojoomdar* for Respondent.

The mere issue of notice to the judgment-debtor in cases where more than one year has elapsed from the date of decree is not a proceeding to enforce or keep in force the decree.

THIS Court has ruled that the mere issue of a notice to the judgment-debtor in cases where more than one year has elapsed from date of decree is not a proceeding to enforce or to keep in force the decree.

The Judge's decision is affirmed, and the appeal dismissed with costs and interest.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Revival of decree—Dilatoriness of the Court.

Case No. 586 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 14th June 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 31st March 1865.

Rajah Sutto Surun Ghossal Bahadoor (Decree-holder), *Appellant,*

versus

Nobeen Chunder Doss and others (Judgment-debtors), *Respondents.*

Baboos Hem Chunder Banerjee and *Obhoy Churn Bose* for Appellant.

No one for Respondents.

The dilatoriness of the Court cannot prejudice a petition for revival of a decree, if filed in time. The appellant is not bound to remind the Court to do its duty by motion or petition.

THE Judge admits that the appellant's petition for the revival of his decree was filed in time, and further that it was the "dilatoriness" of the Court which brought about the delay; and yet, in the face of this admission, he holds that the appellant was bound to remind the Lower Court of its duty by motion or petition. The omissions of the Court were visited upon the suitor; and his application, which was admittedly filed in time, was rejected.

We think that such an order is quite unsustainable, and we reverse it, and decree this appeal with cots and interest.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Final decree.

Case No. 606 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 2nd August 1865, modifying an order passed by the Principal Sudder Ameen of that District, dated the 6th December 1864.

Shaikh Fuzl Imam and others (Decree-holders), *Appellants,*

versus

Doolun Singh and others (Judgment-debtors), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* and *Baboo Mohendro Lal Shome* for Appellants.

No one for Respondents.

Limitation runs from the date of the last judgment by which the whole decree becomes final, and not from the date of an incomplete decree (*i. e.*, where a case is partly decreed and partly remanded).

IN this case we must hold the Judge's decision to be erroneous. The Sudder Court in 1860 affirmed the Additional Judge's decision in part, but remanded the case for further investigation on certain points. That investigation took place, and a final decree was passed, which was "upheld" (to use the Judge's words) "by the High Court in its entirety" in 1862.

It was undoubtedly from the date of this last judgment, by which the whole decree became final, that the period of limitation is to run; for the plaintiff could not be expected to execute, and in fact could not execute, an incomplete decree, and could take no steps, until the whole of the questions in the suit were adjudicated upon.

The Judge's order is, therefore, set aside with costs.

This order applies to cases 607-8-9; and the counter-appeal No. 636, it is admitted, must, under this decision, fail, and it is, therefore, dismissed with costs.

The 18th August 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction (of Civil Court)—Forgery—Criminal Prosecution.

Dinobundhoo Chuckerbutty, *Petitioner.*

Under Section 170 of the Code of Criminal Procedure, any Civil Court, which has the power of calling before it the proceedings and evidence of a suit in which forgery is alleged to have been committed, may, if satisfied, after a preliminary enquiry, that the charge is proper for investigation, give its sanction to the charge being entertained and investigated by the Magistrate, notwithstanding that the Subordinate Court by whom the suit was being tried refused its sanction to the prosecution.

Phear, J.—DINOBUNDHOO CHUCKERBUTTY, the present petitioner, seeks to set aside an order of the Judge of Dacca, dated the 29th of April last, giving sanction to pro-

ceedings being entertained in the Criminal Courts against the petitioner and others under Section 170 of the Criminal Procedure Code. The circumstances out of which that order arose were shortly as follow, as stated by the petitioner in his petition:—

The petitioner and the prosecutor, who now desire to take criminal proceedings against him, were sued together as co-defendants in a suit for contribution in respect of certain Government revenue, which the plaintiff in that suit alleged he had paid on the defendant's behalf. The prosecutor did not appear in the suit; but the petitioner did, and, as matter of defence, put forward a document purporting to be a Bill of Sale from prosecutor to himself, with the view of showing that he had no liability except as transferee of the prosecutor, and that that liability did not commence early enough to support the plaintiff's claim. Notwithstanding this document, the suit was decreed against all the defendants, against the petitioner and prosecutor alike. After the termination of the suit, the prosecutor complained to the Deputy Magistrate of the District that the Bill of Sale put forward in the late suit by the petitioner was a forgery, and sought to institute criminal proceedings against the petitioner in respect of it. The Deputy Magistrate, after some preliminary enquiry, refused to go on with the matter without the sanction of the Sudder Ameen before whom the suit was tried, and he wrote to the Sudder Ameen for that sanction. In reply, the Sudder Ameen declined to give the sanction asked for, because he saw no reason to impugn the *primâ facie* authenticity of the document, and for putting the petitioner on his trial for forgery.

Thereupon the prosecutor applied to the Judge of Dacca, and the Judge made the order which is now sought to be set aside.

The substance of the petitioner's contention is, that the sanction contemplated by Section 170 can only be given by that Court in which the evidence is actually (for the first time) given in the suit, or by some superior Court before which the suit has come in regular course, and which has thus before it all the materials of the case at the time when the application for its sanction is made.

I think that this contention is founded on much too narrow a view of the scope of Section 170. But I have also some doubt whether the case before us comes within the operation of Section 170 at all. At any rate, if it does so, it seems to me practically undistinguishable from that of Radhanath Banerjee *versus* Kangalee Mollah, reported in Marshall's Reports, page 407, and is, therefore, governed by the decision there given. As the Chief Justice remarked in that case, "the object of that Section is to prevent "persons, being parties to a suit, from "oppressing and harassing their adversaries "by criminal proceedings under the Section "of the Penal Code to which reference is "made in respect of documents used in evi-"dence in civil proceedings." This is somewhat different from the object of the repealed Act I. of 1848, which, in effect, made the Court the accusing party. That Act, by forbidding Magistrates to receive charges, except as therein directed, from the hands of the Civil Court, took away from private persons, in certain limited cases, the power of preferring criminal charges of forgery against others, their adversaries in a civil suit, and transferred that power to the Civil Court in which the suit was pending, and which was directed to send the party accused in custody before the Magistrate. By Section 170 of Act XXV. of 1861, the Legislature does nothing of this kind: it leaves the power of preferring the charge with the party, and only provides that it shall not be entertained "except with the "sanction of the Court in which the docu-"ment was given in evidence, or of some "other Court to which such Court is subor-"dinate. Such sanction may be given at "any time." And it is worth remarking that the latter part of Section 171 still gives the Civil Court the only power which was conferred upon it by Act I. of 1848, namely, of itself sending the accused person in custody before the Magistrate, when, as I suppose, the matter of accusation turned up before it during the actual trial of the suit. It, therefore, appears to me that the "sanction" of Section 170 is something new; and, in my judgment, it merely means so much action on the part of a Court of Justice, which has access to all the evidence and proceedings in a suit, as will protect a party to that suit from harassing criminal accusations at the hands of his adversary, relative to documents which have been used as evidence in the suit. No unnecessary restriction is intended to be placed on the right (and indeed duty) of a private person to prosecute where he believes the offence of forgery to have been committed. The evil aimed at is, I think, the attempt of the prosecutor to make a frivolous prosecution the

instrument for harassing one who has been his opponent in a civil suit relating to matters occurring in that suit, and I judge, from the very wide and restricted words which the Legislature has employed in Section 170, that it considered this object would be hit by imposing as a condition precedent to a prosecution of the kind referred to, that some Civil Court, which has the power of calling before it the proceedings and evidence of the suit, shall, after satisfying itself (by preliminary enquiry if necessary) that the charge is proper for investigation, have given its sanction to the charge being entertained and investigated by the Magistrate. With these views, I am of opinion that one such Court having given the requisite sanction, the Magistrate is bound to investigate the charge as he would in any other ordinary case, and exercise his discretion solely with reference to the merits as they appear before him. It is, I think, a matter of perfect indifference that other subordinate Courts, including, it may be, the Court of first instance, have previously refused their sanction to the prosecution: for I do not think that either the giving or the withholding of the sanction is a judicial act similar to the endorsement of the Judge on the Nisi Prius record in England, which has the effect of giving or refusing costs, and which, once done, cannot be altered except by review or appeal. I will only add that (as I have already hinted) I have doubts whether the case before us really comes within the spirit of the Act. The prosecutor and petitioner were not adverse litigants in the suit in question, and it does not appear that the document, which is alleged to be forged, could, as used in that suit, have any disadvantageous effect on the prosecutor's interests. On the whole, I think the rule *nisi* must be discharged with costs.

Bayley, J.—Under the facts of this case, I think Section 170 of Act XXV. of 1861 allowed the petitioner to apply to the Judge of Dacca for his sanction to an enquiry before the Magistrate, when the Sudder Ameen had refused his application to the same effect.

I, therefore, concur with the order proposed by my learned colleague.

The 30th August 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Execution of decree—Limitation—Set-off.

Case No. 258 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 21st February 1865.

Prosunno Coomar Ghose and others (Decree-holders), *Appellants,*

versus

Sham Lal Gungopadhya (Judgment-debtor), *Respondent.*

Mr. C. Gregory and *Baboo Romanath Bose* for Appellants.

Mr. R. T. Allan and *Baboo Taruckuath Sein* for Respondent.

A tenant obtained a decree giving him possession of his tenure with mesne-profits, but directing him to pay the rent due to the zemindar with interest up to date of realization. The tenant, who had kept alive his decree by intermediate applications for execution, having applied for further execution—HELD that the zemindar, who had made no attempt to execute his decree within the period of limitation, could not, when the execution of his decree was barred by limitation, be allowed to execute in the shape of a set-off.

Order passed on the 24th August 1865.

WHEN the case was called up for hearing, the respondent's vakeel was not in attendance. The case before us is as follows: The appellant obtained a decree on the 11th January 1848, reversing the sale of his tenure, and giving him possession with mesne-profits, but directing him to pay Rupees 928-2, the amount of rent due to the defendants with interest to date of realization. Application for the execution of the decree was made by the appellant in 1851, and it has been kept alive intermediately by repeated applications. The defendant appears to have made no attempt to realize the sum of Rupees 928-2 awarded him under the decree; but, now that the appellant has again sued out execution, the defendant has applied to the Judge to have the sum decreed to him with interest deducted as a set off against the appellant's claim. As the defendant up to the present time has made no attempt to execute his decree, for such in fact the order in his favor amounts to, and more than sixteen years have elapsed since that order was passed, he cannot now be allowed to execute it in the shape of a set-off, and we think the Judge was in error in allowing it, as execution

barred by limitation. We reverse the order of the Judge, and decree this appeal with costs.

Final Order.

At the request of the petitioner's vakeel, who stated that by mistake the case in this Miscellaneous file had been taken up a day before the date fixed in the notification, we suspended our order passed on the 24th, in order that the petitioner's pleader, who was absent when this case was brought up, might be heard. This day this case has been again brought up for hearing, and it is urged by Mr. Allan for the respondent that the decree of 1848 contained a direction for the payment of the sum of Rupees 928-2 out of the mesne-profits declared to be payable to the special appellant. We have carefully read the decretal order, and cannot find any such provision. It appears from what is stated to us that previous to 1848 the respondent, who is the zemindar, obtained a summary decree for rent from the Collector, and under that decree sold the tenure. What was the date of that decree is not shewn us. The suit by the special appellant was to set aside that sale, and the decree in his favor of the 11th January 1848 provides for the payment of the rent to the zemindar. What is said in that judgment regarding the zemindar's claim is in effect a confirmation of the Collector's decree. It declares the plaintiff bound to pay that amount of rent to the zemindar while the sale of his tenure is set aside, and he is entitled to recover mesne-profits during the period of dispossession. As this decision was passed long anterior to the enactment of Act VIII. of 1859, when the principle of set-off was not recognised by the Courts, the zemindar was bound, in the absence of any order declaring that the sum payable to him as rent should be deducted from the mesne-profits, to execute his decree in the usual way, and he has done nothing up to the present time. Now, that the special appellant, who has kept alive his decree, seeks further execution, the respondent asks that his claim, with the interest which has accrued thereon, may be charged as a set-off against part of the appellant's claim under the provisions of Section 209 of Act VIII. of 1859. This doubtless he would be entitled to have if his decree were capable of execution; but, if execution is barred by limitation, he not having attempted to execute it within twelve years, the decree is so much waste paper, and cannot now be enforced. The zemindar has no one to blame but himself. He might have applied for execution; and, if the Court to which he applied had passed any order refusing to execute on the ground that he had a larger sum to pay as mesne-profits, or directing his claim to be deducted from the larger claim when the amount of mesne-profits were ascertained, he would have preserved his right. But he appears to have been supine throughout. Under these circumstances, we see no sufficient grounds for interfering with our order of the 24th instant.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Execution of decree—Liability of Joint Judgment-debtors.

Case No. 628 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 29th June 1865, reversing an order passed by the Sudder Ameen of that District, dated the 5th December 1864.

Gopal Pershad and another (Decree-holders), *Appellants,*

versus

Ramawoogra Sing (Judgment-debtor), *Respondent.*

Baboo Anund Gopal Pauleet for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

A decree-holder can execute his decree against one or any or all of the joint judgment-debtors. If he has received any sum in part payment of his decree from one of the joint-debtors, and chooses to absolve him from further liability, and to proceed against the others, this will not affect the position of the debtors *inter se* or their mutual responsibilities, or absolve the debtor who has paid from contributing if he has paid less than he is liable for as between him and his co-debtors.

It is admitted that in this case the decree was passed against all the defendants, and that they were jointly and severally liable. But the Judge holds that, because the decree-holder chose to receive a certain sum from one of the joint-debtors, and to pursue him no further in execution, he is by his own act estopped from executing his decree against the other joint-debtors under the decree, except rateably and to the extent of the sum recovered by him from one of the co-defendants.

On calling upon the pleader for the respondent to support the judgment of the Judge, he refers to a decision of this Court, dated 18th February 1862, in the case of Bishonath Tewaree, petitioner, *versus* Kolashbany Narain Singh and others.

It is very clear that the decree-holder could execute his decree against one or any or all of the joint judgment-debtors. If he has received any sum in part payment of his decree from one of the joint-debtors, and chooses to absolve him from further liability, and to proceed against the others, this will not affect the position of the defendants *inter se*, or their mutual responsibilities, or absolve the co-defendant who has paid from contributing if he has paid less than he is liable for as between him and his co-defendants.

The decision referred to did not lay down any general rule, and was governed by its peculiar circumstances. We also find that in that case a compromise was entered into by the plaintiff and some of the co-defendants during the pendency of the case. The circumstances of the case not being applicable to the present case, the decision is not binding upon this Bench.

The appeal is decreed, and the decision of the Judge reversed.

This judgment will govern No. 629.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Execution of decree—Limitation—Legal disability—Section 11, Act XIV. of 1859.

Case No. 632 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 28th June 1865.

Rotty Rumun Oopadhya (Decree-holder), *Appellant,*

versus

Chunder Binode Oopadhya and others (Judgment-debtors), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. R. E. Twidale for Respondents.

There is no law or rule of practice which stays the Law of Limitation in cases of execution, pending the period a decree-holder may be under legal disability. Section 11, Act XIV. of 1859, applies to suits, and not to processes in execution of a decree.

THE only point taken by the pleader for the appellant is that one of the decree-holders attained his majority in February 1865, and that he took steps to enforce the decree within the prescribed period after attaining majority.

We know of no law or rule of practice which stays the Law of Limitation in cases of execution pending the period a decree-holder may be under a legal disability. Section 11 of Act XIV. of 1859 quoted by the pleader applies to suits, and not to processes in execution of a decree.

The appeal is dismissed with costs and interest.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Certificate (Grant of—to Widow)—Adoption.

Case No. 640 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 12th August 1865.

Nitto Kallee Debee, *Appellant,*

versus

Obhoy Gobind Chowdhry, *Respondent.*

Baboos Sreenath Doss and *Shib Chunder Mojoomdar* for Appellant.

No one for Respondent.

A certificate may be granted to a widow, as guardian of her minor son, to collect the debts due to her deceased husband, notwithstanding that the adoption of the husband may have been set aside.

THIS was an application by a Hindoo widow, as guardian of her minor son, for a certificate to enable her to collect the debts due to the estate of her deceased husband. In her application her husband was styled by the name he usually went by, *viz.*, Sukuda Gobind Chunder.

The Judge refused to grant the certificate, because the adoption of Sukuda Gobind Chunder had been set aside by a decision of the Privy Council.

We are of opinion that the Judge ought to have granted the appellant a certificate to collect the debts due to her husband, commonly known by the name of Sukuda Gobind Chunder, for it was by that name he was known during his lifetime, and in that name

all his monetary transactions were carried on.

The granting of such a certificate in no way recognises the *status* of the husband as an adopted son. The opposition on the part of the objectors appears to the Court to have been vexatious. We, therefore, direct that this appeal be decreed with costs.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Interest (Right of decree-holder to).

Case No. 649 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th June 1865.

Modhoo Soodun Roy Chowdhry and others (Decree-holders), *Appellants,*

versus

Bhikaree Roy Chowdhry and others (Judgment-debtors), *Respondents.*

Baboo Motee Lal Mookerjee for Appellants.

Baboo Baneenath Bose for Respondents.

As long as a decree-holder does not incur the loss of right by limitation, he cannot be deprived of the interest which his decree gave him, on the ground of his dilatoriness in taking out execution.

We think the decision of the Principal Sudder Ameen is wrong in withholding interest on the ground that the decree-holder had been dilatory in taking out execution.

The decree was for money and bore interest till date of realization. The judgment-debtor ought to have paid the amount due if he wished to escape the payment of further interest; and, as long as the creditor does not incur the loss of right by limitation, he cannot be deprived of the interest which the decree gave him.

We are referred to a Construction of the Sudder Dewanny Adawlut; but that Construction has been superseded by the Code of Civil Procedure.

On this point, therefore, we must order the decision of the Principal Sudder Ameen to be amended with costs.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Appeal struck off for default.

Case No. 666 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 28th August 1865, reversing an order passed by the Principal Sudder Ameen of that District, dated the 8th April 1865.

Gour Chunder Shaha (one of the Decree-holders), *Appellant,*

versus

Gour Mohun Ghosh and others (Judgment-debtors), *Respondents.*

Baboos Kalee Prosunno Dutt and *Kalee Mohun Doss* for Appellant.

No one for Respondents.

An appeal struck off the file for default does not give the decree-holder a fresh point from which to start in calculating the period of limitation when he seeks to execute his decree.

We think in this case the Judge was right.

An appeal struck off the file for default does not, we think, give the decree-holder a fresh point from which to start in calculating the period of limitation when he seeks to execute his decree.

The appeal is, therefore, dismissed.

The 25th January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Ex-parte Judgment (Application to set aside)—Procedure.

Case No. 595 of 1865.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 27th June 1865.

Doorgaranee Dossee, *Appellant,*

versus

Jadub Chunder Thakoor, *Respondent.*

Baboos Kishen Kishore Ghose and *Gopal Lall Mitter* for Appellant.

Mr. J. L. Reed and *Baboo Sham Lall Mitter* for Respondent.

An application under Section 119, Act VIII. of 1859, to set aside an *ex parte* judgment decreeing possession of

a putnee, &c., if made within 30 days from the date of the process enforcing the judgment, ought to be disposed of according to that Section, and not rejected on the ground that, as the ancestors of the applicants were parties to the original suit, their application could not be entertained under Section 230.

In this case it appears that a suit was brought against Ram Sunkur and Hur Sunkur for possession of a putnee, and to set aside certain dur-putnees said to have been created subsequent to the purchase of the parent putnee in execution of a decree.

The judgment was an *ex parte* one. The appellants in No. 627 applied under Section 119 of the Code of Procedure, but were directed by the Judge to bring forward any claim they might have at the time of execution. No appeal appears to have been made against this order.

The decree was executed; and within thirty days from the date of the process enforcing the judgment, the appellants applied under the provisions of Section 119. Their application was rejected by the Judge. He held that, as the ancestors of the appellants were parties to the original suit, their application could not be entertained under the provisions of Section 230 of the Code.

We think that the Judge is clearly wrong. The application is not made under the provisions of Section 230, but under those of Section 119, and was made within thirty days from the date of the process enforcing the judgment. The order of the Judge is reversed with costs, and the case sent back for trial under the provisions of Section 119 of the Code.

This order applies to appeal No. 627.

The 26th January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Cross-decrees—Set-off.

Case No. 694 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 18th September 1865.

Moulvie Reazooddeen Hossein *alias* Siakut Hossein (Judgment-debtor), *Appellant,*

versus

Fuzloonissa and another (Decree-holders), *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondents.

In order to admit of a set-off being made where there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite.

We think that the Judge has rightly held that Section 209 of the Code of Procedure does not apply in this case.

In order to admit of a set-off being made where there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite.

In this case it is very doubtful what the liability of Siakut Hossein really is. In the first decree for dower which Fuzlun obtained against Siakut and Luheemun, those parties were made personally liable only to the extent to which they inherited the estate of the husband of Fuzlun. In the other suit, in which Fuzlun and Shureefun were co-plaintiffs, it is not shown with any certainty who are the heirs of Shureefun. Siakut Hossein is the husband it is true, but there are admittedly other heirs.

On the whole there is so much uncertainty in the matter that the Court is unable to apply the principles of Section 209. The appeal is dismissed with costs and interest.

The 26th January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Admission of Judgment-debtor—Interest.

Case No. 695 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 31st August 1865.

Luchmee Narain (Judgment-debtor), *Appellant,*

versus

Shudasheo Singh and others (Decree-holders), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Mr. R. E. Twidale for Respondents.

A fresh starting point is given to a decree-holder by the judgment-debtor's admission of the debt.

Interest runs on sums decreed as a matter of course unless a specific order is recorded to the contrary.

The point in this appeal is whether the judgment-debtor's admission, in his petition of the 21st July 1864, is sufficient to give

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the decree-holder a fresh starting point from which to calculate the period of limitation.

It is contended by the appellant's pleader that the original execution applied for on the 30th of November 1863 was out of time. the decree having been passed on the 4th of December 1856. No doubt, this objection is supported by the facts of the case; and, had the judgment-debtor been served with notice at that time, he would have been enabled to come in and plead successfully limitation against his creditor; and *à fortiori* when the present execution was taken out, and notice served on the 1st of June 1864, the same objection would have been fatal to the decree-holder's claim.

But, instead of doing that, the judgment-debtor condoned the laches of the decree-holder by admitting at least part of his claim on the 21st July 1864, and agreeing to pay that amount. Under these circumstances, we agree with the Judge in thinking that a fresh starting point was given to the decree-holder by the judgment-debtor's admission of the debt, and that execution may now issue as prayed for.

The case of Digamburee Debia and another (3 Sutherland's Weekly Reporter, Miscellaneous Appeals, page 27) is in point, and supports our view of the case.

We, therefore, dismiss the appeal with costs.

Appeal No. 696 is on a question of interest only; and it has been frequently ruled that interest runs on sums decreed as a matter of course, unless a specific order is recorded to the contrary. This appeal also is, therefore, dismissed with costs.

The 27th January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal to Privy Council—Security from party in possession under decree.

Huro Soonduree Debia, *Petitioner,*

versus

Mr. and Mrs. J. Stevenson, *Opposite Party.*

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Petitioner.

Mr. R. V. Doyne for Opposite Party.

The High Court cannot interfere to require security from a party who has formally been put in possession of the property in dispute in execution of a decree, where execution was taken out before an appeal to the Privy Council was preferred and admitted.

On the 25th August 1865, the opposite party were called upon to show cause why they should not give security sufficient to cover the amount of the decree of this Court in regular appeal No. 343 of 1864 before they are allowed to execute the said decree.

Mr. Doyne, on behalf of the opposite party, has this day shewn cause. The petitioner was heard through her pleaders, Mr. Allan and Baboo Kishen Kishore Ghose.

The opposite party, who were the plaintiffs below, were successful in both Courts, and obtained a decree awarding possession with mesne-profits of the property, the subject of the suit.

The decision of this Court, affirming the decree of the Judge of Rajshahye, is dated the 31st January 1865. On the 22nd February 1865, the opposite party took out execution of that decree, and obtained formal possession of the property decreed on the 7th of April 1865.

The petitioners filed their petition of appeal to the Privy Council on the 9th of March 1865, or subsequent to the application of the opposite party to execute their decree, as also after the order to give them possession had gone out.

The learned Counsel for the opposite party contends that the Court has no power to interfere in the matter, and that the possession, which has been formally given to his clients, the petitioners standing by and taking no steps in opposition thereto, cannot be taken away from them and restored to the petitioner who must bide the consequences of her own laches.

The pleaders for the petitioner urge that, under Section 4, Regulation XVI. of 1797, this Court is bound to interfere, and that, if the Court deem it necessary to retain the opposite party in possession, they must furnish adequate security. Two decisions of this Court are quoted in support of the argument.

We are of opinion that the rule must be discharged, and the petition rejected with costs. Section 4, Regulation XVI. of 1797, does not apply to the circumstances of this case. In the present case, there is no execution to suspend. The opposite party took out execution, and obtained an order to be put in possession before the petitioner took any step even towards filing an appeal to the Privy Council; formal possession was given before the appeal was admitted. The judgment of this Court has been carried into

execution, and we know of no law or rule of practice which vests this Court with jurisdiction to interfere and restore possession to the petitioner. The decisions quoted by the pleaders are wholly inapplicable to a case where execution has been taken out before an appeal to the Privy Council has been preferred and admitted. The petitioner justly suffers the consequences of her own laches.

The 31st January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Objections to decree—Appeal.

Case No. 644 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Behar, dated the 20th July 1865.

Ranee Emamun (Judgment-debtor), *Appellant,*

versus

Ranee Moradun and others (Decree-holders), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. R. E. Twidale and *Baboo Mohendro Lal Shome* for Respondents.

A person, who has lost her right to appeal from an order rejecting her objection, and directing execution of decree to proceed, is not entitled to re open a question already decided.

THE appellant should have appealed from the order of the Principal Sudder Ameen, rejecting her objection, and directing execution of the decree to proceed.

It is admitted that the process of execution has been taken out against the same property, as that which was involved in the former petition of objection which was rejected.

The appellant is not entitled to re-open a question already decided, and with reference to which she allowed her right of appeal to pass away.

The appeal is dismissed with costs and interest.

The 31st January 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Jurisdiction (of Court to whom decree is referred for execution)—Limitation.

Case No. 703 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 24th June 1865.

Buzur Beebee and others (Decree-holders), *Appellants,*

versus

Mrs. Mary Jackson (Judgment-debtor), *Respondent.*

Baboos Kishen Kishore Ghose and *Greeja Sunkur Moojoomdar* for Appellants.

Mr. J. S. Rochfort and *Baboo Nil Monee Sein* for Respondent.

A Court, to whom a decree is referred for execution, has jurisdiction to decide that the decree-holder's right to execute his decree has lapsed under the Statute of Limitations.

THE only point urged worthy of a moment's attention is that the Judge of Tipperah, being directed by the Judge of Chittagong to execute the decree, the former Judge had no jurisdiction to decide that the decree-holder's right to execute his decree had lapsed under the Statute of Limitations.

The Court, to which a decree is referred by another Court for execution, is competent to enquire into the validity of such decree in a case where it appears that the Court making the decree had no jurisdiction.* Much more then can the Court, to whom a decree is referred for execution, enquire into a point of jurisdiction involving the question of the power of the Court to entertain the application of the decree-holder to execute that decree.

* *See* Section 288, Code of Procedure.

We dismiss this appeal with costs and interest.

The 31st January 1866.

Present:

The Hon'ble F. B Kemp and L. S. Jackson, *Judges.*

Khas possession (Right of Co-sharer to).

Case No. 739 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 21st August 1865, reversing an order passed by the Sudder Ameen of that District, dated the 3rd February 1865.

Brohmo Moyee Debia (Decree-holder), *Appellant,*

versus

Raj Chunder Roy and others (Judgment-debtors), *Respondents.*

Baboos Dwarkanath Mitter, Romesh Chunder Mitter, and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Greeja Sunkur Mojoomdar* for Respondents.

Until a partition takes place, a person is entitled, incidentally, to the enjoyment of her rights as co-proprietor in a talook, to partake in the joint possession of all the land which was held *khas* by the co-sharers, or would be now so held by them if they had not granted a lease.

In this case, the plaintiff established her right to a fractional share in a certain talook, and got a decree for possession, setting aside, as far as her interest extended, a putnee lease which her co-sharers had granted in her name as well as their own.

It appeared that part of the land comprised in this talook was held by ryots, and part was held *khas;* and, in some part of the land held *khas,* the defendants had built houses while the plaintiff was out of possession.

In execution of the decree, she claimed actual *khas* possession as co-sharer of all the *khas* land, and incidentally demanded that the houses built on the lands shall be pulled down. The Court of first instance passed certain orders on this point which on appeal were modified by the Zillah Judge.

He declared that the plaintiff was merely entitled to have it proclaimed that she was in possession (by virtue of the decree) of a specific share in the talook, and nothing more.

Of these words, and of the refusal to give her *khas* possession, the plaintiff now complains in further appeal abandoning any claim to have the houses pulled down by order of the Court, but contending that she is entitled to share the possession of every part of the property held *khas.*

We think her contention is just, and that, until a partition takes place, she is entitled, incidentally, to the enjoyment of her rights as a co-proprietor in the talook, to partake in the joint possession of all the land which was held *khas* by the co-sharers, or would be now so held by them if they had not made the lease.

The words used in the Judge's decision undoubtedly go to limit the effect of her decree, and she is entitled to have them amended, and to have the costs of this appeal; but we say nothing of the right which she may have as to the houses.

This order applies equally to the cases Nos. 740, 741, and 742.

The 1st February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Decree (Enforcement of).

Case No. 735 of 1865.

Miscellaneous Appeal from an order passed by the Officiating Judge of Jessore, dated the 17th August 1865.

Gooroo Churn Banerjee (Decree-holder), *Appellant,*

versus

Roy Preonath Chowdhry and others (Judgment-debtors), *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

No one for Respondents.

The mere filing of a petition, praying that notice may be served on a judgment-debtor, is not a process to enforce a decree, and such as keeps the decree alive.

THIS appeal must be dismissed with costs and interest.

The mere filing of a petition, praying that notice may be served on a judgment-debtor, is not a process to enforce a decree and such as keeps the decree alive.

The 1st February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Set-off—Cross-decrees—Enforcement of decree.

Case No. 582 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Mymensing, dated the 21st June 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 20th March 1865.

Anund Mohun Surma Mojoomdar and others (Decree-holders), *Appellants,*

versus

Huro Chunder Bhuttacharjee (Judgment-debtor), *Respondent.*

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellants.

Baboos Sreenath Doss and *Nil Madhub Sein* for Respondent.

A set-off is not admissible except upon a cross-decree which the decree-holder is seeking to execute, and not upon a cross-decree incapable of execution by lapse of time.

A cross-decree must be kept alive by the action of the party entitled under it.

An order striking off a case is not a proceeding under Section 20, Act XIV. of 1859, to enforce or keep alive a decree.

THE points urged before us in this appeal are these:—

1st—That the existence of a decree under which the appellant had been declared entitled to recover a certain amount from the opposite party was of itself sufficient to entitle him to a set-off under Section 209 without reference to the question whether that decree was incapable of execution by lapse of time or not.

2nd.—That the decree was in force, because the application by the opposite party to execute his cross-decree of itself brought the appellant's decree into activity.

3rd.—That, irrespectively of this, it was in force with reference to the terms of Section 20, Act XIV. of 1859, by reason of the order passed on the 14th September 1859.

4th.—That there had been a defective investigation by the Court of first instance in neglecting to enquire into the appellant's allegation that there had been a payment of 50 rupees on the date last mentioned.

On the *first* of these points, it is sufficient to observe that the law plainly contemplates the case of cross-decrees which the respective decree-holders are seeking to execute, and not of cross-decrees which may be in existence as pieces of paper somewhere.

The *second* contention is in our opinion wholly untenable, as the cross-decree must be kept alive by the action of the party entitled under it.

On the *third* point we observe that the appellant was required to show (before he could execute his decree) that he had taken some proceeding within three years next preceding the application, that is, before the 13th September 1862, to keep it in force. We do not think the making of a note on the 14th September 1859 by some officer in the margin of a register, to the effect that the case had been struck off the file, was any taking of such a proceeding by the appellant.

On the *fourth* point we need only observe that the appellant did not name any witnesses, nor file any documents in proof of what he alleged; that he merely stated evidence was forthcoming, and the Court observed on the other hand that evidence was not forthcoming. Supposing, therefore, that such payment would have helped the appellant, it is plain that the Court was not in fault.

On all grounds, therefore, we think the special appeal must fail, and we dismiss it accordingly with costs.

The 1st February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Execution of decrees in force at time of passing of Act XIV. of 1859.

Case No. 647 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 17th June 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 31st March 1865.

Mr. Gasper Gregory (Decree-holder), *Appellant,*

versus

Juggat Chunder Banerjee (Judgment-debtor), *Respondent.*

Mr. C. Gregory and *Baboo Judoonath Mookerjee* for Appellant.

No one for Respondent.

On the first application to execute, after the passing of Act XIV. of 1859, a decree in force at the time of the passing of that Act, Section 21 applies; but on the next and subsequent applications the rule contained in Section 20 is to be followed.

We think the Judge has wrongly applied the law.

This was an application to execute a decree which was in force at the time of the passing of Act XIV. of 1859. This application being made on the 30th December 1864, an order was passed to bring the application on the file on the 16th February 1865. The Judge then applies Section 21, Act XIV. of 1859, and holds that, because more than three years, had elapsed, the application must be refused.

Now, it appears that another application to execute this decree had been made in 1861, proceedings had been taken for the attachment of monies in the hands of the Collector, and the case was struck off the file on the 29th March 1862. In this case, on the first application to execute after the passing of Act XIV., Section 21 would apply; but on the next and subsequent applications the Court would have to be guided by the rule in Section 20.

The order of March 1862 would not, indeed, of itself be a proceeding of the nature contemplated, but it is just possible that, as contended by the appellant's vakeel, the appellant might have been able to show that he had done something to enforce the decree or to keep it in force within three years next preceding the application to execute; and, reversing the order of the Zillah Court, we remit the case for an enquiry into this point. If the petitioner can show that he had taken any such proceeding within that time, he will be entitled to execute; otherwise not.

The 1st February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Time for appealing from order rejecting application for Review of Judgment.

Ameeroonissa Begum and others, *Petitioners,*

versus

Maharanee Indurjeet Koonwar, *Opposite Party.*

Messrs. G. C. Paul, R. E. Twidale, and *C. Gregory* for Petitioners.

Mr. R. T. Allan for Opposite Party.

An appellant is in time if his appeal is lodged within 6 months of the order rejecting his application for review of judgment.

On hearing Counsel in this matter, we are of opinion that the rule must be discharged.

The appellant has lodged his appeal within six months of the order rejecting his application for review; and under the decision of this Court in the case of Nuzeer Ali Khan, reported in Weekly Reporter, Vol. I., page 13 (Miscellaneous Appeals), he is in time.

That decision has never been overruled, and we think it is right in principle.

Mr. Paul endeavoured to show us that there was a difference in the facts between that case and the present; but we see nothing which would lead us to suppose that the Court would have decided otherwise than it did if the facts had been similar. In fact, the Court dealt with the case of Nuzeer Ali Khan simply as a case in which the application for review had been refused, as it was here.

The rule is consequently discharged with costs.

The 1st February 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Mooktear (Dismissal of).

Issur Chunder Mookerjee

versus

Puddo Lochun Goopto.

Baboo Chunder Madhub Ghose and *Romesh Chunder Mitter* for Applicant.

Semble That a client may dismiss a mooktear for misconduct, notwithstanding that the contract or agreement between them is for a fixed period, and without the client being obliged to go through the form of suing for the cancelment of the engagement.

THIS is an application for leave to file a special appeal against a decree for arrears of wages due under a *mooktearnamah* which the applicant had received.

It appears that the mooktear was engaged for seven years, subject to a condition which the Judge below has construed to bind the master to pay the mooktear his wages for seven years whether he does his business or not, and even if he disobeys the orders of his master. Under Section 27 of Act XXIII. of 1861, it is provided that "no special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act by any Court subordinate to the Sudder Court in any suit of the nature cognizable in Courts of Small Causes under Act XLII. of 1860, when the debt, damage, or demand for which the original suit shall be instituted shall not exceed 500 rupees; but every such order shall be final."

We think that there is some ground for the contention of the applicant that the decree of the Judge was wrong, inasmuch as he has apparently overlooked the power which a master has to discharge a servant for misconduct, notwithstanding that the contract or agreement between them is for a fixed period.

The law on this subject is very clearly laid down in Mr. Manley Smith's Treatise on Masters and Servants, page 69.

But it is not in our power to interfere under the circumstances, the debt sued for being only 254 rupees.

If the master can show that he has a good cause for dismissing his servant, he may dismiss him without going through the form of suing for the cancelment of the engagement.

This application must be rejected.

The 6th February 1866.

Present :

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Forgery (in Civil Court)—No appeal from Criminal prosecution.

Case No. 552 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 28th June 1865.

Gunga Narain Sircar, *Appellant,*

versus

Azeezoonissa Beebee and others, *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Oomesh Chunder Banerjee for Respondents.

No appeal lies from an order of a Civil Court directing a criminal prosecution for forgery committed before it.

THE petitioner is an *amlah* of a woman on whose behalf a will of her deceased husband was filed below, and which she afterwards denied to have been filed with her knowledge, or to be the will of her husband, deceased.

The petitioner appeals against an order of the Lower Court, ordering the petitioner to defend before the Magistrate a charge of forgery referred to the latter regarding the aforesaid will.

There cannot be any appeal from such an order to this Court, and this Court cannot prevent the Magistrate from investigating the charge under the direction of the Lower Court, and thereby finding out who are the guilty parties. This is in accordance with a decision reported in page 270 of Marshall, Vol. I., 9th July 1862, Eshan Chunder *versus* Prannath.

We, accordingly, reject the appeal with costs.

The 6th February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Enforcement of Decree.

Case No. 686 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 2nd August 1865, reversing an order passed by Moulvie Ali Ahmed, Moonsiff of that District, dated the 27th February 1865.

Syud Khan and others (Objectors), *Appellants,*

versus

Jumal Beebee and others (Decree-holders), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Resisting an appeal against a decree (which appeal was eventually compromised) is a proceeding within the meaning of Section 20, Act XIV. of 1859, taken to enforce or keep alive the decree.

We think the application to execute in this case was in time under Section 20 of Act XIV. of 1859, inasmuch as the plaintiff, decree-holder, has, within three years next before the application, taken some proceeding to keep the decree in force; in that he had within that time resisted the appeal of the intervenor against the decree, which appeal was on the ground of *res judicata.* This appeal, if sustained, would have had the effect of setting aside the decree for want of jurisdiction, and the plaintiff (being respondent) settled it by compromise. This we think was a proceeding within the meaning of Section 20 of the Limitation Act, and saves the application. Appeal dismissed with costs.

The 6th February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Execution of Decree—Instalment Bond.

Case No. 685 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Backergunge, dated the 10th August 1865.

Jankee and others (Decree-holders), *Appellants,*

versus

Sreenath Roy Chowdhry (Judgment-debtor), *Respondent.*

Baboos Sreenath Doss and *Dwarkanath Mitter* for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

An arrangement come to, since the passing of a decree, between the decree-holder and judgment-debtor, and recognized by the Court and incorporated with the decree, may be enforced without the necessity for a new suit.

The decree-holder is the appellant. The original decree was passed on the 5th February 1856. It was assigned to three parties. These parties and the judgment-debtor came to an arrangement, whereby the sum covered by the decree was to be paid by instalments, and some of these instalments were duly paid. All this took place before Act VIII. of 1859 came into operation. The decree-holder now seeks to recover another instalment which has fallen due. The Principal Sudder Ameen, finding that the instalment-bonds were made since the passing of the decree, referred the decree-holder to a separate suit.

The decision of this Court, dated the 21st March 1865, in the case of Lal Mahomed *versus* Ghonee Jola Gazee, is quoted.

We are of opinion that the circumstances of the case, quoted by the Principal Sudder Ameen, are very different from those of the case before the Court. In the former case, a *kistbundee* formed part of the original decree. The parties departed from the terms of that *kistbundee,* and executed another by way of satisfaction of the decree, thus altering the original decree. This Court, therefore, held that this gave a new cause of action, and that a separate suit was necessary.

In this case the original decree has not been altered, nor has one *kistbundee* been substituted for another. The Court below recognized the arrangement come to by the decree-holder and his judgment-debtors, and such arrangement became incorporated with the original decree. We also observe that the present objection was not taken by the judgment-debtor, who appears to have been willing to pay the sum due under the instalment-bond. We reverse the decision of the Principal Sudder Ameen; costs of this appeal to be paid by the respondent.

The 7th February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Certificate (Application for—under Act XXVII. of 1860)—Procedure.

Case No. 702 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 26th June 1865.

Shaikh Mean Jan and others, *Appellants.*

Baboo Romesh Chunder Mitter for Appellants.

When an application is made for a certificate under Act XXVII. of 1860, the Judge, instead of considering the necessity or otherwise for a certificate, should ascertain whether the applicant or any one else is entitled to the certificate sought, and grant the same accordingly.

THE appellants made application to the Zillah Judge for a certificate under Act XXVII. of 1860, as representatives of their deceased father, alleging that they had been receiving debts and paying liabilities of the estate, but that, for the purpose of recovering some other amounts due, they found a certificate necessary. Among the debts yet recoverable, they mentioned a claim for an annual payment in lieu of sayer taxes.

The Judge considered that, under the circumstances, no certificate could be granted, and none was wanted; and he observed that the Collector, on application made to him, would make proper enquiries, and satisfy himself as to the right of those parties to succeed to the estate of the deceased.

We think this order was erroneous, and the observations on what the Collector might do irrelevant.

It was the Judge's business to ascertain whether the applicants or any one else had a right to the certificate sought, and to grant the same accordingly.

We, therefore, reverse his order, and direct that, after notice, unless any other claimant appear and establish a preferable right, he grant the certificate to the applicants.

The 7th February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Limitation—Enforcement of Decree.

Case No. 709 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 12th August 1865, affirming an order passed by the Moonsiff of that District, dated the 7th March 1865.

Bharuth Singh (Decree-holder), *Appellant,*

versus

Sadut Ali and others (Judgment-debtors), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Roopnath Banerjee for Respondents.

A decree-holder applying on 24th December 1864 to execute his decree passed on 7th December 1861 was bound, under Section 20, Act XIV. of 1859, to show that he had taken some proceeding within 3 years next before the application to keep alive the decree.

IN this case, the final decree having been passed on the 7th December 1861, the 20th Section of Act XIV. of 1859 applied.

The decree-holder, applying on the 24th December 1864 to execute the decree, had consequently to show that he had taken some proceeding within three years next before the application to keep the decree in force. He did not show any such thing, and was consequently too late.

The decision reported at page 2, Vol. III., Weekly Reporter, has been overruled.

This appeal is, therefore, dismissed with costs.

The 8th February 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Limitation—Execution of decree in force at passing of Act XIV. of 1859—Abortive proceedings.

Case No. 713 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 26th August 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 22nd June 1865.

Baroda Debia (Decree-holder), *Appellant*,

versus

Sreeram Chowdhry and others (Judgment-debtors), *Respondents*.

Baboos Romanath Bose and *Oomesh Chunder Banerjee* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

According to Section 21, Act XIV. of 1859, process of execution cannot be issued in respect of a decree in force at the passing of that Act, except where an effectual application has been made, either within the time previously limited by law, or within 3 years next after the passing of the Act whichever should first expire.

Abortive, because unauthorized, proceedings cannot give the decree-holder any first start for computing limitation.

We think that the judgment of the Lower Appellate Court was right, and that the application to execute the decree was out of time.

The decree was one of the year 1829, which by various proceedings had been kept alive down to the passing of Act XIV. of 1859, and was, therefore, in force at that time.

Subsequently, in 1860 and 1861, certain applications, not amounting to proceedings to keep the decree in force, were made; but the first real attempt to execute, after the passing of the Act, was made on the 9th of December 1863. The Court had then no power to execute the decree, and execution ought on that account to have been refused; but, under some misconception, certain property was then attached and sold. The sale, however, was impeached and set aside by reason of a vital irregularity, and the proceedings came to nothing.

A fresh application was then made on the 31st of March 1865 for attachment and sale of the debtor's property, and on this occasion it was objected that execution was barred by Act XIV. of 1859, Section 21.

We think it is so, and that process of execution could not be issued in respect of such a decree, except where an effectual application had been made, either within the time previously limited by law, or within three years next after the passing of the Act, whichever should first expire.

No doubt, process might have been issued on the application of 1860, if the decree-holder had proceeded with it, and such process would subsequently under Section 20 have given the decree-holder a fresh period of three years, But we cannot think that the abortive proceedings of 1863 which were done wholly without authority can give the decree-holder any fresh start.

We, therefore, dismiss this appeal with costs.

The 8th February 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Attachment (in respect of decree-holder who has not applied for).

Case No. 756 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 23rd August 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 31st March 1865.

Kishen Koomar Chowdhry (one of the Judgment-debtors), *Appellant*,

versus

Meer Nuzuf Ali (Decree-holder) and others (Judgment-debtors), *Respondents*.

Baboos Romesh Chunder Mitter and *Luleet Chunder Sein* for Appellant.

No one for Respondents.

A Court ought not to order property belonging to a judgment-debtor to be attached and placed under management in respect of a decree-holder who never applied to the Court to have his claim included among those for the re-payment of which the judgment-debtor's property was attached.

In this case it appears that the Judge has ordered certain property belonging to the judgment-debtor to be attached and placed under management in respect of a decree held by one Nuzuf Ali, and it is urged before us in appeal that this party never made any application to the Civil Court to have his claim included amongst those for the re-payment of which the judgment-debtor's property was attached. This being so (and no one appears on behalf of the decree-holder to contradict it, nor did that individual prefer any claim in either of the Lower Courts), it is clear that the Principal Sudder Ameen's order in the first instance, and the Judge's afterwards in appeal, were entirely uncalled for and unnecessary. The decree-holder can take out execution against his judgment-debtor's property at any time

if he be so minded; but it is not a Civil Court's business to interfere in such a matter, or to give him a relief which he neither asked for, nor, so far as the record shows, desired.

We, therefore, reverse the Judge's order without costs, as no one has appeared on the other side, and declare that the judgment-debtor's property be not considered under attachment so far as Nuzuf Ali's decree is concerned.

The 9th February 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Dismissal of appeal for default—Interest (in excess of principal).

Case No. 762 of 1865.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 17th April 1865, reversing an order passed by the Maonsiff of Manickgunge, dated the 26th November 1864.

Shib Chunder Goopto (Judgment-debtor), *Appellant,*

versus

Allad Monee Dossia (Decree-holder), *Respondent.*

Baboo Luleet Chunder Sein for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

Section 346, Act VIII. of 1859 (providing for the dismissal of an appeal for default), even if it applies to miscellaneous cases, does not apply to a case in which it is not shown distinctly that the appellant had any notice that his appeal would be heard on the day to which the case was adjourned, and on which the Judge disposed of it.

Regulation XV., 1793 (prohibiting award of interest in excess of principal), applies to sums decreed only, and not to interest which has accumulated through the neglect of the judgment-debtor to pay.

THE special appellant in this case objects to the Judge's order on two grounds, *1st*, because, under Section 346 of Act VIII. of 1859, the appellant in the Court below not having been present at the hearing, his case should have been at once dismissed for default; and, *2ndly*, because interest has been awarded in excess of the principal, contrary to the provisions of Regulation XV. of 1793.

Neither of these objections are tenable. Even if we admit, for the sake of argument, that Section 346 of Act VIII. of 1859 applies to miscellaneous cases of this description, it is clear to us that a party, seeking to put in motion the stringent provisions of the Section quoted, is bound to show very distinctly that the procedure under it has been strictly complied with, and, as in the present case, that the appellant did not make his appearance "on the day to which the case was adjourned."

The special appellant's pleader is unable to show us that this was the case, or that the appellant below had any notice that his appeal was to have been heard on the day on which the Judge disposed of it. And, this being so, we think that Section 346 will not apply.

With regard to interest, we observe that the Section of Regulation XV. of 1793, quoted by the special appellant's vakeel, applies to sums *decreed* only, and not to interest which has accumulated through the neglect of the judgment-debtor to pay. In the present case, the interest decreed was not in excess of the principal, so that the special appellant's objection falls to the ground at once.

We dismiss the appeal with costs.

The 9th February 1866.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

Cross-decrees—Purchaser of decree.

Case No. 695 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 24th July 1865.

Shaikh Rozeeoodeen (Purchaser of decree), *Appellant,*

versus

Shaikh Jehangeer (Judgment-debtor), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Nil Madhub Bose for Respondent.

A obtains a decree in a Court of the N.-W. Provinces against *B. C*, taking the decree *bonâ fide* by assignment, applies to execute it in the 24-Pergunnahs. *B*, who has got a decree against *A* in the 24-Pergunnahs, applies to have the decree set off against the other decree in the hands of *C*. HELD that in such circumstances Section 209, Act VIII. of 1859, does not apply.

THIS was an application by Rozeeooddeen to execute a decree obtained by him by assignment from Mozahir Ali and Kadir

Buksh against Jehangeer for Rupees 141-14. The decree, we are informed, was a decree of a Court in the North-Western Provinces, which had been sent to the Zillah Court of the 24-Pergunnahs for execution.

It appeared that the same Jehangeer had got a cross-decree in a Court subordinate to the Zillah Judge for 135 rupees* against Mozahir Ali and Kadir Buksh. This decree the Zillah Judge called up from the Subordinate Court, and, setting off one against the other, declared the holder of the larger decree entitled to execute it for the amount of difference only.

* The petition of appeal to this Court gives the amounts of the several decrees in the coarse way, but the difference is not material.

The assignment to Rozeeooddeen he declared to be immaterial, and not to affect the rights of Jehangeer.

Against the Judge's order, Rozeeooddeen has appealed to this Court.

The Judge must be presumed to have made this order under the authority of the 209th Section of the Code of Civil Procedure.

That Section, we think, does not extend beyond the case of cross-decrees to which the parties and the parties executing are the same.

The system of assignment of decrees is universally recognzied by the practice of the Courts in this country, as well as by the Code itself; and it has never been held, so far as we know, that a person taking the rights of a decree-holder by assignment for valuable consideration takes it subject to the equities or liabilities of the decree-holder to the judgment-debtor on account of other claims of which he had no notice.

Certainly, to allow a Court in execution of a decree summarily to make the holder by assignment so liable, would be going, we think, beyond the intention of the Legislature. And, if any such power existed, the case before us would illustrate an extreme exercise of the power.

It may be objected that, holding as we do, we open the door to frauds by allowing persons who have trifling claims against others who are their creditors to much larger amounts, to give an unreal value to those smaller claims by transferring them to third parties, and possibly to leave no property discoverable from which the larger decree can be satisfied, or, in fact, by a fictitious transfer to obtain specific payment of amounts which ought in justice to be simply set off in part of their own liabilities.

But, in the *first* place, the creditor for the larger sum may always attach the less decree, and so prevent it from being assigned; and, in the next, it would, no doubt, be competent for the parties against whom the fraud was intended to show that the original decree-holder and the assignee were, in fact, one and the same person, and in such case the Court would, no doubt, proceed to apply the provisions of Section 209.

We think the Judge's order must be set aside with costs.

The 9th February 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Limitation—Enforcement of decree.

Case No. 775 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 6th August 1865, affirming an order passed by the Moonsiff of that District, dated the 24th June 1865.

Sheo Pertap Lal (Purchaser of Decree), *Appellant,*

versus

Issur Roy and others (Judgment-debtors), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Roopnath Banerjee for Respondents.

The mere filing of a petition to be admitted as representative of a deceased decree-holder, without the previous obtaining of a certificate under Act XXVII. of 1860, is not a proceeding which keeps the decree in force.

THIS is a case in which the applicant had merely filed a petition to be admitted as representative of the deceased decree-holder, which petition had been refused by reason of his not having obtained a certificate under Act XXVII. of 1860.

He now applied with such a certificate, and was held to be barred by the Law of Limitation.

We are obliged to hold that the abortive petition above referred to was not a proceeding which kept the decree in force, and we dismiss the appeal with costs.

The 12th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, Shumbhoonath Pundit, and A. G. Macpherson, *Judges*.

Jurisdiction—Perjury or Forgery (in Civil Courts)—High Court (Power of—to stay Criminal proceedings pending Appeal).

Ram Pershad Hazaree (Appellant), *Petitioner*,

versus

Soomuthra Dabee (Respondent), *Opposite Party*.

Baboos Onoocool Chunder Mookerjee and *Aushootosh Dhur* for Petitioner.

Baboo Banee Madhub Banerjee for Opposite Party.

This case was referred to a Full Bench by Justices Loch and Glover, with the following order:—

If, in the course of hearing a suit, a Civil Court commits a party to the suit for trial on a charge of perjury or forgery, or directs that the case be made over to a Magistrate for investigation of such a charge, the High Court, in the exercise either of civil or criminal jurisdiction, cannot, in the event of a regular or special appeal being lodged against the decision of the Lower Court, interfere to stay the criminal proceedings until the appeal shall have been heard and determined.

Referring Order.—THE vakeels for the petitioner have produced no order of this Court in a previous case staying the proceedings of the Court below in regard to the committal of a party till the result of the special appeal then pending was made known; and, as it appears questionable whether this Court has authority to interfere with the proceedings directing the commitment of a party for perjury or forgery, we think that the question should be submitted for the decision of a Full Bench.

A separate proceeding submitting the case will be drawn up by us, and, in the meantime, we direct the Judge, if the party have not been made over to the Magistrate, to suspend the criminal proceedings till the special appeal now pending in this Court be disposed of.

Peacock, C.J.—I am of opinion that if, in the course of hearing a suit, a Civil Court commits a party to the suit for trial on a charge of perjury or forgery, or directs that the case be made over to a Magistrate for investigation of such a charge, this Court cannot, in the event of a regular or special appeal being lodged against the decision of the Lower Court, interfere to stay the criminal proceedings until the appeal shall have been heard and determined.

As the question propounded is somewhat ambiguous, and it is doubtful whether the referring Judges in using the words "this Court" intended the Division Bench of which they were the Judges, or the High Court generally, we have heard the question argued with reference to the power of the High Court generally, as well as with reference to the power of a Division Court in the exercise of either civil or criminal jurisdiction.

The order, if treated as an order in a civil case, is not appealable under Act VIII. of 1859. Act VIII. of 1859, Section 365, gives an appeal against orders as to fines or as to imprisonment under the Act; and an appeal is also given by the Code of Criminal Procedure in similar cases by Section 413. But no appeal is given either by the Code of Criminal or Civil Procedure against orders which are left to the discretion of the Civil Court, either granting or withholding sanction to a criminal prosecution under Section 169 or 170, or against an order sending a case for investigation before a Magistrate under Section 171 of the Code of Criminal Procedure. Section 414 of that Code enacts that, "unless otherwise provided by this "Act or by any other law for the time "being in force, no appeal shall lie from any "order or sentence of a Criminal Court." There is no special provision made by the Code for cases of sanction under Sections 169 and 170, or of orders for investigation under Section 171.

I am of opinion, therefore, that this Court cannot, either in the exercise of civil or criminal jurisdiction, entertain an appeal against any such sanction or order. It cannot, as a Court of Revision, reverse such sanction or order upon the ground that it was not warranted by the facts: for, as a Court of Revision, it cannot reverse an order except for error in law. In the present case the application was not by way of appeal, but merely by way of motion to postpone the committal.

If the Court, as a Court of Appeal or as a Court of Revision, cannot reverse or alter such an order, I cannot see any inherent authority which it has to stay proceedings.

I remark that, in some of the cases cited, the question, as to reversing such sanctions, was brought before the Court by motion. I asked how the case came before the Court

by motion. The answer was that the motion was in the nature of a petition of appeal. But I am clearly of opinion that, in cases in which no appeal lies to this Court, relief cannot be given indirectly by motion in the nature of an appeal.

If the Full Court cannot exercise such a power, it follows that a Division Court cannot do so.

The question propounded by the Judges will, therefore, be answered in the negative.

Bayley, J.—I am of the same opinion. Although I find that in some cases the power has been exercised as an inherent power, I can find and am shown nothing in the law constituting the late Sudder Court, or in the Code of Criminal Procedure, to show that the Court has such a power.

Seton-Karr, J.—I am inclined to the opinion that the Judges who referred the case to a Full Bench intended to refer the question with reference to the power of a Divisional Bench of the High Court on the Civil Side to grant such an order. I am glad, however, that the case has been argued with reference to the power of the Court both on the Civil and Criminal Sides. We have carefully looked over all the cases, and heard all the arguments on both sides: and I agree with the Chief Justice that we have not, by any law, the power, either on the Civil or Criminal Side, to pass an order suspending the proceedings of the Magistrate, till the civil appeal be decreed; and that we have no inherent power to supply any defect in the law by laying down new rules on the subject.

Shumbhoonath Pundit, J.—I concur in the judgment delivered by the Chief Justice.

Macpherson, J.—I agree entirely in what has fallen from the Chief Justice. I may add that, considering the Legislature has thought fit to empower Courts, in their discretion, to direct the criminal prosecution of persons who commit certain offences in the course of proceedings before those Courts, it would, as it seems to me, almost amount to an absurdity if a prosecution so ordered to be had were to be suspended, merely because an appeal is pending from the decree made in the suit in the course of which the act or omission which is the subject of the prosecution was committed.

The 13th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, Shumbhoonath Pundit, and A. G. Macpherson, *Judges*.

Jurisdiction—High Court (Power of—to interfere with order of Lower Court setting aside sale in execution of Decree).

Miscellaneous Case.

Appeal from an order passed by Mr. H. R. Maddocks, Judge of Bhaugulpore, dated the 31st July 1865, affirming an order of the Sudder Ameen of that District, dated the 26th June 1865.

Mr. J. DaCosta, *Petitioner*,

versus

Mrs. M. M. Hall, *Opposite Party*.

Mr. G. C. Paul for Petitioner.

Mr. R. E. Twidale for Opposite Party.

The High Court cannot interfere with the order of a Lower Court setting aside a sale of moveable property in execution of a decree, even though the Lower Court has thereby acted wholly without jurisdiction, and done injury to a *bonâ fide* purchaser.

This case was referred to a Full Bench by Justices Loch and Glover, with the following order:—

Referring Order.—In execution of a decree held by one Cohen, the moveable property of the judgment-debtor, Mrs. M. M. Hall, was sold. Among the property were certain Simla Bank shares, which were purchased by the petitioner, who paid the purchase-money, and completed the sale. The judgment-debtor, Mrs. Hall, objected to the sale on certain grounds, and, among others, objected to the inadequacy of the price, stating that an offer to purchase these shares had been made by the Secretary of the Simla Bank for Rupees 2,187-8, and that they should not have been sold, under such circumstances, for 625 rupees. The Sudder Ameen on this ground reversed the sale. The purchaser appealed to the Judge, who rejected the petition on the ground that an appeal did not lie to him; and the purchaser has now applied for redress to this Court, urging that the Sudder Ameen has acted wholly without jurisdiction.

It appears that a letter was received from the Secretary to the Simla Bank, making an offer of 2,187 rupees for the Bank shares; but at the time of sale there was no one present to represent or to bid on behalf of the

Bank, and the shares were knocked down to the highest bidder, who completed his purchase according to law. Now, as this was a sale of moveable property, the Sudder Ameen had no authority under Section 252 to enquire into any objections raised to the sale by the judgment-debtor. If there had been any irregularities in the sale-proceedings, the remedy was an action for damages. Had there been fraud, such fraud might have constituted a cause of action to set aside the sale by separate suit, but did not, in our opinion, give the Sudder Ameen any jurisdiction to interfere summarily with the sale. In refusing to receive the appeal, the Judge, we think, acted legally: for there is no appeal provided for in such cases by the law. Had he interfered, the case could have been brought under the provisions of Section 35 of Act XXIII. of 1861, and this Court would then have been able to right the petitioner. As it is, we find that the Sudder Ameen has acted wholly without jurisdiction, and has done injury to a *bonâ fide* purchaser; and that, under the law as it now stands, there is apparently no power in this Court to put matters right.

This has not been the first time that cases of this kind have come before the Court in the Miscellaneous Department; and the course followed by the Court has been to point out in distinct terms the illegality of the order complained of, and to recommend the complainant to apply for a review of judgment, filing with the petition a copy of the Court's opinion; and this appears to be the course followed by the High Court of Madras (24th April 1861).

This, however, is but a lame expedient; for the Lower Court is not bound to act upon the opinion of the High Court, and it may happen that the Judge of the Lower Court may, from sheer obstinacy, refuse to admit a review, and the complainant is then without a remedy. This appears to be a state of things which should not be allowed to continue; but it can be rectified only by the Legislature, unless this Court, in the opinion of the majority of the Judges, has power under its Charter to interfere in such cases. If not, we think a remedy should be provided by Statute, and that the same power which is given to the Court in its criminal jurisdiction to send for cases and rectify errors of law committed by subordinate authorities should be extended to civil proceedings which, upon their face, show that the order is illegal. We submit the case for the consideration of a Full Bench, in order that some authoritative rule on the subject may be laid down.

The judgment of the Full Bench was delivered by Peacock, C.J., as follows :—

It is clear that we cannot, under the general powers vested in the Court by the Letters Patent, interfere by way of motion, and do indirectly that which we cannot do directly by way of appeal. Nor can we interfere in this case as a Court of Revision under Section 35 of Act XXIII. of 1861; or as a Court of Appeal under Section 12 of that Act. The Judge was right in holding that he had no power to interfere with the order of the Sudeer Ameen setting aside the sale under the execution.

By Section 364 of Act VIII. of 1859 it was enacted that no appeal should lie from any order passed after decree, and relating to the execution thereof, except as thereinbefore expressly provided. There was no express provision in the Act which would enable the Court to deal with a case like the present. Act XXIII. of 1861 did not repeal Section 364, but by Section 11 enacted that any questions arising *between the parties to the suit* in which the decree was passed, and relating to the execution of the decree, should be determined by order of the Court executing the decree, and not by separate suit, and that the order passed by the Court should be open to appeal.

This is a question not arising between the parties to the suit, but between the debtor and a third party who claims as purchaser under an execution. It occurred to me at first that Section 12 of Act XXIII. of 1861 provided for this case. But when I considered the words "provided the application "be preferred within ninety days from the "date of the passing of this Act," it appeared clear that the intention of Section 12 was to provide only for cases in which orders had been made before the passing of the Act.

That Section says: "An appeal from an "order passed in execution of a decree which "shall have been rejected as inadmissible "under Section 364 of Act VIII. of 1859, or "which would have been inadmissible before "the passing of this Act, but which is rendered "admissible by this Act, may be admitted on "an application in writing to the Court which "rejected the appeal, or by which the appeal, "had it been admissible before the passing "of this Act, would have been cognizable, "provided the application be preferred with-"in ninety days from the date of the passing "of this Act."

By Section 364 of Act VIII. of 1859 it was expressly enacted that an appeal should not lie from an order relating to the execution of a decree. Section 11 of Act XXIII. of 1861 applied only to future cases. The words are "*shall* be determined by order of the Court executing the decree," and "the order passed by the Court shall be open to appeal." And Section 11 applied only to questions between the parties to the suit.

It appears to us that Section 12 does not apply to any order made after the passing of Act XXIII. of 1861; and that the words 'which would have been inadmissible before the passing of this Act, but which is rendered admissible by this Act, may be admitted,' &c., apply to cases of orders made before the passing of Act XXIII. of 1861. If the object of that Section had been to give an appeal in cases of orders made subsequently, the words "provided the application be preferred within ninety days from the date of the passing of this Act" would not have been used.

We have carefully gone through the Charter, and there is nothing in it which induces the Court to think that it has any power to give relief to the parties. The Court cannot make any rules providing for cases like the present, for, if the parties are precluded from appealing by Section 364 of Act VIII. of 1859 which has not been repealed, an order giving a right to apply by motion would be contrary to the provisions of the Act.

We cannot consider in this place whether a remedy ought to be provided by the Legislature. Sitting judicially, we cannot recommend the Governor-General in Council to amend the law.

The 20th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Special Appeal (from order refusing to revive Appeal struck off for default).

Case No. 529 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 31st May 1865.

Shaikh Golam Mahomed Akbur and others, *Appellants,*

versus

Koonj Beharee Lal and others, *Respondents.*

Baboo Romanath Bose for Appellants.

Mr. R. E. Twidale for Respondents.

A special appeal lies from an order refusing to revive, under Section 347, Act VIII. of 1859, an appeal struck off for default.

THIS is an appeal against the order of the Lower Appellate Court, rejecting to revive, under Section 347 of Act VIII. of 1859, an appeal struck off for default.

Respondent objects that there is no appeal to this Court against such an order. The matter has already been settled by the decision of the High Court, dated 13th February 1865 (Vol. II., Weekly Reporter, p. 23).

As to the appeal of the special appellant, we find that, on the day appointed for hearing the appeal, one of the two appellants was present in person, and, instead of asking to carry on the trial of the appeal as ordered by the High Court for himself as well as for his brother absent, he simply asked for a week's time to file a *vakalutnamah.*

The Judge below refused the prayer, and, as the only appellant present before him did not ask the case to be tried, and was not in fact ready with his proofs to prove what he and his brother were ordered to prove by the High Court, dismissed the appeal on default.

The revival of the appeal was asked only on the ground of the Judge having refused time for the filing of a *vakalutnamah;* and as the presence of one of the appellants showed that the appellants had due notice of the day fixed for the trial of the appeal, and the alleged sickness of the other appellant absent was no ground for not filing a *vakalutnamah,* if not on behalf of both the appellants, at least on behalf of the appellant present, and as the day for trial had been fixed long after notice, the Lower Appellate Court refused to revive the appeal.

Agreeing with that Court, we reject the application with costs.

The 21st February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Claims to attached property—Procedure under Section 246, Act VIII. of 1859—Appeal.

Case No. 687 of 1865.

Miscellaneous Appeal from an order passed by Baboo Nurattun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 3rd August 1865.

Beebee Saheb Jehan and others (Decree-holders), *Appellants,*

versus

Syud Shah Asudoollah *alias* Abdoollah and others (Judgment-debtors), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Mohendro Lal Shome for Respondents.

Before a claim can be investigated under Section 246, Act VIII. of 1859, it is necessary to ascertain whether the proprietary title claimed by the intervenor arose through a right originating before or after the attachment made by the decree-holder.

No appeal lies from an order passed at the instance of a third party for excluding a particular property from sale in execution of a decree.

THERE can be no doubt that the claim of the objector in this case was wrongly tried, if tried at all, under Section 246 of Act VIII. of 1859, without first determining the fact whether the proprietary title claimed by the intervenor arose through a right originating before or after the attachment made by the appellant, decree-holder.

The appellant charges collusion between his debtor and the other decree-holder, in execution of whose decree the property attached by the appellant was sold and purchased by the intervenor.

As, however, against an order passed at the instance of a third party for excluding a property from sale, there cannot be any appeal to this Court, as the said order is liable to be set aside by a regular suit, and as the provisions of Section 11 of Act XXIII. of 1861 appear to allow appeals only in all matters for which generally no new action can be brought, we are compelled to reject the present application with costs.

The 27th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Interest (not provided for in decree).

Case No. 789 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 28th August 1865, affirming an order passed by the Sudder Ameen of that District, dated the 18th May 1865.

Nilambur Sein and others (Decree-holders), *Appellants,*

versus

Pitambur Sein and others (Judgment-debtors), *Respondents.*

Mr. C. Gregory for Appellants.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

The Court in execution cannot order payment of interest on the principal decreed, when the decree is silent as to such interest.

WHEN the decree does not provide for payment of interest upon the principal decreed, no Court ordinarily can add an order for payment of it in course of execution.

We see no reason to interfere against the order of the Lower Appellate Court refusing to allow any interest to the decree-holder, special appellant, on the ground of the debtors having for a long time refused to pay. Section 11 of Act XXIII. of 1861, which is cited by appellant, has no bearing on the case.

The special appeal is rejected with costs.

The 28th February 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Execution of decree for possession of Wife—Claim of Objector.

Case No. 692 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 21st August 1865, reversing an order passed by the Moonsiff of that District, dated the 21st November 1864.

Akbur Ali (Objector), *Appellant,*

versus

Hosein Ali and others (Decree-holders), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Motee Lal Mookerjee for Respondents.

The ordinary provisions of law relating to execution do not apply to a decree for possession of a wife in which the claim of the objector was not tried as a suit between him and the decree-holder; nor was it a case in which the process of attachment and sale could be enforced.

In this case, both parties before us admit that a decree was given to the special respondent for possession of his wife.

The decree-holder prayed for such possession in execution, and applied for execution on various occasions between 1858 and the present time. The present special appellant, appearing as objector, urged (as the wife has urged in the original suit) that the wife had been divorced by her husband, and after that divorce was legally married to him (special appellant here) under Mahomedan Law.

In execution, the plea of divorce was at first apparently admitted. But the Judge on appeal held that there had been no divorce, and decreed the appeal, and consequently execution of the decree for possession of the wife. The Judge also remarked that, if the special respondent had divorced his wife, he would have adjusted his decree through the Court under Section 206.

The objector (the alleged second husband and special appellant here) urges—

I. That the Judge had no jurisdiction to receive an appeal.

II. That his view of Section 206 of Act VIII. of 1859 is wrong.

We do not think it necessary to entertain this appeal. The main Sections of the law referring to execution are 229, 230, 231, 246, and 247. Before Sections 229, 230, and 231 can apply (if they can at all), the objector ought to have been made a party, and the case tried as if it were a suit. This was not done. Then Sections 246 and 247 contemplate attachment and sale of the property. These are not processes that can be enforced here. We think, then, that the special appellant cannot come before us claiming the application of

these, the ordinary provisions of the law: for they do not apply to such a case as this. As to the Judge having misconstrued Section 206, we may add that it is immaterial. The Judge's remark is merely inferential, and, if incorrect, does not affect the case: for, independent of that inference, he finds as a fact that there was no divorce of the wife by special respondent.

Thus, as we see no proper ground to interfere, we dismiss this appeal with costs.

The 14th March 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Estoppel—Execution of decree (after petition of satisfaction)—Intention of parties.

Case No. 806 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 21st August 1865.

Dwarkanath Surma Mojoomdar (Decree-holder), *Appellant,*

versus

Unnoda Soonduree (Judgment-debtor), *Respondent.*

Baboo Sreenath Dass for Appellant.

Baboo Kishen Dyal Roy for Respondent.

Where a creditor files a petition of satisfaction on the condition that the judgment-debtor would withdraw a special appeal then pending, the intention of the parties must be looked to. If the special appeal, instead of being withdrawn, is carried to a hearing, and is dismissed, the creditor is not estopped from suing out execution.

THIS is an appeal by a decree-holder from the decision of the Judge of Dacca, dated 21st August 1865, not allowing the decree-holder execution after a petition of satisfaction.

On the other hand, the creditor seeks to execute his decree on the ground that he (the creditor) filed a petition of satisfaction on the condition recorded in that petition that the judgment-debtor would withdraw a certain special appeal then pending. A decision of Mr. Justice Loch and Mr. Justice Seton-Karr of 17th December 1864 is cited by the appellant in support of his plea.

Now, we fully agree with those Judges that the point to be looked to is *the intention of the parties.* Applying this test, we think that the creditor here would not have filed his petition of satisfaction had he not been assured that the special appeal of the debtor would be *entirely withdrawn* and *no steps whatever* taken in regard to it. Now, was this done? It was not. The special appeal went to a hearing, and was dismissed. It is true that the only point taken was limitation, and that was not pressed. Nevertheless, we look upon the intention of the parties to have been that the special appeal should have been withdrawn from hearing even.

In this view, we reverse the order of the Court below, and we accordingly decree this appeal with costs.

The 20th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Limitation—Admission of Judgment-debtor.

Case No. 817 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 9th September 1865, affirming an order passed by the Moonsiff of that District, dated the 24th June 1865.

Prosunno Coomar Roy Chowdhry (Decree-holder), *Appellant,*

versus

Kashee Kant Bhuttacharjee (Judgment-debtor), *Respondent.*

Baboos Anund Chunder Ghosal and *Greeja Sunkur Mojoomdar* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A judgment-debtor's admission of liability gives the decree-holder a fresh starting point for computing limitation.

We are of opinion that, when, after the petition for execution was revived, and the debtor's property attached for sale, the debtor, on being arrested in execution of the decree and brought to Court, filed a petition admitting his liability, and asking to be released on the ground of the debts being realizable from the sale of his property already attached, he has, according to the ruling in the case noted in the margin,* debarred himself from pleading, as he did, on the day of sale, that the petition for revival of execution was filed three years after the last effectual step taken to keep the decree alive.

* Volume V., Weekly Reporter, page 12, 26th January 1866.

Such an admission by the debtor, and such a condonement by him of the laches of the decree-holder, if there was any on the part of the latter, prevent the question of limitation being taken up in the case.

The Section of the law which applies limitation to revival of execution of decrees cannot override clear admissions of liability made by the debtor.

We, accordingly, reverse the order of the Lower Court, and remand the case.

The 20th March 1866.

Present :

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Mortgage—Extension of time to Mortgagor under Section 8, Regulation XVII., 1806.

Case No. 765 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 13th September 1865.

Mahomed Gazee Chowdry, *Appellant,*

versus

Abool Mahomed Ameeroodeen, *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Sreenath Banerjee for Respondent.

A Judge has no discretion to extend the time allowed to a mortgagor under Section 8, Regulation XVII., 1806.

We concur with the appellant, and think that the Judge had no discretion to extend the time allowed to the mortgagor under Section 8, Regulation XVII. of 1806.

We must treat what the Judge has done, in allowing a further period of 4 months to the mortgagor, petitioner before him, as an absolute *nullity*, being done without law. We accordingly set aside his proceedings as of none effect. Costs to appellant.

The 21st March 1866.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

No Set-off (for sum not ascertained).

Case No. 777 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Mymensing, dated the 6th September 1865.

Huro Soonduree Dossee, *Appellant,*

versus

Bungshee Mohun Doss, *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

No decree by way of set-off can be awarded to a defendant for a sum to be ascertained in a suit for accounts when the result shows that nothing is due to the plaintiff.

HURO SOONDUREE, the petitioner before us, is the wife of Nudea Kishore, who was sued in Dacca in two cases by his partners in trade, Bungshee Mohun and Goopee Mohun. Nudea Kishore himself had sued these two partners for a settlement of accounts.

The case of the husband of the petitioner was dismissed, and the suits of his partners decreed against him by the Lower Court.

The husband of the petitioner had a decree of a Court of Mymensing against a third party, and the petitioner appeared in the case before the Principal Sudder Ameen of the latter district, claiming to have obtained an assignment of the decree in her favor, and asking to be made the decree-holder in the case.

On the intervention of the two partners of the husband of the petitioner, the Principal Sudder Ameen of Mymensing allowed the petitioner to become the substitute of her husband as decree-holder, allowed her to take proceedings in execution, but ordered that the money so realized should not be taken away by the petitioner, but should remain under attachment, pending the cases instituted by the said partners of Nudea Kishore.

This decree originally was one in favor of all the three partners, but the other two had separately realized their dues, and so the remainder was a decree of Nudea Kishore. The debtor under the decree lately paid a portion of the debt, and it remained in deposit in the Court. Meanwhile, on the appeal of the husband of the petitioner to the High Court, the decree given to his partners in the two cases brought by them was reversed, their claims were dismissed, and the case of Nudea Kishore was remanded to the Court below. It was remarked in the decision of the High Court that the partners of the husband of the petitioner might ask to obtain in that suit a credit for the money claimed by them by those two separate suits dismissed.

After remand, the husband of the petitioner has obtained a decree, and it is admitted that no appeal has yet been preferred against that decree to the High Court, but the time for urging such an appeal has not yet passed.

Whether an appeal may be preferred or may not be preferred hereafter, it is certain that, after the dismissal of the two cases instituted by the two partners of the husband of the petitioner, even if the ultimate result of the case brought by him is to be a dismissal of his claim, on the ground that the settlement of accounts shows that he is indebted to his partners, they are not in a position to say that, under any law, they can in any proceedings in that case obtain a decree for any sum of money so found due to them.

They must bring an action before a decree can be given to them for their share, even if anything be found due to them, as there cannot be any decree by way of a set-off for a sum which may possibly be found out by an enquiry in the suit of the plaintiff.

After the decree was given to her husband on demand, the petitioner prayed for the money in deposit to be made over to her, and the Principal Sudder Ameen of Mymensing refused to make it over to her on the ground that it was attached and is in deposit, and so could not be made over.

It is clear that the object of the attachment was to detain the money, till the result in the two cases instituted by her husband's partners was known; and though the transfer to her by her husband may not be a *bonâ fide* transaction, yet, when she has already been allowed to become the substitute for her husband, and the cases for which the money in deposit was kept under attachment are no longer pending, we do not think that under any law the said partners of Nudea Kishore have a right to keep this money any longer under attachment in expectation of the result of the case against

them showing a balance in their favor, and of the probability of their suing hereafter on the ground of that possible finding in their favor of a balance due by them from Nudea Kishore.

It is argued before us that there can be no appeal in this case, as the order for deposit was obtained at the request of persons who were not parties to the case. As, strictly speaking, there is no appeal to us, we do not like to reverse the order of the Lower Court, but cannot refrain from pointing out to it that the order itself is not based on any substantial grounds or reasons.

Probably, the Principal Sudder Ameen will, on re-consideration of the matter, make over the money to the petitioner, if the petitioner should be advised to make a fresh application; and if the attachment was made at the request of the Dacca Court, and the Principal Sudder Ameen of Mymensing objects to make over the money to the petitioner without any order of the Court that had sent orders for an attachment of this decree, the petitioner may move the latter Court on the subject, should she be so advised.

A copy of this order may be sent to the Principal Sudder Ameen of Mymensing, against whose order the petitioner had filed this petition.

The 22nd March 1866.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

Plaint (Verification of)—Inability of plaintiff to verify.

Case No. 773 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 29th August 1865.

Maharajah Muhessur Buksh Singh Bahadoor,

Petitioner.

Moonshee Ameer Ali Khan Bahadoor and *Baboo Mohesh Chunder Chowdhry* for Petitioner.

Generally, plaints should be verified by the plaintiff. The exception under Section 28, Act VIII. of 1859, in favor of persons unable to verify, should be separately pleaded and considered in each case.

A COMPLAINT was laid before the Judge by a defendant sued by the petitioner, that, in the case brought against the said defendant in a Subordinate Court, the petitioner had, along with other rents due, also sued for a *kist* which had been realized. The Judge called for a report from the Court before which the case was instituted, and on being informed in return that this was a mistake, and that it had been corrected by the petitioner, the Judge remarked that this irregularity in the *seristah* of the petitioner had given him much dissatisfaction, that the case and other proceedings that had come before the Judge satisfied him that the petitioner does not verify his own plaints, but that he has got a set of *mookhtears* to verify them for him. The Judge accordingly ordered that a copy of this proceeding be sent to the petitioner as well as to all the Courts subordinate to the Judge, intimating that these Courts should always require all parties to verify their pleadings themselves, except under certain circumstances detailed in Section 28 of Act VIII. of 1859, and as laid down in the decision of this (High) Court, dated 5th November 1862.

The petitioner produces before us a copy of an order of the Principal Sudder Ameen of the district, dated 4th December 1861, upon an application of a *mookhtear* on behalf of the petitioner (not filed in any particular case), directing that, as the petitioner pleads that, for want of capacity to write in full, he cannot verify his plaints, the *mookhtear* who holds a power to verify for him may be allowed to be considered as authorised to verify on behalf of the petitioner.

This latter order, as well as the order of the Judge, were apparently not passed in any case or appeal pending judicially before the Courts, and it is highly desirable that such a general ruling should be avoided as much as possible.

The petitioner contends that the order of the Judge is likely to deter all Courts subordinate to him from receiving pleadings on his behalf, if not verified personally by the petitioner, even when under the law they may be received without his personal verification, and that the order may preclude the possibility of his pleading his inability to verify on the ground that was laid before the Principal Sudder Ameen when he passed the order noticed above. He further states that he is also afraid that he may be compelled to verify where he may have no personal knowledge, notwithstanding the provision in Section 9 of the Circular Order, 29th July 1859, to the effect that only those who have personal knowledge should be allowed to verify.

The Principal Sudder Ameen does not state that he was satisfied that the petitioner is incapable of writing the verification or signing it, and, if the petitioner is actually so incapable, the order of the Judge can never be a bar to the petitioner's pleading that excuse.

We have no hesitation in declaring our opinion that the Judge must not be held to have intended to decide or prohibit any of his subordinate Courts from deciding upon the propriety or otherwise of any special grounds which the petitioner may have occasion to plead in each case, any general ground of incapacity which the petitioner may have to set up regarding his inability to verify any particular pleadings.

The petitioner is at liberty to plead in any case of his, in support of his inability to verify a pleading, any good excuse that he may have to urge, such as his incapacity to write or sign, or his want of personal knowledge; and the excuse as set up by him ought, under the law, to be judicially decided in each instance by the Court before which it may be pleaded, and, if the petitioner is dissatisfied against an order so passed, he may, if the law allows him, resort to the privilege of appeal in all such cases.

We cannot pass any general orders for or against the petitioner on this application, as we can take judicial cognizance only of an order passed in any particular case; but we have already expressed our opinion that the Judge's order cannot be held binding in all cases on himself and on the subordinate Courts, nor can it preclude the Judicial Authorities from considering the effect and intent of Section 28 in any or each particular case. In general, however, we agree with the Judge in thinking that plaints should be verified by plaintiff, and that Section 28 should be applied exceptionally and for the good and sufficient causes contemplated therein. Such causes should be judicially considered whenever pleaded.

We do not consequently find it proper to pass any more precise order on the present application of the petitioner. A copy of this decision will be sent to the Judge.

b

The 10th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mesne-profits (recoverable under a decree).

Case No. 467 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 13th May 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 25th June 1864.

Bishessuree Debia and others (Judgment-debtors), *Appellants,*

versus

Mohun Chunder Bose and others (Decree-holders), *Respondents.*

Baboo Bamachurn Banerjee for Appellants.

Baboo Woomesh Chunder Banerjee for Respondents.

A decree-holder may recover as mesne-profits such sums as may have been collected and appropriated by others in wrongful possession, or such sums as the party wrongfully ousted would have collected had he been in possession, and which he was prevented from collecting by having been kept wrongfully out of possession.

THE petitioner appeals on the ground that he should not be made to pay, as mesne-profits, more than he has collected during the time of his possession of the lands decreed to his opponent.

This plea is opposed to a series of decisions referring to this question.

The ruling reported in pages 122 to 127 in Marshall, Volume I., 9th September 1862, passed by a bench of three Judges—Chief Justice, and Bayley and Kemp, JJ., in the case No. 31 of 1862—distinctly shows (see page 126) that a decree-holder was held entitled to recover "such sums as may have "been collected and appropriated by others "in wrongful possession, or such sums as "the party wrongfully ousted would have "collected had he been in possession, and "which he was prevented from collecting by "having been kept wrongfully out of pos-"session, because one or other of these "descriptions of profits are *profits* which "have been lost in the *meantime* to the "party ousted; that is, during the interval "of his wrongful dispossession by others."

This is followed by Norman and Steer, JJ., in page 204 of the same Volume.

We accordingly reject this appeal with costs.

The 10th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Extension of time to file security for staying execution for costs.

Case No. 851 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 30th October 1865.

Bishessur Dutt Chowdhry (Judgment-debtor), *Appellant,*

versus

Kalee Kinkur Roy and others (Decree-holders), *Respondents.*

Baboos Qnoocool Chunder Mookerjee and *Gopal Lal Mitter* for Appellant.

Baboo Kalee Mohun Doss for Respondents.

The judgment-debtor, having been allowed by this Court to file security in the Lower Court, on its re-opening after the Dusserah vacation, to postpone execution for costs, did not offer to file the security until a few days after the re-opening, when he explained the cause of the delay. As the judgment-debtor seemed really desirous to carry out the order of this Court, further time was allowed to him to file security for the purpose of staying execution.

IN this case, the petitioners were ordered, on the 13th of September 1865, to file

below security to postpone execution for costs on the re-opening of the Lower Court after the vacation. The Court opened on the 23rd October, and on the 30th of the same month the petitioners filed a petition offering to file security under the order of the High Conrt, stating that they could not file it for two preceding days, the 28th and 29th, as these were holidays, and that they could not file it on the 23rd up to the 27th, because their people could not, from Calcutta, reach the Lower Court in time. The Lower Court rejected their prayer, on the ground that no security was filed on the 23rd of October. The precept sent out distinctly specified, in more clear terms than the order itself, that the security was to be filed on the 23rd of October; and it is now pleaded by the pleaders of the petitioners that they had not so understood the order when it was passed.

It is clear that the order, as passed, would not ordinarily bear any other interpretation, as there was no limit of any day or number of days after the vacation up to which the security was allowed to be filed; and, in their petition filed before, the petitioners admitted that they had failed to comply with the order of this Court as passed, and wanted to explain their delay.

As, however, they appear to have shewn an earnest desire to carry out the order of this Court by offering, through their petition of the 30th of October, to file the required security, we think they may be allowed to stay execution on their filing proper security within a week of the arrival of this order in the Lower Court, and that, in case of their failure to do so, the execution should be allowed to the decree-holders, after, however, taking from them proper security, as required by Regulation XVI. of 1797.

The costs of this miscellaneous appeal to be borne entirely by the petitioners.

The 17th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Minor (Claim to represent—under a Neeumputtro)—Certificate under Act XL. of 1858 (unsuccessful application for.

Case No. 831 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 31st May 1865.

Ranee Shoobhudra, *Appellant,*

versus

Ranee Prem Moyee and others, *Respondents.*

Baboos Unnoda Pershad Banerjee and *Molee Lall Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Mohendro Lall Shome* for Respondents.

An unsuccessful application by the grandmother of a minor for a certificate under Act XL. of 1858 is no bar to her suing under a *neeumputtro* alleged to have authorised her to represent the minor.

THIS is a claim by a party alleging herself to be grandmother, and to have a title under a neeumputtro to represent a minor in a suit. The Judge referred for his reasons to his judgment on an application for a certificate under Act XL. of 1858, and rejected the claim.

The Judge, we observe, disallowed the application for a certificate under Act XL. of 1858, for these reasons—

1st. As the father and grandfather were alive and of sound mind and were legal guardians.

2nd. As the alleged deed of adoption seemed fraudulent.

3rd. As a woman was not a proper person for such a charge as that of a minor.

The father and grandfather are certainly the legal guardian if the neeumputtro be not established; but, if it be, this boy would then belong no longer to the family of the natural father and grandfather.

The party who sued in this case did, it is true, fail to get a certificate when told to apply for one after the suit was instituted; but we cannot see why the petitioner should not sue out her rights under the alleged neeumputtro as any ordinary plaintiff could.

We, therefore, reverse the order of the Judge, and direct that the suit of petitioner be allowed to proceed.

The 17th April 1865.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Appeal to Privy Council—Failure to give security—Attachment of property.

Case No. 643 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Behar, dated the 2nd September 1865.

Baboo Khoroo Lal (Decree-holder), *Appellant,*

versus

Kant Lal (Judgment-debtor), *Respondent.*

Baboos Onoocool Chunder Mookerjee and Dwarkanath Mitter for Appellant.

Mr. R. T. Allan, Moonshee Ameer Ali Khan Bahadoor, and *Baboo Unnoda Pershad Banerjee* for Respondent.

In the case of an appeal to the Privy Council, the Court has no power, on failure of both parties to furnish security as required by Section 4, Regulation XVI., 1797, to attach any property held by the appellant beyond that decreed.

THE petitioner before us is the decree-holder who had, as plaintiff, recovered against the defendant, his brother, a decree for half of the moveable and immoveable property belonging to their father. The defendant, having appealed to Her Majesty in Council, applied to this Court for an order to stay execution on his giving proper security, and the Court, with the consent of the petitioner, and on his having expressed his inability to furnish the required security for carrying out the execution, stayed it with this direction that the defendant was to give, for the present, security to the extent of two lacs of rupees, and if he failed to supply the same, then the property was to be attached. The defendant failed to furnish the required security, and the Court below attached the property decreed. The petitioner contends that as he may have large sums of money to recover from the defendant, as mesne-profits, &c., he is entitled to obtain an order for the attachment of also the other half belonging to the defendant, for which the petitioner has not obtained any decree.

We do not find that, in case of both the parties failing to supply the security as required by Section 4, Regulation XVI. of 1797, this Court has any power to attach any other property held by the appellant beyond the moiety in dispute. The passage at the end of the Section quoted by the petitioner refers to the security required from the appellant before his appeal to England can be admitted, and is not meant to give the power of attachment to any such extent as asked by the petitioner.

Therefore, we see no reason to interfere, and reject this appeal with costs.

The 25th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Mesne-profits (payable by wrong-doer under decree).

Case No. 603 of 1865.

Miscellaneous Appeal from an order passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 1st July 1865.

Chunder Coomar Roy (Judgment-debtor), *Appellant,*

versus

Kasheenath Roy Chowdhry and others (Decree-holders), *Respondents.*

Baboos Sreenauth Doss and Bungshee Dhur Sein for Appellant.

Baboo Obhoy Churn Bose for Respondents.

A decree-holder is entitled, as mesne-profits, to whatever the wrong-doer has collected, though it be more than the decree-holder himself might have ordinarily collected.

THE petitioner objects to the order of the Court below fixing the amount of the mesne-profits payable by him, according to the report of an Ameen deputed for the purpose. The petitioner urges that his objections to the investigations of the Ameen are not noticed in detail by the Lower Court. The Court below has given its reasons for generally disallowing these objections, and for adopting the Ameen's report. The Lower Court further adds that the petitioner has not produced any accounts of his collection during his possession. The decree-holder is a purchaser of the rights and interests of a putneedar, and the petitioner had kept himself in possession by fraudulently setting

up an under-tenure from the putneedar. He now attempts to explain away his neglect by stating that he did not produce these accounts, because he was never asked to produce them.

His objections to the investigations of the Ameen are that the vendor of the decree-holder has, as against some ryots, obtained in Revenue Courts decrees for rents higher than that paid before by these royts; that the Ameen has fixed the wasilat in respect to these ryots, as well as others, at the rate fixed by these decrees, without any regard to the fact that the said decrees were afterwards set aside by a Civil Court; and that there were no such decrees against many of the ryots.

We find, however, that the Ameen fixed the rents at the higher rate, not because the vendor of the decree-holder had obtained decrees for this higher rate, but because the Ameen was satisfied by the examination of witnesses that the petitioner had collected according to this higher rate from the ryots against whom the vendor of the decree-holder had obtained decrees, as well as from those against whom similar decrees had not been obtained in the Revenue Courts.

The Ameen, therefore, fixed the wasilat at this higher rate, not because he was not aware of the fact of the reversal of these decrees of the Revenue Courts by a Civil Court, but because he thought it his duty as an Ameen to adopt the *actual* collections as the basis of his report.

We think that, in this case, the proper rule would be that, where the wrong-doer has, as here, collected more than what the decree-holder might ordinarily have collected, the wrong-doer should make over all that he has collected, and should not be allowed to retain any portion for his benefit and use. To limit the decree-holder only to what he himself might have collected, would be holding out a premium to fraud and aggression, and giving the benefit of his wrongful extortion to the wrong-doer.

We find, further, that the petitioner complains that no deduction has been allowed to him for charges of collection.

On the whole, we uphold the order of the Court below fixing the amount of mesne-profits, but order that out of it be deducted 10 per cent. as charges of collection, if not already done.

So far the order of the Court below is to be amended, but without any costs, to the petitioner, who is liable for all the costs of this appeal to the decree-holder.

The 25th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Reversal of decree—Restoration of possession with Mesne-profits.

Case No. 36 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Hooghly, dated the 1st December 1865.

Gooroo Churn Bose and others (Judgment-debtors), *Appellants,*

versus

Bykuntnath Acharjee (Decree-holder), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellants.

Baboos Kishen Kishore Ghose and *Greeja Sunker Mojoomdar* for Respondent.

For the restoration of possession with mesne-profits of lands made over in execution of a decree subsequently reversed on appeal, a specific order is not necessary to be inserted in the decree of the Appellate Court.

THE petitioner is the purchaser of the rights of a debtor. He sued for possession the opposite party, who, denying the rights of the debtor, the vendor of the petitioner, set up a putnee from the co-sharers of the debtor of the entire property in dispute. A decree was given to the petitioner by the first Court for the whole of the lands in dispute. On appeal to the late Sudder Court, the claim of the petitioner was dismissed to the extent of 10-16ths, and the decree of the Lower Court decreeing to him the remainder 6-16ths, *viz.*, the extent of the share of the debtor, the vendor of the petitioner, was upheld.

Meanwhile, possession of the whole had been taken by the petitioner under the decree of the Lower Court. After the reversal of that decree to the extent of the 10-16ths by the Sudder Court, the putneedar of the 10-16ths asked the Lower Court to restore to him the possession of the 10-16ths with mesne-profits during its possession by the petitioner. The Court below has allowed that request, and the petitioner

appeals to this Court, urging that the decree of the Sudder Court not having provided for mesne-profits, the opposite party should not have it in execution, and that the Court executing the decree cannot introduce into it matters not provided for in the same.

He also quotes several cases of this Court, shewing that, when a decree passed in favor of a plaintiff by the Court of first instance is reversed in appeal, if possession has been taken by the plaintiff intermediately, for mesne-profits of the time during which possession was so held by the plaintiff, the defendant was referred to a regular case. Now, we cannot understand on what principle no objection is taken either in this case, or was taken in the precedents quoted by the petitioner, to the restoration of possession by such a plaintiff after the reversal of the decree given to him by the Lower Court in execution of which decree the plaintiff had taken possession from the defendant.

If, in order to give to the opposite party in this case mesne-profits of the period during which possession was held by the petitioner under the decree afterwards reversed, a regular case is to be considered as necessary, it follows that such a course would also be necessary as regards the said defendants receiving back possession. If no suit is to be considered necessary for taking back possession, none would be required for obtaining the mesne-profits of the lands made over in execution of the decree of the Court of first instance. Now, the question is whether, in order to restore possession with mesne-profits given over under a decree subsequently reversed, a specific order is necessary to be inserted in the decree of the Appellate Court.

In answer to this question we would say that, when an Appellate Court reverse a decree of a Court of first instance, this decree in reversal is to be considered to include an order for restoration of possession with mesne-profits of the lands made over in execution of the decree reversed, or, in other words, an order to place the parties in that position which they would have respectively occupied as owner or loser in the case if the decree in appeal had been the decree in the said first Court. It is upon this principle that, in all such cases, on a Lower Court's decree being reversed in appeal, possession is restored to the defendants, if the plaintiff had taken it intermediately; and for such an obviously equitable purpose and result, no separate specific order is practically required.

We do not think that an Appellate Court, when reversing a decrée of the Lower Court for money decreed to the plaintiff, is required to provide for restoration of this money if it has been intermediately realized. In another sense, the application to get back possession with mesne-profits in cases where the decree given by the first Court to the plaintiff is reversed in appeal, is no part of the decree in the case. The order in appeal in all such cases simply is that the plaintiff's suit is dismissed. So in this suit the decree of the Appellate Court is that the plaintiff's suit for 10-16ths is dismissed. On the intimation to the Lower Court of the result of the appeal against its decree, it is the duty of the Court to undo all that it may have done in execution of its decree. Thus, for instance, as a matter of course, and as a consequence following the result of the trial in appeal, the Lower Court will have to restore the things taken away from the appellant. The restoration of possession of lands includes the profits realized from them by the plaintiff subsequent to their being made over to him. It is a proceeding held under a power inherent in all Courts whose decrees are reversed by superior Courts, and in the exercise of which it must adopt and act upon all the rules applicable to the execution of decrees. In this view of the case, we reject the plea of the petitioner that the defendant could not recover mesne-profits from the petitioner in this case for the period that the petitioner held possession in execution of the decree of the Lower Court reversed in appeal.

The petitioner further claims a deduction of the sums paid by him as Government revenue of the 10-16th share during his possession of the whole of the lands. The Lower Court refused him that deduction in this case, and directed him to sue for this money his co-sharers, the proprietors of the 10-16ths of the property. Now, in this case, the putneedar claimed to get possession of the property, and, having obtained a decree, has taken possession. He now claims as mesne-profits the gross rental of the lands, including the Government revenue, the *rents* payable by the putneedar (exclusive of the revenue) to the landlord, as well as his own profits as putneedar.

The Government revenue was either payable by the zemindar, or, as between the

zemindar and the putneedar under the contract between them, by the putneedar on account of the zemindar.

No deduction is to be allowed to the petitioner but for that which will be proved to have been paid to the Government on account of the revenue due from the zemindary, during any portion of the time the petitioner was holding possession. If he succeeds in establishing that he paid the Government revenue for any period during this time, it settles the question for that period regarding payment of the same by either the putneedar or the co-sharers of the petitioner to the extent of that payment.

Now, if this revenue is payable by the putneedar according to his contract with the zemindar, the petitioner rightly asks for a deduction of that from the mesne-profits payable by him to the said putneedar. If the revenue is not payable by the putneedar, and was payable by the zemindar himself, it is evident that, if the putneedar be now required to grant a deduction for these Government revenues, the putneedar can, to the extent of the amount of the Government revenue so allowed by him, make over to his own landlord the receipts for these Government revenues (payable by the zemindar, and not paid by him) as a part of his putnee rents. If the putneedar, however, has paid to his landlord, as putnee rents, these Government revenues, the putneedar cannot make any allowance for them out of the mesne-profits due to him.

On the whole, we think it necessary to remand the case to the Lower Court, with directions to try and to find whether the petitioner has paid any Government revenue, and if so, how much, and during what portion of the time for which mesne-profits are hereby claimed against the petitioner; and to find whether for this period the putneedar has paid his putnee rents to his landlord, whether these rents include the Government revenue, and whether, under the terms of the putnee contract, the Government revenue was payble by the putneedar or by the zemindar.

In holding these enquiries, the Court below is not to overlook how far it has already been decided in the case for mesne-profits that the putnee is a mere fraudulent and *benamee* transaction for the benefit of the zemindar of the 10-16th share.

The case is accordingly remanded for re-trial with reference to the above remarks.

The 28th April 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Execution of decree as to mesne-profits—Keeping alive decree as to costs.

Case No. 487 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 19th May 1865, reversing an order passed by the Principal Sudder Ameen of Santipore, dated the 31st August 1864.

Oopendur Mohun Mustafee (Decree-holder), *Appellants,*

versus

Mr. H. D. Tripp, Manager of the Bengal Indigo Company (Judgment-debtor), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

Mr. R. E. Twidale and *Baboo Bhowanee Churn Dutt* for Respondent.

Proceedings in excution of a decree as to mesne-profits held to be an effectual proceeding, within the meaning of Section 20, Act XIV. of 1859, taken to keep alive the same decree as to costs.

THIS is a case in which the petitioner appeals against the order of the Judge of Nuddea, passed in the Miscellaneous Department, holding that the petitioner was out of time under Section 20, Act XIV. of 1859, inasmuch as the decree given to him was of the 3rd May 1859; but the application for execution as to the costs awarded as part of the decretal order was not made till the 20th June 1864, *i. e., more than three years* after the decree.

The plea of the petitioner now in summary special appeal before us is that, as the application for the execution of the decree in respect to the item of costs in it had been omitted by mistake to be made before, but that still, as effectual proceedings in respect to execution for *wasilat* which was part of the decree had been taken within three

years of decree, which proceedings were still pending, the petitioner could have three years from the time of his taking such proceedings in execution as to the *wasilat*, under the legal and proper interpretation of the Section 20 (Act XIV. of 1859). The petitioner added that the Judge referred to the heavy interest chargeable on the judgment-debtor for these costs by this means and owing to petitioner's delay in taking out execution as to them, and urges that there would have been no interest falling upon the judgment-debtor if he had done what the Court itself, by its own order, required him to do, *viz.*, pay the costs when the decree was given.

We are clearly of opinion that the objection of the petitioner is a legal and valid objection, and that it is also one of the same character as that we have admitted as valid in the case of Joy Kurun Lal, Petitioner, decided by this Bench on the 6th February 1866.

The case is admitted by the Lower Court and by all parties to be one to be governed by the construction of Section 20, Act XIV. of 1859.

That Section enacts that "no process of "execution shall issue from any Court not "established by Royal Charter to enforce "any judgment, decree, or order of such "Court, unless *some proceeding* shall have "been taken to enforce such judgment, de-"cree, or order, or to keep the same in force "within three years next preceding the ap-"plication for such execution."

The High Court has ruled that the "proceeding" referred to must be an "*effectual*" proceeding.

The petitioner had a decree for possession, *wasilat*, and *costs*. It is admitted that he sued out execution of his *wasilat* within the time allowed by the Section; and it is also admitted that that execution is still pending, and that these three years have not passed between "the application for such execution" of *wasilat* and the application for execution of the part of the decree referring to *costs*.

We think, then, that, under the terms of the law and this Court's ruling, the petitioner has taken effectual proceeding to enforce his decree as to *costs* within three years next preceding the application for such execution, *viz.*, that made by the petitioner within three years in respect to that part of the decree which referred to *wasilat*.

We, accordingly reverse the order of the Lower Court, and decree this appeal with costs.

The 30th April 1866.

Present:

The Hon'ble L. S. Jackson, *Judge*.

Jurisdiction—High Court—Court of Wards—Marriage of Minor.

Baboo Gujadhur Pershad Narain Sing, *Petitioner*.

The High Court cannot restrain the Court of Wards, whether acting with or without jurisdiction, from interference in the bestowal in marriage of a minor. Proper course to be taken by the parties aggrieved.

Mr. Allan, on behalf of the petitioner, applied for an order restraining the Commissioner and Deputy Commissioner of Chota Nagpore, acting as the Court of Wards, from all further interference in the bestowal in marriage of the daughter of the Rajah of Dhunwar until further orders.

Jackson, J.—I have consulted my learned colleagues (Bayley and Phear, JJ.), and they both concur with me in thinking that this Court cannot interfere in the present stage of the proceedings, inasmuch as it has no jurisdiction of this kind over the Court of Wards, whether the Court of Wards is acting with or without jurisdiction.

It appears to me—and those learned Judges, I believe I may say, are of the same opinion—that the proper course for the parties aggrieved in this matter to take is, in the first place, to apply to the Board of Revenue for an order restraining the Commissioner and Deputy Commissioner, and in the next place to take proceedings in the Civil Court to try the right of the Court of Wards to interfere in the matter, in the meantime obtaining an injunction. Possibly it may also be desirable to apply in the usual way and to the proper authority to have a guardian appointed to this young lady.

If, on either of these applications to the Civil Court, the parties think that they have any reason to complain, they can come to this Court on appeal.

The petition will be returned to Mr. Allan in order that it may be presented to the proper authority.*

* NOTE.—It is understood that, on application subsequently made to the Board of Revenue, an order was granted restraining the local officers.—EDR.

The 1st May 1866.

Present :

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Appeal to Privy Council—Security for Execution—Duty of Court—Nazir's Report.

Case No. 820 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Midnapore, dated the 14th September 1865.

Chowdhry Brojo Mohun Sutputty, *Appellant,*

versus

Sooda Moyee Debee and others *Respondents.*

Baboos Onookool Chunder Mookerjee and *Uprokash Chunder Mookerjee* for Appellant.

Baboo Mohendro Lal Shome for Respondents.

Where a Lower Court on remand admits, as sufficient, security tendered to enable the decree-holders to take out execution in a case appealed to the Privy Council, which security before remand he had rejected as insufficient, the Lower Court is bound to give specific reasons for this act, and to satisfy itself of the sufficiency of the security, using the Nazir's report to assist him, but not binding himself to it on the ground of the Nazir's responsibility.

THIS is a case involving the question of whether the security tendered by the decree-holders in this case is sufficient.

The security is ordered by this Court to be given before the decree-holders are to be permitted to take out execution in a case appealed to Her Majesty in Council.

The law, Section 4, Regulation XVII. of 1797, states that the security for costs "as well as for the performance of such order or judgment as Her Majesty, Her heirs or successors, may think fit to give," shall be security "to the satisfaction of the Sudder Dewanny Adawlut."

In accordance with this law, the Zillah Court has the above duty of seeing that security satisfactory to it, as the representative of the Sudder Dewanny Adawlut, is given.

In this case two Mehals were tendered as security, *viz.:*

1.—Mehal Solabaria.
2.—Mehal Balabaria.

The first was said to be worth ten thousand rupees, the second to be worth forty thousand rupees, and some additional property to be worth 1,700, or 51,000 rupees.

Objections were raised to the sufficiency of the security. They were mainly these:—

As to *Solabaria.* That it purported to be the property of one Narayunee by gift from Tara Monee, but that no title by gift was shewn, and that it was property which was not transferable or alienable by Narayunee as a Hindoo widow; so that it could not be sold for the purposes of the security.

As to *Balabaria.* That the Income Tax Returns showed the profits to be 2,000 rupees, while they had been taken for the purposes of this security at 8,000 rupees; that the property was said to be that of Juggurnath Pebraj, while there were two brothers sharers; consequently both would share and share alike, and only half of the Mehal, therefore, could be available for the purposes of this security; and, further, that this property was hypothecated for other claims.

The Principal Sudder Ameen, on the first enquiry, admitted these objections.

The case, however, being remanded from this Court in the Miscellaneous Department, Loch and Glover, JJ., with a view to raise the security from 40,000 to 50,000 rupees, there was a necessity further to test the security tendered; and as the Nazir reported the Mehals unencumbered and of sufficient value to meet the security demanded, the Principal Sudder Ameen, adopting that report and alluding to the responsibility of the Nazir for its correctness and the sufficiency of the security, admits the above Mehals as sufficient security.

In regular appeal in the Miscellaneous Department before us, the objections before noticed are repeated; and it is added that, as the same Principal Sudder Ameen has now admitted the security as sufficient before deemed not so, *he* was especially bound to give specific reasons for this act, which he was not done, but only vaguely stated his idea that they were sufficient. It was added that the Principal Sudder Ameen was bound to satisfy himself of the sufficiency of the security, using the Nazir's report to assist him, but not binding himself to it on the ground of the Nazir's responsibility, as the Principal Sudder Ameen had done here.

On a perusal of the judgment and after hearing Counsel at length, we think these objections valid, and remand the case for re-trial with reference thereto.

The Principal Sudder Ameen will, on this remand, enquire whether, if Mehal Balabaria be sufficient security, and gives 8,000 rupees per annum clear profits, its marketable value is not more than 40,000 rupees, as contested by the opposite party.

Remand accordingly.

The 1st May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Limitation—Execution of decree—Set-off.

Cases Nos. 745 and 747 of 1865.

Miscellaneous Appeals from an order passed by the Judge of Behar, dated the 22nd August 1865, affirming an order passed by the Principal Sudder Ameen of that District, dated the 17th December 1864.

Hemraj Chowdhry and others (Decree-holders), *Appellants,*

versus

Asoodun (Judgment-debtor), *Respondent.*

Mr. C. Gregory for Appellants.

Mr. R. E. Twidale for Respondent.

The act which the law requires one man to do to save from limitation his decree of one date and character, cannot be considered the same act which another man is required to do to save from limitation his decree of a totally different date and character.

It is admitted by the vakeels of both parties before us, that these two appeals will be governed by one and the same decision here.

The first plea is that, under Section 209, the Lower Court should have allowed a set-off for the special appellants' decree. But we hold that that decree was barred by the Law of Limitation. It was a decree of 29th July 1854, of which execution was taken out *by the decree-holder* in November 1862. Now, the time under Section 20 of Act XIV. of 1859 had expired then. But the pleader argues that, as the other party took out execution on the 31st December 1861, and the special appellant had the cross-decree to be set-off, this act or proceeding made his decree active as effectually as an application of his own. We do not agree in this view. The act which the law requires *one* man to do to save his limitation as to his decree of one date and character, cannot be considered the same act which *another* man is required to do to save his limitation in respect to that other man's decree of a totally different date and character.

The pleader then urges that, under his first plea (*i.e.*, that limitation does not bar him), he means that it should have been pleaded before by the opposite party, and was not. We do not think that the vague words, such as are used, are the distinct expression of this plea which is required in grounds of special appeal; nor do we think the plea otherwise good. If it really had been taken by special appellant below, as it should have been to make it ordinarily admissible here, it would have been referred to in the judgment, which it is *not;* and if it were taken and not referred to by neglect of the Lower Court, that neglect should have been made a clear and specific ground of special appeal, which it certainly is not.

On the whole, seeing no reason to interfere with the order below, we dismiss both appeals with costs.

The 1st May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Limitation—Keeping alive decree—Attachment of property.

Case No. 798 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 22nd July 1865, reversing an order passed by the Moonsiff of that District, dated the 1st June 1865.

Prosunno Coomar Mookerjee (Decree-holder), *Appellant,*

versus

Ramtonoo Chunder (Judgment-debtor), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Luleet Chunder Sein for Respondent.

The attachment of a judgment-debtor's property is an effectual proceeding, within the meaning of Section 20, Act XIV. of 1859, taken to keep alive a decree.

THE Judge is clearly wrong. The attachment was not taken off until March 1862. The present application to execute is dated December 1864.

The Judge is of opinion that no intermediate proceeding can keep a decree alive, but this is clearly contrary to the terms of Section 20, Act XIV. of 1859. The law says that a proceeding must be taken to enforce the decree within three years preceding the last application for execution. Now, in our opinion, no more effectual proceeding could be well taken by a decree-holder to enforce his decree than that of attachment of his judgment-debtor's property.

The appeal is decreed and the case remanded. The plea of the judgment-debtor that he has satisfied the decree must be considered.

The 6th April 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Time for presentation of appeal—Deduction.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 29th January 1866, rejecting an Appeal from an order passed by the Deputy Commissioner of Lohardaga, dated the 19th December 1865.

Lal Gopalnath Sahee Deo (Plaintiff), *Appellant,*

versus

Musst. Pudum Koonwur and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

No one for Respondents.

The time which intervenes between the putting in stamps and obtaining a copy of the decree should be excluded from the time prescribed for the presentation of an appeal.

WE think that the Judge was wrong in not admitting this appeal. The time which intervened between the putting in stamps and obtaining a copy of the decree should be excluded. Excluding that time, the appeal was presented in time.

The Judge has made a mistake in taking the date on which the copy of the judgment was obtained, and not the date on which the copy of the decree was delivered.

Under these circumstances, the Judge should be directed to admit the appeal as within time.

The 8th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Execution of decree.

Case No. 2 of 1866.

Miscellaneous Appeal from an order passed by Baboo Jugobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 30th November 1865.

Ram Coomar Chowdhry (Judgment-debtor), *Appellant,*

versus

Ram Mohun Chowdhry (Decree-holder), *Respondent.*

Baboos Mohendro Lal Shome and *Doorga Doss Dutt* for Appellant.

No one for Respondent.

The Court executing a decree has no discretion to order the decree-holder to proceed first against one debtor, and afterwards (if his debt should remain unsatisfied) against the other debtors.

IT appears that the decree now under execution was passed jointly under the Ruffanamah filed by the debtors against them all, and the Court below has now directed the decree-holder to proceed to execute the decree first against the petitioner, and, if that does not satisfy the decree, to proceed against the other debtors.

It does not appear to us to be within the power of the Court executing the decree to make any such directions to the decree-holder, who, however, had a right to make his selection—an option which he has not exercised. On the assumption of there being nothing in the Ruffanamah or the decree which we have examined to authorize such a division of the liability as made by the Court below, we reverse the order of the Lower Court, and order it to execute the decree as passed.

Appeal decreed.

The 9th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Appeal—Dispute among heirs of deceased decree-holder—Power of High Court (to pass proper order after reversal of order on appeal).

Case No. 11 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 21st November 1865, reversing an order passed by the Moonsiff of that District, dated the 16th June 1865.

Raj Chunder Roy Chowdry and others, *Appellants,*

versus

Grish Chunder Roy and others, *Respondents.*

Mr. A. T. T. Peterson and *Baboo Sreenath Doss* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

According to Section 11, Act XXIII. of 1861, no appeal lies in a case of private dispute among the heirs of a deceased decree-holder as to their respective rights.

The order of the Judge in appeal was accordingly reversed, and (by virtue of Section 35 of the same Act) the proper order passed allowing the sons of the deceased decree-holder to represent him as his sons without any determination of the genuineness of an alleged will by which different shares were allotted to the several sons, or of the extent of their respective shares.

THE first contention before us is that no appeal will lie to the Judge in a case like this, where, on the death of the original decree-holder, his several sons disputed they had respectively certain rights to represent the deceased in different and contested shares as between themselves, and the Moonsiff allowed them to represent their deceased father under a will set up by some of the sons and denied by the others, by which will different shares were allotted to the several sons.

The Judge heard the appeal, and decided that the Moonsiff should have admitted all the sons as one party, and not decided anything regarding the extent of their shares, because the decree must be executed as a whole, and not separately, for the shares claimed by the different sons of the deceased.

Before we consider whether the order of the Judge be a correct order or not, we have to decide the question whether the Judge could hear the appeal.

We hold that any such private dispute between the heirs of a decree-holder not connected with the original decree under execution, that is to say, not a dispute between the decree-holder or his heirs in the same interests as in the suit on his part, on the one side, and the judgment-debtor on the other side, is not a matter appealable under Section 11 of Act XXIII. of 1861 (*see* 8th December 1865, page 14, Miscellaneous Appeals, Volume IV. of Sutherland's Weekly Reporter).

The Judge below having in appeal exceeded its jurisdiction, this Court has power under Section 35 of the aforesaid Act to reverse this order. This Section, however, does not say that this Court is to be satisfied with reversing the order of the Lower Appellate Court, but authorizes this Court (*see* the case reported in page 145, Volume III. of Act X. Decisions, Sutherland's Weekly Reporter) to pass the legal order in the case.

We find that the order passed in this case by the Moonsiff was not a proper order, but that passed by the Lower Appellate Court was a correct one.

We, accordingly, proceed to set aside the order of the Moonsiff, and pass the order we consider correct, *viz.*, that the sons of the deceased decree-holder should be allowed to represent the decree-holder deceased as his sons without any determination of the genuineness of his alleged will or the extent of the shares of each of the said sons.

Order accordingly.

The 9th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Limitation—Keeping alive decree—Review.

Cases Nos. 8 and 9 of 1866.

Miscellaneous Appeal from an order passed by Mr. C. P. Hobhouse, Judge of Midnapore, dated the 13th November 1865, affirming an order passed by the Sudder Ameen of that District, dated the 2nd September 1865.

Chowdhry Junmenjoy Mullick (Judgment-debtor), *Appellant,*

versus

Bissambhur Panjah (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Babgo Uprokash Chunder Mookerjee* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

The filing of an application by a debtor for the review of an order passed for execution of decree does not bar the operation of Section 20, Act XIV. of 1859. Nor does the order rejecting the petition of review give a fresh starting point for computing limitation.

In this case, the Courts below have decided that, although the petitions of the *creditors* for execution in both these cases were filed after the expiry of three years from the decree, they were yet in time, as they were made within three years from the date on which the application for review filed by the *debtor* was rejected by the Court passing the decree.

The appellant appeals and quotes Volume 5, page 11, Miscellaneous Appeals, Sutherland's Weekly Reporter, and Section 20 of Act XIV. of 1859, in support of his plea.

It is admitted that the decree in this case was passed after Act XIV. of 1859 came into operation. We are clearly of opinion that, under that law, the filing of the review by the debtor cannot stop the operation of Section 20 of that Limitation Act, nor does the order rejecting a review (which leaves the case only a non-admitted application for review) give a new commencement to the running of the period of limitation. The respondent quotes the case in page 21 of Volume III. of Sutherland's Weekly Reporter.

Now, it is clear that, when there is an appeal, and it proceeds to trial, though it may be on trial dismissed, the date of the decree must be the date of the trial in appeal, for that is, in fact, the final judgment which incorporates both *decrees*. The case, however, is quite different where an order, petition, or application for a review is filed and rejected. That is no decree, nor final adjudication of a regular suit. The petitioner further argues that the words in Section 20 "to keep the decree in force" must include the opposing of the *judgment-debtor*, not only in appeal, but also voluntarily or otherwise appearing to watch the application for review, and that, therefore, the final orders in such summary proceeding give a new start. We are not prepared to hold that, to take effectual proceedings to enforce execution or to keep a decree in force, was meant to include the appearance of a decree-holder to watch or oppose his adversary in appeal, and much less, as here, on an application for review only. An effectual proceeding is such as a case brought after decree to prove that certain property claimed by a third party belongs to the debtor, and such like.

We reverse the order of both the Lower Courts, and decree the appeal with costs. The execution is to be struck off with costs, as barred by limitation.

The 9th May 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoonath Pundit, *Judges.*

Purchase and satisfaction of decree by one co-debtor (Effect of)—Contribution—Waivor of objection.

Case No. 850 of 1865 and No. 131 of 1866.

Miscellaneous Appeals from the orders passed by the Judge of Beerbhoom, dated respectively the 27th October and 3rd December 1865.

Digamburee Debia (Judgment-debtor), *Appellant,*

versus

Sharoda Pershad Roy and others (Decree-holders), *Respondents.*

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Appellant.

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, Kishen Succa Mookerjee,* and *Nil Madhub Sein* for Respondents.

A joint-debtor who satisfies the entire decree may sue his co-debtors for contribution; but he cannot purchase the decree and execute it against them, such a purchase operating as a satisfaction of the decree.

The omission to obtain an injunction to stop a sale in execution cannot operate as a waivor of right to object to the sale sought to be set aside on the ground of irregularity.

We are quite satisfied that the Judge below has not given sufficient opportunity to the petitioner in both these appeals to prove her allegation that she has lately discovered (after remand) that the alleged purchase of the decree by Sharoda Pershad Roy is a mere benamee transaction by and for the benefit of one of the petitioner's co-debtors under the decree.

We also hold that no joint-debtor, under a decree passed jointly and severally against several persons, has any right to satisfy the decree, and by a purchase take an assignment to execute it against his other co-debtors. The purchase operates as a satisfaction.

It is urged against the petitioner that, the Judge below having sold the property, and

the petitioner having failed to obtain beforehand an injunction from this Court to stop the sale, the petitioner has lost all rights. We are not prepared to accept this as a good plea in law against the petitioner.

It is further pleaded against the petitioner that Sharoda Pershad Roy purchased the decree long ago, and that, when the said purchaser first executed the decree, the petitioner clearly admitted his liability to the said purchaser, and then only pleaded limitation and no other plea whatsoever. If the petitioner did not plead what she is now urging when she pleaded limitation, she cannot lose her rights to plead what she is now pleading, especially as it is said that only now she has discovered the fictitious nature of Sharoda's purchase. If the petitioner has only delayed to urge the present point until it is too long, or if she has by her previous proceedings admitted the rights of the purchaser of the decree and waived all rights of objection, knowing the alleged nature of his purchase, it is for the Lower Court, when trying the present plea of the petitioner, to take these matters into consideration. These cannot be grounds on which we can, in anticipation of their groundlessness, refuse the petitioner all inquiry.

We therefore remand both the cases to the Lower Appellate Court with this direction, *viz.*, that the Lower Appellate Court will allow the petitioner due opportunity to prove her allegation of the fictitious nature of the purchase by Sharoda Pershad Roy. If, in considering this, it be necessary to send for documents likely to prove the allegation of the petitioner, from the Collector who has under him the estate of the minor co-defendant for whom it is alleged, the benamee purchase has been made in the name of Sharoda Pershad, the Lower Appellate Court will do that. If the petitioner then fails to prove her allegations regarding the fictitious nature of the purchase by Sharoda Pershad, the Judge below should limit his further enquiries to the objections of the petitioner regarding the proceedings of the sale as to their being irregular and invalidating the sale. The Zillah Judge has not tried these, as they were not specifically made before him on other occasions, but they are detailed in the petition of the petitioner against the sale.

In the view before expressed by us as to the legal effect of the co-debtor's purchase, and consequent satisfaction of the decree, if the petitioner succeeds in her objection regarding the nature of the purchase of Sharoda Pershad, there will be, of course, no necessity to try her objections to the proceedings of the sale as to irregularity and invalidity.

We may add the remark that, when a judgment-debtor pays entirely the debt due jointly and severally from him and others, every one of whom may respectively have between themselves a liability only for a portion of the whole debt, there remains a right of suit as against co-debtors for contribution proportionate to their respective proved liabilities; but a co-debtor cannot purchase the decree, and execute it against the other debtors. Such a purchase, being, as we before observed, a sufficient satisfaction, renders the decree in the hands of the purchaser, as against the co-debtors of the purchaser, no longer operative. Indeed, if we look in any other view, on a co-debtor taking out execution as a representative of the decree-holder, it would be difficult for co-debtors to sue for contribution as for their separate respective limited liabilities.

Remanded accordingly.

The 13th March 1866.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Stamp-duty—Security-bonds for costs of appeal to Privy Council.

Soonjharee Koonwur, *Appellant to England,*

versus

Ramessur Pandey and others, *Respondents to England.*

Baboos Kalee Prosunno Dutt and *Bhowanee Churn Dutt* for Appellant.

No one for Respondents.

Security-bonds for costs of appeal to the Privy Council come within Article 12, Schedule A, Act X. of 1862, and ought to be executed on a stamp as therein specified.

Deputy Registrar.—I BEG to request Mr. Justice Louis S. Jackson's attention to the fact that the security-bond filed in the main appeal is engrossed on a stamp of the value of 8 annas only.

An Amlah in the office of the Deputy Registrar of Deeds at Sasseram has inserted

a note above the bi-coloured stamp, to the effect that the document has been "duly "stamped under Section (Article is meant) "2, Schedule B, Act X. of 1862."

The article adverted to provides for "*Bail*, or security-bond, or other obligation" evidently in cases of penalty or fine awarded by a Court of Justice, or by any Revenue Authority."

Clearly, Article 12, Schedule A of the said Stamp Law, is applicable to a security-bond tendered in appeals to Her Majesty in Council by way of security for costs; and, according to it, the said bond ought to have been engrossed on a stamp of the value of Rupees 25, instead of on one of the value of 8 annas.

The practice in the office has *always* been to receive such a security-bond on a stamp of the value of ordinary petitions, *viz.*, Rupees 2. But I question the correctness of the practice, and it seems to me to be contrary to law.

Order.—It appears to me that this bond should be executed on a stamp of 25 rupees. Return the bond, and let the appellant have one month's time to file a fresh security-bond.

Means ought to be used to make this ruling generally known, *viz.*, that bonds of this description come within Article 12, Schedule A, Act X. of 1862.

The 15th May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Certificate (Cancellation of)—Section 6, Act XXVII. of 1860—Right and title in Native Religious Endowments.

Case No. 14 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 9th September 1865.

Mohunt Susman Gossain, *Appellant,*

versus

Ramchurn Bhukut, *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Onookool Chunder Mookerjee and *Mohesh Chunder Chowdhry* for Respondent.

The cancellation of a certificate granted under Act XXVII. of 1860, when involving the adjudication of a question of right in a regular suit, is not matter for decision in the Summary Department.

Section 6 of that Act contemplates the application for cancellation to be made to the High Court, and not the Zillah Court.

A party, who has a decree recognizing him as gudeenusheen of *D*, must show in a regular suit that *A* is a part or dependency of *D* before he can question the competency or character of the holder of a certificate as gudeenusheen of *A*.

THE petition asked the Zillah Court to cancel a certificate granted by it in 1863 to one Ram Churn Bhukut for the estate of Ruttun Gossain on account of the Muth of *Aurungabad.*

The Lower Court refused on the ground that a certificate had already been duly given.

The petitioner's pleas below and here are—

1. That petitioner was declared in 1864 to have a superior title.

2. That the holder of the certificate is incompetent and of bad character.

The decree in favor of petitioner in 1864 was for Muth *Dhunwattee;* whereas the certificate of 1863 was for *Aurungabad.* The plea is then taken that *Aurungabad* is but a dependency of *Dhunwattee.* This, we think, is not a matter for decision in the Summary Department, but, as a dispute of right, it will be adjudicated in a regular suit.

Nor do we think that, while petitioner has a decree recognizing him as gudeenusheen of *Dhunwatee*, he can, till he shows in a regular suit that *Aurungabad* is a part or dependency of *Dhunwattee*, question the competency or the character of the holder of the certificate as gudeenusheen of *Aurungabad.*

Further, we do not think that Section 6, Act XXVII. of 1860, contemplates the application for cancellation of the certificate to be made to the Zillah Court, as it has been, but to this Court.

We, therefore, see no reason to interfere in the Summary Department in respect to the certificate given.

If the petitioner sues in a regular suit for a declaration of a title to the gudeenusheen of *Aurungabad* as a part of *Dhunwattee*, and gets a decree, then the certificate given to Ram Churn Bhukut may be cancelled.

The 19th May 1866.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Mooktars (Non-admission of—under Rule 39 by Zillah Judge).

Petition of Mahomed Hossein, Mooktar of the Fouzdaree Court of Zillah Shahabad.

Mr. R. E. Twidale for Petitioner.

The High Court will not interfere with Zillah Judges in the selection and admission of Mooktars under the 39th Section of the new Pleaders' Rules.

Remarks on the particular case.

THIS is a petition by a person who has been practising in the Criminal Courts of Zillah Shahabad, and he presented himself to the Judge of that District with a view to admission as Mooktar under the 39th Section of the Pleaders' Rules. The Judge, it seems, refused to admit him on the ground that he was one of two persons who bore a bad character as Mooktars; and the Judge appears to have founded that opinion on certain reports relating to the petitioner. The petitioner having applied for copies of such reports, it appeared that no reports of the kind were in existence. On the other hand, the petitioner produces several certificates of character which testify very strongly in his favor.

The matter appears to me not to be one in which this Court can interfere with authority, inasmuch as the selection and admission of Mooktars under the 39th Rule are left entirely to the Zillah Judges. But it seems to be a case in which this Court may properly recommend the Judge to re-consider his decision, and at all events to record with greater fullness and precision his reasons for excluding the petitioner from the practice of his profession.

The petitioner can take a copy of this order.

The 28th May 1866.

Present :

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Decree for land—Buildings thereon.

Case No. 180 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 28th February 1866.

Mr. Henry Maseyk and others (Judgment-debtors), *Appellants,*

versus

Mr. C. W. Lyons and others (Decree-holders), *Respondents.*

Mr. R. T. Allan for Appellants.

Mr. Montriou for Respondents.

Held that, under the decree in this case giving actual possession of land, the buildings on the land did not go with the land, as the valuation showed the suit to have been for the land only, and *not* for the buildings.

THIS case has been before this and the Lower Courts in various stages and forms of litigation, and now comes before us for the decision of the question whether the decree-holders are or are not entitled *to the buildings of a factory* as well as *to the ground* on which those buildings are or to which they are appurtenances. The Judge below has awarded *these buildings* as well as the *land.* It is admitted by the petitioner that the decree-holder is entitled to the *land,* but he contends that the Judge has erred in construing the order "*for actual possession*" passed by Loch and Glover, JJ., on the 9th and 21st December 1865, as one requiring the actual possession *of the buildings* to be made over, as well as of the land.

In support of this contention, great stress was laid on the fact that the valuation and the pleadings throughout shew that the factory-lands were valued in the suit as so much per beegah as Bastoo or ground-rents, and that this was all that was claimed or asked for by the decree-holder, and that the buildings were not claimed.

We subjoin at full the present decision, in the Miscellaneous Department, of the Zillah Judge, as it gives the history of the later litigation briefly, and (with one exception, which we shall notice hereafter) gives it correctly. We do this also as the Judge's

own reasons for his views are set forth therein, with which we do not concur:—

"The petitioners pray for actual possession of the lands decreed to him by order of the High Court of September 1862.

"The opposite party appeals on the ground that he (the decree-holder) is not entitled to actual possession of the land on which the factory stands under the decree which must be interpreted with reference to the original claim in the suit. The pleader of the opposite party has produced a copy of the original plaint, and his whole line of argument went to show that, under a correct interpretation of the decree compared with the claim, the actual possession granted by the decree could carry no more than allowing the petitioner to collect the rents from him and other ryots on the disputed land. On going over the papers of the execution-case, however, I am of opinion that no liberty of interpretation of this decree is left to this Court by the last order of the High Court. The case stands briefly thus: Prior to the decision of the appeal to the High Court, *viz.*, to the 11th of September 1862, the decree-holder took *symbolical* possession of the decreed land. On the receipt of the order of the High Court, he applied to the Principal Sudder Ameen for *actual* possession of the land on which, as he then alleged, the opposite party had erected houses. This was refused both by the Principal Sudder Ameen and the Judge, on the ground that, possession having been once given and acknowledged, nothing further could be done. On appeal to the High Court, this order was set aside so far as to say that there was nothing in the law to prevent actual possession being given even though symbolical possession had before been taken.

"The Judge was directed to give actual possession if the terms of the decree authorized it. In the meantime, the term of the lease under which the decree-holders held expired, and not having a renewal of it, my predecessor, Mr. Birch, cancelled an order he had passed for actual possession, and refused to execute the decree. A renewal of the lease having been produced, an application for review of this order was made to me and was rejected, on which the order was appealed to the High Court, and the High Court's order of the 21st of December 1865 is the result of that appeal. Before deciding that case, *the interpretation of the original decree was asked from the Judges who passed it, and an order, in which there can be no ambiguity, has been passed to give actual possession to the petitioners.* There are only two kinds of possession recognised in Act VIII. One has been already given, and the other is sought, and has been finally ordered by the High Court. I am, therefore, unable to go into the question of interpretation urged by the pleader for the objector, and disallow his objection.

"The petitioner will receive actual possession of the land occupied by the factory and houses as by his petition under Section 223; he will also receive costs."

The exception to which we have referred is as to the portion in italics. Mr. Justice Bayley and Mr. Justice Kemp were only asked for an interpretation of the decree as to the *period* from which the renewal was to be taken, whether from 1263 B. S. or 1254 B. S. Upon *this* point, and *this* point *only*, did *they* give their opinion upon the reference to these by Mr. Justice Loch and Mr. Justice Glover. The words "*actual possession*" were not *their* words, but those of the Judges, Loch and Glover, who passed the final orders of the 9th and 13th December 1865.

Then, as to the main question, *viz.*, whether the original suit and decree were for the *buildings* of the factory as well as the ground on which they stand, we are clearly of opinion, after a careful consideration of the pleadings as a whole, and of the scope and object of the suit, and its valuation and statement of claims, that the original suit, plaint, and claim were only for the lands *leased* and for the rents of such *leased* lands, and that the *buildings* were *not* the subject of suit.

It is then pressed upon us that the rule of law is that, when actual possession of lands is the subject of a decree, the things on the land go with the land.

We are not prepared *in this case* to admit this plea, because we do not think, on a reconsideration of the pleadings with reference to this special argument, that this was at all the view of the plaintiff. His valuation is for land, and land only, *i. e.*, his claim is to property capable of yielding rents at so much per beegah, and of land claimed with that object, as under the title of a tenure, and the *actual possession* of the factory-building was not at all the specified object or prayer of the plaint, nor the thing given by the decree of 11th September 1862, which did not, and could not, *give more than the plaintiff asked.* Nor, therefore, can we now do so.

We consider, therefore, that the Judge's present decision is incorrect, and we accordingly reverse it, and decree this appeal with costs.

The 28th May 1866.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Rights of purchaser of Putnee Rights—Ejectment of Dur-putneedar—Appeal (from order admitting claim under Section 269, Act VIII. of 1859).

Case No. 574 of 1865.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 12th June 1865.

Jadub Churn Thakoor (Decree-holder), *Appellant,*

versus

Bholanath Singh Roy (Judgment-debtor), *Respondent.*

Mr. Reed and Baboo Sham Lall Mitter for Appellant.

Mr. Marinden and Baboo Hem Chunder Banerjee for Respondent.

A dur-putneedar cannot be ousted so long as he pays his dur-putnee rents, except by regular course of law.

Where a dur-putneedar intervened under Section 269, Act VIII. of 1859, and his claim was admitted—HELD that no appeal lay from such order.

IN this case, the petitioner claims to have a right to 27 villages as comprising Mouzah Kistobatee, a Putnee Lot which was purchased at a Sheriff's sale by one Gopal, and thereafter passed to petitioner. It is admitted by petitioner that 20 villages only were specified as forming what was sold in execution by the Sheriff. It is, however, contended by petitioner that this was but descriptive; that he is not to lose any rights owing to misdescription or mistake; that his rights are to Lot Kistobatee, which does in fact comprise not 20 but 27 villages, and that, on going to take possession, the petitioners were ousted by a variety of claimants alleging rights in the seven villages; that the petitioners brought suits against these opponents, making the putneedars also parties, and got a decree; but that, on execution of that decree, one Bholanath, alleging dur-putnee rights by mortgage in the seven villages, intervened, and his claim was admitted; that, in the face of the decree in favor of petitioners, this Bholanath had no *locus standi* in Court; and that, both in this respect and in the construction of the deed of sale, the Lower Court has erred in deciding against petitioner, especially in holding that Section 230, Act VIII. of 1859 applies to the case.

For the opposite party, it was urged that there was no appeal under Section 269 of Act VIII. of 1859; that Bholanath's *dur-putnee* rights being assailed by the petitioner's application for execution, specifying therein that he sought for *Khas possession*—that is, to *oust* the dur-putneedar—was the first opportunity which the opposite party had of knowing of the invasion of his rights; and that he, the opposite party, was no party to the suit referred to above as brought by the petitioners, and, therefore, was in no way bound by the result of it; and *lastly*, that the thing sold was the putnee right and interests of a judgment-debtor in the 20 villages specified in the bill of sale in Lot Kistobatee, and *not* any *dur-putnee* rights mortgaged to this opposite party.

We are quite clear that both the pleas of the petitioner are quite untenable. Bholanath had every right to come forward in execution with his *dur-putnee* claims, when (and it is clear it was then only), by the petitioner's prayer for *khas possession*—or, in other words, for the ouster of the opposite party—his (Bholanath's) dur-putnee rights were invaded. Moreover, the opposite party being in no way a party to the petitioner's regular suit, could not be bound by the decree in it.

We are further quite clear that *no dur-putnee* rights passed by the Sheriff's deed of sale, and that the purchase then made of the putnee rights and interests did in no way give the petitioner any right to *oust* the *dur-putneedar*.

With reference to the plea of the opposite party, that Section 269 bars this appeal, we think that, under the facts above stated, there is no appeal—that Section prohibiting it.

It may be quite possible that the Judgement-debtor, in execution at the Sheriff's sale, reserved to himself 7 of 27 villages, and thus created the dur-putnee of them which he mortgaged to Bholanath; and it may also be quite true that the whole revenue and rent charges for Lot Kistobatee have been paid by petitioner. Should the petitioner be advised that, on either of the above grounds, he ought to seek redress at law, he can act as he may be advised. But neither of these facts will entitle him to

oust the dur-putneedar under his present proceedings so long as the dur-putneedar pays his dur-putnee rents, and is not ousted by regular course of law.

This appeal is accordingly dismissed with costs.

The 29th May 1866.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Sale in execution of decree—Property liable to be sold.

Case No. 94 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 25th November 1865, affirming an order passed by the Sudder Ameen of that District, dated the 4th September 1865.

Bromomoyee Debia (Judgment-debtor), *Appellant,*

versus

Boykunt Chunder Gungopadhya (Decree-holder) *Respondent.*

Baboo Motee Lal Mookerje for Appellant.

No one for Respondent.

In a suit for monies secured by a mortgage of landed property, the decree ordered the sale of that property in satisfaction. HELD that the decree-holder was bound to bring that property to sale before he could sell any other property belonging to the judgment-debtor.

WE think that the Judge was wrong in allowing the decree-holder to attach and bring to sale the property in suit. The suit was to recover certain monies which were secured by a mortgage of landed property. The decree ordered that property to be sold in satisfaction; and this being so, we think that the decree-holder must carry out the terms of the decree, and first bring to sale the property covered by the mortgage before he can sell any other property belonging to the judgment-debtor. Of course, if the mortgaged property be insufficient to cover the amount of the decree, the judgment-creditor will be at liberty to attach and sell the property now in question.

The 29th May 1866.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Set-off—Appeal.

Case No. 77 of 1866.

Miscellaneous Appeal from an order passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 9th February 1866.

Huro Pershad Roy Chowdhry and another (Judgment-debtors), *Appellants,*

versus

Shama Pershad Roy Chowdhry and others (Decree-holders), *Respondents.*

Mr. R. T. Allan and *Baboo Anund Chunder Ghosal* for Appellant.

Baboos Onoocool Chunder Mookerjee and *Motee Lall Mookerjee* for Respondents.

A judgment-debtor is entitled to set-off a decree whether the judgment-creditor may or not intend to object, on appeal, to the judgment-debtor's decree.

WE think that the Principal Sudder Ameen is altogether wrong, and that the appellants should be allowed to set-off their decree in satisfaction of the decree of the respondents. It is said that the respondents my raise objections regarding the appellants' decree before the Privy Council, but respondents have preferred no application for leave to appeal to that Council. Whether they intend to make any application to the Privy Council or not, the appellant is entitled for the present to have his decree awarded to him by this Court set-off in his favor against the decree of the Respondents. The Principal Sudder Ameen will give effect to this opinion.

Appeal decreed with costs.

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The 29th May 1866.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Streedhun—Gift of money by son to mother for maintenance.

Case No. 108 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 27th November 1865.

Mussamut Doorga Koonwar, *Appellant,*

versus

Mussamut Tejoo Koonwar and others, *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboos Kishen Kishore Ghose and *Nil Madhub Sein* for Respondents.

A gift of money by a son to his mother for the purposes of maintenance of the mother comes within the definition of streedhun in the Hindoo Law.

THE appellant claims a certificate to collect debts due to her deceased mother-in-law on account of maintenance-money. The Judge has refused the certificate, holding that such money is streedhun to which the appellant would not succeed as heir. It is attempted before us to contest the fact that such money is strictly streedhun. We think that a gift of money by a son to his mother, for the purposes of maintenance of the mother, comes within the definition of streedhun given in the Hindoo Law; and, holding this view, we find the Judge was correct in withholding the certificate from appellant.

We dismiss the appeal with costs.

The 29th May 1866.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Staying execution of decree—Non-expiry of period of appeal.

Case No. 161 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 5th January 1866.

The Deputy Collector of the Sonthal Pergunnahs, on behalf of the Court of Wards (Judgment-debtor), *Appellant,*

versus

Binode Ram Sein (Decree-holder), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

No one for Respondent.

According to Section 338, Act VIII. of 1859, the non-expiry of the period of appeal is not a sufficient reason for staying execution of a decree.

WE think that this order of the Judge must be set aside. Section 338, Act VIII. of 1859, lays it down that execution may be stayed on sufficient cause shown. Now, the Judge's only reason for staying execution is that the period of appeal has not expired; but, as this is expressly stated, in the beginning of the Section above referred to, to be no sufficient reason for such an order, and as no cause has been shewn on the other side, nor has any one appeared on behalf of the respondent, we think that the Judge has acted without warrant of law, and was not justified in keeping in force the order of attachment.

The 4th June 1866.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Special Appeal—Certificates by Pleaders.

Case No. 1470 of 1866.

Lowazima Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 27th February 1866, affirming a decision passed by Baboo Madhub Chunder Chowdhry, Principal Sudder Ameen of that District, dated the 13th May 1864.

Jumeenissa Khatoon (Plaintiff), *Appellant,*

versus

Bungo Chunder Chuckerbutty and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondents.

Meaning of the words "*good* grounds of appeal" in the Rule dated 10th May 1866.

Baboo Mohinee Mohun Roy, vakeel for the special appellant, comes before me for an order to admit this petition. Being asked why he has not certified the grounds of special appeal in the manner prescribed by the Rule dated 10th May last, he informs the Court that his understanding of the Rule prevents him from certifying.

He understands that the words "good grounds of appeal" mean *unanswerable* or *indisputable* grounds, and that a pleader cannot now certify unless he is quite satisfied that the decision of the Court will be on his side.

This was not the intention of the Rule; and I may add that to make such a Rule would be tyrannical and beyond the power of the Court. I do not think the word "good" really means more than the word "reasonable" in the former Rule, and I think the only effect of the present Rule is to bind the vakeel specially to the grounds which he includes in his certificate.

No one can pretend to foresee with certainty the decision of a Court upon a point which has not been settled by former decisions; and whenever a vakeel may find, in a case submitted to him, a point of law arising which fairly admits of argument, and on which there is a reasonable chance of the Court deciding in his favor, he will be safe in certifying.

The 18th May 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Lunatic Enquiries.

Case No. 148 of 1866.

Miscellaneous Appeal from an order passed by Major H. Oliphant, Deputy Commissioner of Chota Nagpore, dated the 30th December 1865.

Maharajah Jugunnath Sahee Deo, *Appellant,*

versus

Burra Lal Opendronath Sahee Deo, *Respondent.*

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Appellant.

Mr. R. V. Doyne and *Baboo Unnoda Pershad Banerjee* for Respondent.

The application for an enquiry under the Lunacy Act, Act XXXV. of 1858, should be verified, and proper notice given to the alleged lunatic or his friends in case of necessity. In examining him, the greatest care and delicacy should be observed, and everything likely to cause unnecessary pain or excitement to him avoided. If also he be a person of rank exempted from personal appearance in Court in ordinary civil proceedings, his personal appearance in Court in an enquiry into the state of his mind should be dispensed with.

Peacock, C. J.—It appears to me that this order ought to be quashed. Section 2, Act XXXV. of 1858, enacts:—

"Whenever any person, not subject to the "jurisdiction of the Supreme Courts, who "is possessed of property, is alleged to be "a lunatic, the Civil Court within whose "jurisdiction such person is residing may, "upon such application as is hereinafter "mentioned, institute an enquiry for the "purpose of ascertaining whether such per-"son is or is not of unsound mind and "incapable of managing his affairs."

The question before us is not whether the Rajah of Chota Nagpore is or is not of unsound mind; nor is it a question before us whether, upon a proper application being made, the Deputy Commissioner, as exercising the powers of a Judge of a District, would be able to enquire into the state of the Rajah's mind. But the questions are, whether the petition in this case, without any verification of the facts stated in it, was sufficient to justify the Deputy Commissioner in issuing an order; and whether the order was such as the Judge ought to have issued.

Section 38, Act XXIII. of 1861, enacts that "the procedure prescribed by Act VIII.

"of 1859 shall be followed, so far as it can "be, in all miscellaneous cases and proceed-"ings which after the passing of this Act "shall be instituted in any Court."

In following this Act as nearly as may be in a miscellaneous case, where application is made for an enquiry into the state of a person's mind, I think it is even more necessary than in a case of proceedings in an ordinary civil suit, that the applicant should verify the facts upon which his application is founded. In this case, there was no verification, but a simple petition setting out allegations from which the conclusion is drawn that the Rajah was of unsound mind.

It appears to me that the Deputy Commissioner was wrong in issuing an order upon such an application without having it verified.

But that is not all. Section 4, Act XXXV. of 1858, provides:—

"When the Civil Court is about to in-"stitute such an enquiry as aforesaid, it "shall cause notice to be given to the "alleged lunatic of the time and place at "which it is proposed to hold the enquiry. "If it shall appear that the alleged lunatic "is in such a state that personal service on "him would be ineffectual, the Court may "direct such substituted service of the "notice as it shall think proper. The Court "may also direct a copy of such notice to "be served upon any relative of the alleged "lunatic."

Section 5 enacts: "The Civil Court may "require the alleged lunatic to attend at "such convenient time and place as it may "appoint for the purpose of being person-"ally examined by the Court or by a per-"son from whom the Court may desire to "have a report of the mental capacity and "condition of such alleged lunatic," probably referring to the report of a medical officer. The Section goes on:—

"The Court may likewise make an order "authorizing any person or persons therein "named to have access to the alleged luna-"tic for the purpose of a personal examina-"tion."

Section 6 enacts:—

"The attendance and examination of the "alleged lunatic under the provisions of "the last preceding Section shall, if the "alleged lunatic be a woman who, accord-"ing to the manners and customs of the "country, ought not to be compelled to "appear in public, be regulated by the rules "in force for the examination of such per-"sons in other cases."

The object of these Sections was to provide for proper notice to the lunatic or to his friends in case of necessity; and also for the personal examination of the alleged lunatic both by the Court itself and by such professional men or other persons as the Court might think fit to appoint to report upon his state of mind. Cases of this kind require the greatest care and delicacy in dealing with them, and everything should be avoided which is likely to cause unnecessary pain or excitement to the unfortunate object of the enquiry.

I regret to be obliged to say that much more consideration ought to have been shown to the Rajah than was shown by the order of the Deputy Commissioner. The Rajah was a person of rank who, under the orders of Government, could not be compelled to appear in open Court even as a witness. If his evidence was necessary in a civil case, it could only be taken under a commission. Special provision was made by the Act for ladies of rank who, according to the customs and manners of the country, ought not to be compelled to appear in public; and the least reflection ought to have satisfied the Deputy Commissioner that, in dealing with the Rajah under the Act, the same considerations and the same policy, which induced the Government to exempt him from personal appearance in a Court of Justice as a witness, would entitle him to exemption from personal appearance in a public Court of Justice for the purpose of having his state of mind enquired into.

The Rajah had committed no offence, and, if the Deputy Commissioner considered it necessary to enquire into his state of mind, he ought to have conducted the proceedings in such a manner as to give as little pain and annoyance as possible to the Rajah.

Now, let us see what the order was which the Deputy Commissioner thought fit to make. I should scarcely have thought it possible that any gentleman discharging the important duties of a Judge could have made such an order. It appeared to me at first sight to be the production of a native Clerk which the Judge had improperly allowed to be issued without having read it. But, upon referring to the document, I see initials which I presume are those of the Deputy Commissioner attached to it.

The Deputy Commissioner was bound to give the Rajah notice that an enquiry was

The 4th June 1866.

Present :

The Hon'ble L. S. Jack-

Special Appeal—Cer

Case No.

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"was filed by Burra Lal Opendronath Sahee "under Act XXXV. of 1858. The sub- "stance of the case is that Maharajah "Jugunnath Sahee Deo, the paternal uncle "of the above-mentioned petitioner, resem- "bles a mad man, and cannot properly man- "age his zemindary affairs, and is unfit "for work. After perusing the entire "petition, I find that, according to Section "2 of the above-mentioned Regulation, it is "necessary to enquire into the particulars "relating to the Maharajah's insanity. "It is, therefore, *ordered* that an Ittalanamah "be issued against the Maharajah of Nag- "pore and Burree Muhadai Saheba, and "Munjhul Muhadai Saheba, and Gopal Sahee, "fixing 7th February 1866 as the date for "the trial of the case, directing them to "look after it. Besides some Rajahs will "come to the Fair, two of whom shall be "elected as Assessors, and assist me in "investigating and trying the matter. More- "over, a written order be issued against Lall "Muhal Sahee, Nubur Dewan Pandeh, "Jugunnath Roy, and Pandeh Bhoopal Roy, "Sheo Pershad Sunker, and Juggut Sunker, "directing them to make the Maharajah ap- "pear at the Fair ; should they fail to make "him appear, a proper order shall be issued. "The Maharajah's objection that he has been "exempted from attending Courts of Justice "cannot be listened to. The persons named "above are required to make him appear with- "out raising any objection. No plea whatever "on the point will be heard in this case."

No place is mentioned for holding the enquiry into the state of the Rajah's mind except the *Mala* or Fair. If for any reason the Deputy Commissioner thought it right, instead of holding the enquiry in his ordinary Court, that the Court should be held at the *Mala*, and that the Rajah should attend at his camp or wherever he might intend to hold the enquiry, he ought to have given the Rajah of the precise place at which he was to attend. Instead of that, he and the ladies are told generally that the enquiry would be held at the *Mala*.

On of the greatest afflictions to which a human being can be subject is to be deprived of his intellect. But think of the degradation of being required to attend *at a Mala* for the purpose of having the state of his mind enquired into! To compel the Rajah to appear in open Court would have been wanting in that respect to which he was entitled. But to compel him to appear at the *Mala* for such a purpose shows a want of consideration which one would scarcely imagine to be possible. It was, as it were, announcing to him that the state of his mind was to be proclaimed and made public to all the Rajahs and other gentlemen of distinction who might attend at the *Mala*, and that he was to come there to expose himself. But the order proceeds to state that "a written order be directed to Lala "Dewan Pandeh, Jugunnath Roy, Pandeh "Bhooput Roy, Sheo Pershad Sunker, and "Juggut Sunker, to make the Maharajah "appear at the Fair. Should they fail to make "him appear, a proper order shall be issued. "The Maharajah's objection that he has "been exempted from attending Courts of "Justice cannot be listened to."

Now, it is clear that the Deputy Commissioner had no power or authority to order the persons named or any other person to compel the Rajah to appear at the *Mala*. He had no power except that which was vested in him by the Act. If the Deputy Commissioner considered it necessary that the Maharajah should be examined personally either by himself or by others competent to form an opinion as to his state of mind, proper delicacy required that the examination should be held at the Rajah's own residence. The order appears to have been made without proper reflection and without that consideration which ought to have been shown to any gentleman placed in the lamentable position of having an enquiry instituted as to the state of his mind.

It appears to me that this appeal must be decreed and the order quashed, with costs, to be paid by the persons upon whose petition the order was issued.

Jackson, J.—I am entirely of the same opinion.

Upon the want of feeling and consideration exhibited by the order of the Deputy Commissioner, I have not a word to add. The sentiments to which my Lord has given ex-

pression have my full concurrence. I also quite agree that the application for enquiry under the Lunacy Act ought to be verified. I will only say one or two words touching the privilege of the Maharajah in this case.

Section 5, Act XXXV. of 1858, it is true, provides:—

"The Civil Courts may require the "alleged lunatic to attend at such convenient time and place as it may appoint "for the purpose of being personally examined by the Court or by any person "from whom the Court may desire to have "a report of the mental capacity and condition of such alleged lunatic."

But I think that those words are unquestionably governed by Section 22 of the Civil Procedure Code, which declares that "the "Government may, at its discretion, exempt "from personal appearance in Court any "person whose rank, in the opinion of the "Government, entitles him to the privilege "of exemption."

It seems to me that, if this Maharajah has been exempted, as I am informed he is exempted, from personal appearance in Court in ordinary civil proceedings, he was exempted from personal appearance in Court in any enquiry of this nature; and, if he was exempted from personal appearance in Court at the ordinary place of sitting of the Deputy Commissioner, *à fortiori*, and for infinitely stronger reasons, he was exempted from appearing under compulsion in a public market-place.

The language of Section 6 of the Lunacy Act certainly points to the manner in which the Court should have acted. If it was necessary to institute an enquiry into the state of mind of this gentleman, it was for the Deputy Commissioner to have gone himself or to have deputed some subordinate judicial functionary. A medical officer might also have been directed to proceed to the Maharajah's ordinary dwelling-house. But the order which the Court below did issue appears to me wanting alike in delicacy and in legality.

I have said that what has fallen from the Chief Justice on this occasion has my entire concurrence, and I am perhaps the more bound to say so, because my former experience as a Zillah Judge and otherwise in this country enables me to enter more fully into the feelings of parties. It is the want of consideration and want of propriety evinced in orders like the present, which, more than anything else, disgusts and alienates from the English officials the more intelligent and refined among the people of this country.

I quite concur in the order of the Chief Justice.

The 7th June 1866.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Native Religious Endowments—Succession to Mohunt—Certificate to collect his debts.

Case No. 41 of 1866.

Miscellaneous Appeal from an order passed by Major H. M. Boddam, Deputy Commissioner of Hazareebaugh.

Mohunt Sheoprokash Doss, *Petitioner,*

versus

Mohunt Joyram Doss, *Opposite Party.*

Mr. R. T. Allan and *Baboos Unnoda Persad Banerjee, Dwarkanath Mitter,* and *Chunder Madhub Ghose* for Petitioner.

Baboos Onoocool Chunder Mookerjee, Taruck-nath Sen, and *Mohendro Loll Shome,* and *Moonshee Ameer Ali* for Respondent.

According to Hindoo Law, a Chela is the heir to, and, as such, entitled to a certificate enabling him to collect the debts of, a deceased Mohunt.

Loch, J.—In this case we think that, under the ordinary rule of Hindoo Law, the Chela would succeed to the late Mohunt, and that, as such, he is entitled to the certificate. If there is any custom, though none is stated or pleaded by the opposite party, by which the Chela is not entitled to succeed, and by which the Mohunt is elected by a meeting of Mahajuns and others, the respondent was bound to state and prove its existence. But we find that there is no allegation of anything of that sort before the Lower Court, nor, as now urged before us, that the appellant has forfeited his rights by becoming the disciple of another Mohunt; and, as we think that, according to the ordinary rule of Hindoo Law, the Chela is entitled to the certificate, we reverse the Judge's order with costs, and give him the certificate.

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But I think that those words are unquestionably governed by Section 22 of the Civil Procedure Code, which declares that "the "Government may, at its discretion, exempt "from personal appearance in Court any "person whose rank, in the opinion of the "Government, entitles him to the privilege "of exemption."

It seems to me that, if this Maharajah has been exempted, as I am informed he is exempted, from personal appearance in Court in ordinary civil proceedings, he was exempted from personal appearance in Court in any enquiry of this nature; and, if he was exempted from personal appearance in Court at the ordinary place of sitting of the Deputy Commissioner, *à fortiori*, and for infinitely stronger reasons, he was exempted from appearing under compulsion in a public market-place.

The language of Section 6 of the Lunacy Act certainly points to the manner in which the Court should have acted. If it was necessary to institute an enquiry into the state of mind of this gentleman, it was for the Deputy Commissioner to have gone himself or to have deputed some subordinate judicial functionary. A medical officer might also have been directed to proceed to the Maharajah's ordinary dwelling-house. But the order which the Court below did issue appears to me wanting alike in delicacy and in legality.

I have said that what has fallen from the Chief Justice on this occasion has my entire concurrence, and I am perhaps the more bound to say so, because my former experience as a Zillah Judge and otherwise in this country enables me to enter more fully into the feelings of parties. It is the want of consideration and want of propriety evinced in orders like the present, which, more than anything else, disgusts and alienates from the English officials the more intelligent and refined among the people of this country.

I quite concur in the order of the Chief Justice.

The 7th June 1866.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Native Religious Endowments—Succession to Mohunt—Certificate to collect his debts.

Case No. 41 of 1866.

Miscellaneous Appeal from an order passed by Major H. M. Boddam, Deputy Commissioner of Hazareebaugh.

Mohunt Sheoprokash Doss, *Petitioner,*

versus

Mohunt Joyram Doss, *Opposite Party.*

Mr. R. T. Allan and *Baboos Unnoda Persad Banerjee, Dwarkanath Mitter,* and *Chunder Madhub Ghose* for Petitioner.

Baboos Onoocool Chunder Mookerjee, Tarucknath Sen, and *Mohendro Loll Shome,* and *Moonshee Ameer Ali* for Respondent.

According to Hindoo Law, a Chela is the heir to, and, as such, entitled to a certificate enabling him to collect the debts of, a deceased Mohunt.

Loch, J.—In this case we think that, under the ordinary rule of Hindoo Law, the Chela would succeed to the late Mohunt, and that, as such, he is entitled to the certificate. If there is any custom, though none is stated or pleaded by the opposite party, by which the Chela is not entitled to succeed, and by which the Mohunt is elected by a meeting of Mahajuns and others, the respondent was bound to state and prove its existence. But we find that there is no allegation of anything of that sort before the Lower Court, nor, as now urged before us, that the appellant has forfeited his rights by becoming the disciple of another Mohunt; and, as we think that, according to the ordinary rule of Hindoo Law, the Chela is entitled to the certificate, we reverse the Judge's order with costs, and give him the certificate.

Jackson, J.—I quite concur. In this case the simple matter was that, on the application of a certain party, the Judge invited claimants to come in and show their right to a certificate enabling them to collect the debts of the deceased Mohunt. It appears that only two parties came forward. One of them stated that, by the suffrages of certain fakeers, mahajuns, and other persons, he had been elected Mohunt in succession to the deceased Mohunt, and he says that that gives him a right to the certificate. Another party came forward, and said that he was the Chela, and, according to the Hindoo Law, the heir and personal representative of the deceased Mohunt. There was no proof that the kind of election spoken to by the respondent was an election which could displace the customary heir ; and under those circumstances it appears to me that the Chela was the proper heir, and as such entitled to the certificate. Our decision goes no farther than the pure question who was entitled to the certificate.

The 7th June 1866.

Present :

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Appeal—Review.

Case No. 839 of 1865.

Miscellaneous Appeal from an order passed by the Officiating Judge of Beerbhoom, dated the 1st December 1865, reversing an order passed by the Principal Sudder Ameen of that District, dated the 31st March 1865.

Mohanund Mookerjee, *Appellant,*

versus

Durpo Narain Mahata and others, *Respondents.*

Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Appellant.

Baboo Dwarkanath Mitter for Respondents.

No appeal lies from the order of a Court refusing an application to review its judgment.

THIS was evidently a case dismissed under the provisions of Section 170 of the Code of Civil Procedure. The application of the plaintiff to the Court of first instance must, therefore, necessarily have been an application to review its judgment; and against the refusal of the Court to entertain that application, there is no appeal to the Zillah Judge. Consequently, the Zillah Judge, in entertaining that appeal, and making an order of remand upon it, acted without jurisdiction, and his order must be set aside with costs.

The 8th June 1866.

Present :

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Execution of decree—Shares of the decree-holders.

Case No. 47 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Santipore in Nuddea, dated the 30th November 1865.

Maharajah Sutesh Chunder Roy (Judgment-debtor), *Appellant,*

versus

Saroda Pershad Mookerjee and others (Decree-holders), *Respondents.*

Baboos Sreenath Doss and *Nil Madhub Sein* for Appellant.

Baboos Romanath Bose and *Kishen Dyal Roy* for Respondents.

A judgment-debtor cannot object to the share which one or more decree-holders may claim.

THESE parties, by the assignment which has been executed, stood on the record of this case as some of the decree-holders ; and they are entitled, if the Court think fit, under Section 207 of the Code of Civil Procedure, to apply for execution of the decree, that is, of the whole decree. The Court was competent to compel the judgment-debtor to pay into Court the entire amount due under the decree, unless it should appear in the manner prescribed in Section 206 that the decree had been satisfied either in whole or in part. Then it will be for the Court to ascertain, either by consent of the parties or otherwise, to what share each of the decree-holders is entitled. It is not for the judgment-debtor to object to the share which one or more decree-holders may claim.

The appeal is dismissed with costs.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 4th January 1866.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Evidence (Statement of prisoner).

Queen *versus* Suneechur.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of murder.

The statement of a prisoner, whether taken as a confession or an examination, may be received as evidence.

I SENT for the papers in this case, although there seemed a great doubt whether the appeal was really in time, because there was something not quite clear in the Sessions Judge's charge.

Read with the evidence, which has now arrived, the charge is quite clear.

The statement of the prisoner before the Magistrate is evidence in this case, whether it were taken as a confession or as an examination. His guilt is quite clear from this statement independent of other testimony.

The conviction and punishment are fairly sustainable under the Sections for either murder or dacoity, and the prisoner deserves no sympathy, inasmuch as he was admitted to be Queen's evidence, and then deliberately refused to state what he knew.

I reject the appeal.

The 4th January 1866.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Misdirection by Sessions Judge.

Queen *versus* Sheikh Magon.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of grievous hurt.

Though the Sessions Judge ought not to have made any remarks as to what the witnesses for the defence stated themselves to have heard, this slight error was held not to amount to a misdirection.

THIS seems to be an extremely clear case depending on the evidence which was, as far as regards the prosecution, properly laid before the Jury by the Sessions Judge. The Sessions Judge should not, however, have made any remarks as to what the witnesses for the defence stated themselves to have heard.

But this slight error does not, in any way, amount to a misdirection, and the case against the appellant mainly rests on the evidence for the prosecution, which was clear enough, and was properly dealt with. The conduct of the prisoner Magon was wholly without excuse.

There is no necessity to send for the papers. Appeal rejected.

The 8th January 1866.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Amends—Unlawful compulsory labor.

Rateeah *versus* Phokondee and another.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Amends cannot be awarded in a case under Section 374 of the Penal Code (unlawful compulsory labor) which comes under Chapter XIV. of the Code of Criminal Procedure.

IT has been frequently ruled by this Court that amends can only be awarded in cases coming under Chapter XV. of the Code of Criminal Procedure. The offence with which the party was charged was under Section 374 of the Penal Code, and consequently coming under Chapter XIV. of the Procedure Act.

The order of the Deputy Magistrate was, therefore, illegal, and the amount levied as awards must be refunded.

The 8th January 1866.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Evidence—(as to character of bad livelihood of accused)—Report of Police Officer.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen *versus* Alum Sheikh.

A Magistrate should take evidence as to the general character of a person charged with bad livelihood, and not convict him on the report of a police officer which is not evidence except against the officer making it.

Extract (para. 3) of Letter No. 629, from the Sessions Judge of Rajshahye, dated the 16th December 1865.

3. The Deputy Magistrate of Serajgunge has convicted the prisoner upon what is not legal evidence, *viz.*, on a report of the police officer of Muthoora Station, which describes the prisoner as a person of inveterately bad character, who lives by robbery and theft. The police report may be perfectly correct, but the law requires the Magistrate to take "evidence as to the general character" of the person charged with bad livelihood (Section 296), and a police report is not "evidence of the facts stated therein, except (Section 154) against the police officer who makes it." In the case of theft of which the prisoner had been previously convicted, no proof of his general character had been adduced.

UNDER the circumstances stated by the Sessions Judge, we annul the Deputy Magistrate's proceedings as illegal, and direct him, should he think it necessary, to proceed against Alum Sheikh according to law.

The 8th January 1866.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Jurisdiction (of High Court)—Extra-judicial opinion of Sessions Judge.

Miscellaneous Case.

Pal Charrier and others, *Appellants.*

The High Court has no jurisdiction to quash the proceedings of a Sessions Judge, and to declare that the Sessions Judge acted illegally in making any observations upon the merits of a case in which, while admitting that he had no power to interfere, he should not have passed any opinion upon the evidence.

THIS case was finally dealt with by the Magistrate in the first instance. On the application of complainant, the Sessions Judge called for the record pursuant to Section 434 of the Criminal Procedure Act, for the purpose of satisfying himself as to the legality of the Magistrate's order, and the regularity of the proceedings before him. The result of the Sessions Judge's investigation was that he found no reason for referring the proceedings to this Court, but he took occasion to review the evidence in the case, and to express his disapprobation of the decision of the Magistrate, particularly as regards the view which the Magistrate took of the complainant's conduct. The Sessions Judge did not, however, attempt to interfere with the Magistrate's order. We are now asked to declare that the Sessions Judge acted illegally in making any observations upon the merits of the case, and, therefore, that the proceedings before him ought to be quashed. It is only necessary for us to observe that we do not consider we have jurisdiction under the circumstances to deal with the case. It is unfortunate that the Sessions Judge, while admitting that he had no power to interfere, should have considered himself justified in giving any opinion upon the evidence. But the only thing that we can look at is the judicial conclusion at which he has arrived, and we see no legal ground upon which that can be impeached.

The 12th January 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, the Hon'ble F. B. Kemp, and W. S. Seton-Karr, *Judges.*

Murder (Procedure in acquitting of)—High Court (Powers of, as to correction of wrong acquittal, and enhancement of sentence).

Queen *versus* Toyab Sheikh.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of murder.

A Judge should clearly acquit a prisoner of murder when so charged, instead of merely finding him guilty of culpable homicide not amounting to murder.

When a Judge acquits a prisoner of murder, the High Court cannot, either as a Court of Appeal or as a Court of Revision, find that, according to the evidence, the prisoner caused death with the knowledge mentioned in Clause 4, Section 300 of the Penal Code; nor can the High Court, however wrong it may think the Judge to have been in acquitting of murder, or however inadequate it may think the sentence to be, correct the error or enhance the sentence.

THIS case turns upon a question of fact.

1st.—For murder.

2nd.—For culpable homicide not amounting to murder.

The first Court did not state all the facts necessary to constitute murder. It merely stated that the prisoner committed culpable homicide amounting to murder by causing the death of Ramzan, negativing the Exceptions to Section 300. It was not necessary, under Chapter XIII. of the Code of Criminal Procedure, to state all the facts which were necessary to constitute the offence.

If the charge had been expanded, it would have stated that the prisoner caused the death with the intention of causing death, or with the intention mentioned in Clause 2 or 3 of Section 300 of the Penal Code; or that he caused the death by doing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death, or such bodily injury, &c., so as to bring the case within Clause 4, Section 300 of the Penal Code.

It appears to us that, by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and Assessors, in substance and effect, acquitted him of culpable homicide amounting to murder; and consequently acquitted him as well of an intention to cause death as of the knowledge that the act done was so imminently dangerous as to bring the offence within Clause 4, Section 300, in the same way as they would have acquitted him, if they had expressly found that he caused the death with the knowledge that the act was likely to cause death, but without the intention mentioned in Clause 1, 2, or 3 of Section 300, and without the knowledge mentioned in Clause 4 of that Section.

If they had expressly acquitted him of murder in that way, it would not have been competent to this Court, either as a Court of Appeal or as a Court of Revision, to find that, according to the evidence, the prisoner caused the death with the knowledge mentioned in Clause 4; for whether the death was caused with that knowledge or not was entirely a question of fact.

As a Court of Appeal they could not have done so in consequence of Section 407.

As a Court of Revision, they could not have done so, as the error was not one of law, nor was the sentence illegal (*see* Sections 403, 404, and 405 of the Code of Criminal Procedure).

However wrong the Court may think that the Sessions Judge and Assessors were in acquitting of murder, they have no power, in our opinion, to correct the error. However inadequate they may consider the sentence, they have not, in our opinion, any power to enhance it, as the sentence is one which is authorised by law for the offence of which the prisoner was found guilty.

We may remark that we do not concur with the reasons upon which the Sessions Judge acquitted the prisoner of the graver charge, and we are of opinion that, even upon the Sessions Judge's own view of the case, the sentence is far too lenient, for, even admitting that the prisoner was not guilty of culpable homicide amounting to murder. he was guilty of culpable homicide not amounting to murder of the gravest character. If we had power to enhance the punishment, we should not hesitate to sentence the prisoner to ten years' transportation, the heaviest sentence which can be passed for culpable homicide not amounting to murder, where there is no intention to cause death, under Section 304 of the Penal Code.

The 13th January 1866.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Misdirection (by Judge).

Queen *versus* Narain Bagdee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of dacoity.

It is no misdirection for a Judge to tell the Jury that, if the prisoner could not prove how he became possessed of certain articles (however small in value and common in use they may have been), it was their duty to convict him, for the presumption in such a case was legally valid that he knew that the property had been unlawfully acquired, &c. The Judge drew the attention of the Jury especially to the defence.

I HAVE read the charge carefully, and have heard the arguments of the pleader in favor of the prisoner, which are to the effect that the Sessions Judge misdirected the Jury as regards the prisoner Chunder Holdar, in telling them that, if the prisoner could not prove "how he became possessed "of articles numbered 6 and 7, it was their "duty to convict him of the charge laid "against him; for that the presumption in "such a case was legally valid that he "knew" that the property had been unlawfully acquired, &c., &c.

Now, the Jury had before them two different versions as to the ownership of these articles, and their attention was specially drawn to the witnesses for the defence, and to the arguments of the vakeel that the property was not found concealed. The Jury thought proper to reject this evidence,

and to believe that for the prosecution. Under this belief, the presumption pointed out by the Sessions Judge became a fair legal presumption, and conviction followed.

I am unable to discover anything that amounts to a misdirection in this. The articles, it may be true, were of small value, and in common use; but these are matters for the Jury, and we cannot interfere.

The appeal must be rejected.

The 15th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Nuisance (Removal of)—Personal Service of Notice.

Miscellaneous Case.

Hochan *vs.* Elliot.

The mere non-service personally of a notice to remove a nuisance is not a sufficient ground for the Court, under Section 434 of the Code of Criminal Procedure, to set aside the Magistrate's order, when it appears that the parties did not take the objection before the Magistrate, and that they in fact admitted knowledge of the existence of the notice, and sought to excuse their failure to obey it.

THE ground on which we are asked to set aside the order of the Magistrate is that the notice to remove the nuisance was not served personally on the defendants. No doubt, if the objection had been taken in the first instance by those most interested in it, it might have been fatal to the conviction. But, as it appears from the Magistrate's Memorandum that the parties did not take the objection, and that they in fact admitted that they knew of the existence of the notice, and that they failed to obey it, for certain reasons which they gave, it does not appear to us that there is any substantial error or defect in the proceedings as regards the notice, and, therefore, we decline to interfere.

The 15th January 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Bribery (by Police Officer).

Government *versus* Chunder Coomar Sein.

Referred under Section 434 of Act XXV. of 1861.

In addition to punishing a Police Officer with fine under Section 161 of the Penal Code for taking a bribe, the Joint Magistrate in his administrative capacity ordered his dismissal. HELD that the order of fine and the order of dismissal should not be treated as one sentence beyond the competency of the Joint Magistrate to pass.

WE see no reason for interfering in this case. The offence of which Chunder Coomar was found guilty was one punishable under Section 161 of the Penal Code, either by imprisonment or fine; and the Joint Magistrate, who preferred to inflict the latter punishment, was quite within the law. The sentence of dismissal was one entirely apart from the Joint Magistrate's authority as a Magisterial Officer, and was passed in his administrative capacity. The defendant had the right, if he thought fit, to appeal against this portion of the order to the proper authorities separately, and the Sessions Judge was, we think, wrong in treating the order of fine and dismissal as one sentence which the Joint Magistrate was not competent to pass.

With regard to the concluding part of the Sessions Judge's reference, we observe that the offence under Section 161 of the Penal Code was one in which a summons would ordinarily issue, and came, therefore, under Chapter XV. of the Code of Criminal Procedure, so that Sections 251 and 252 of that Code do not apply.

The case is provided for by Section 265, and it appears, from the Joint Magistrate's proceedings on the record, that the substance of this complaint was stated to the accused person, and he was asked what he had to say in defence.

In no point of view, therefore, do we consider the Joint Magistrate's order an illegal one.

The 15th January 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Nuisance (Removal of)—Obstructions on Thoroughfares.

Referred under Section 434 of Act XXV. of 1861.

Barodapersad Mustafee, *Petitioner,*

versus

Mudoo Soodun Biswas, on behalf of Gorachand Mustafee, *Opposite Party.*

A Deputy Magistrate should proceed under Chapter XX. of the Code of Criminal Procedure for the removal of an unlawful obstruction from a thoroughfare, and not under Section 320, which relates to disputes concerning use of land or water.

Extract (paras. 2,3,4,and 5) of Letter No. 145, from the Officiating Sessions Judge of Jessore, dated the 23rd December 1865.

2. One Mudoo Soodun Biswas, on behalf of Gorachand Mustafee, preferred a complaint before the Deputy Magistrate of Khoolnea, on the 12th October 1865, to the effect that Buroda Persad Mustafee had stopped a public thoroughfare by building a house on it.

3. The Deputy Magistrate enquired into the case, and having found that the road in question was a public thoroughfare, and that it had been closed in the manner stated by the defendant, he disposed of the case under Section 320 of the Criminal Code of Procedure, and ordered that no party was to take possession of the road to the exclusion of the public, and he directed the police to re-open the thoroughfare.

4. It appears to me that the Deputy Magistrate has proceeded under a wrong Section of the Code, and that he ought to have conducted his proceedings in accordance with Section 308 and the following Sections, which provide for the removal of unlawful obstructions from thoroughfares.

5. I, therefore, beg to recommend that the Deputy Magistrate's order be reversed, and that he be directed to commence proceedings afresh under Chapter XX. of the Criminal Procedure Code.

We have read the Deputy Magistrate's proceedings and the Sessions Judge's letter, and we concur with the Sessions Judge. The order of the Deputy Magistrate is reversed, and he will commence proceedings *de novo* under Chapter XX.

The 15th January 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Wrongful Confinement (to extort confession, &c.).

Dhunraj Singh *versus* Peetumber Doss.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

A sentence of fine only cannot be passed under Section 348 of the Penal Code (wrongful confinement to extort confession, &c.); part of the sentence must be imprisonment.

Extract (paras. 2,3, and 4) of Letter No. 68, from the Sessions Judge of Backergunge, dated the 2nd December 1865.

2. The order of the Officiating Joint Magistrate was a fine of 25 rupees; in default of payment, rigorous imprisonment for three months.

3. This order is illegal, as, under the above Section, a sentence of fine only cannot be passed; part of the sentence must be imprisonment.

4. The fine is below the appealable amount, and therefore the case is forwarded to the High Court in order that the sentence may be quashed.

The sentence passed by the Officiating Joint Magistrate, not being in accordance with the provisions of Section 348 of the Indian Penal Code, is quashed, and the record will be sent back to him in order that he may pass a legal sentence.

The 15th January 1866.

Present :

The Hon'ble G. Campbell, *Judge.*

Cheating.

Queen *versus* Heeramun Hulwye.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of cheating.

The mere taking money one day, and dishonestly running away without paying the next day, is not necessarily cheating. There must be an intention to deceive and defraud at the time of taking the money, and the subsequent conduct of the prisoner would only be evidence to show the previous dishonest intention.

The prisoner has been convicted of cheating by the verdict of a Jury. There is perhaps some want of precision in the charge of the Sessions Judge. The mere taking money one day, and dishonestly running away without paying the next day, is not necessarily cheating. There must be an intention to deceive and defraud at the time of taking the money, and the subsequent conduct of the prisoner would only be evidence to shew the previous dishonest intention. Still in this case it appears that there could be no doubt in fact of the dishonest intention, if the evidence were believed, and that the real question was one of identity clearly found by the Jury. No grounds for interfering with the verdict are urged in the petition of appeal, and I reject it.

The 15th January 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Evidence (Proof against each Prisoner)—Confessions of Prisoners—Transmission of evidence by Magistrate.

Queen *versus* Kodai Kahar and others.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Dacca on a charge of dacoity.

The Magistrate in his grounds of commitment, and the Sessions Judge in his conviction should specifically note with exactness and precision the proof against each particular prisoner, and the manner in which it is supported.

To give weight to confessions of prisoners recorded under Section 149, Code of Criminal Procedure, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were, and how far they were quite free agents.

In a preliminary enquiry before a Magistrate, the evidence should be sent in as found, and not kept by the police till they have made it all complete.

THIS is a complicated and difficult case rendered more so by the circumstance that the first report and first police investigation did not disclose the offence now charged, and that the evidence has implicated several other persons, besides the present prisoners, in charges not supported to conviction.

There has been a full investigation; but the circumstances are so peculiar, and the evidence against the prisoners is so limited in its compass, that we could wish that, instead of going so far a field, both the Magistrate in his grounds of commitment, and the Sessions Judge in his conviction, had specified with greater exactness and precision the proof against each particular prisoner, and the manner in which it is supported. On this, the real gist of the case, we find, in the midst of a long and discursive judgment, only a general remark that the charge is proved against the prisoners generally by the confessions before the Magistrate, and the recovery of certain articles of property with no specification of the proof against each individual.

The confessions before the Magistrate cannot be said to have been made in answer to any specific charge; they seem to have been taken weeks before any formal charge was regularly preferred before the Magistrate, and before the witnesses were sent in, and can at best only be considered admissions made in the presence of a Magistrate, and admissible in evidence under Section 149 of the Criminal Procedure Code. Confessions are so often in this country obtained by undue influence that, in order to give weight to those recorded under Section 149, we think that there should always be made a judicial record of the special circumstances under which such confessions were received by the Magistrate, shewing in whose custody the prisoners were, and how far they were quite free agents. Nothing of this is to be found in the record of the present case, and we are unable to understand why the witnesses were not sent in till weeks after. A preliminary enquiry before a Magistrate is not the same thing as a trial before a Judge. The evidence should be sent in as found, not kept by the police till they have made it all complete. We also think that there should have been a much fuller and more precise examination of the witnesses regarding the circumstances of the apprehension and confessions with reference to the prisoner's allegation of maltreatment.

Taking, however, the case as it stands, we have against all the prisoners the confessions recorded by the Magistrate, and further against Kodai, No. 49, certain evidence to recognition, such as it is (the alleged recovery of three rupees in cash, part of the stolen property, is not proved as it ought to have been)—

Against Lall Mahomed, son of Allaluddee, No. 50, the evidence of the Inspector of Police that his information led to the discovery of a small portion of the stolen property—

Against Lall Mahomed, son of Hubboo, the recovery from him of certain small items of the property identified as that stolen—

Against Sher Allee, No. 52, the recovery of a chair.

Against Futtick, No. 53, the recovery of several items.

The case is no doubt somewhat weak, especially against Nos. 49 and 50. But, on the whole, we think that it is one in which it was for the Court trying the case to judge of the credibility of the evidence; and we do not see grounds for the interference of this Court, with a concurrent verdict of the Sessions Judge and Assessors. We dismiss the appeal.

The 15th January 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Charges (Only one count for each offence)—Culpable Homicide not amounting to Murder—Emasculation.

Queen *versus* Baboolun Hijrah and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of homicide caused by emasculation.

One count charging each specific offence and describing it with a reasonable degree of certainty is sufficient.

Where a man of full age (*i. e.*, above 18 years) submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder.

THIS is an important case of homicide caused by emasculation. The operation was performed with the consent of deceased, and, indeed, it would appear at his request, he paying the operator. But it seems to have been by no means performed by a skilful hand or in the least dangerous way: in truth, the whole private parts were simply cut off. There seems to have been no proper ligatures, and it can hardly admit of doubt that death was a very likely result of such a hurt. Death did, in fact, intervene in a few hours. The case has been very carefully committed and tried. It should, however, be remarked that the charge seems to be complicated to an unnecessary intent, by charging the same offences repeatedly in slightly different forms, and entering into excessively particular details regarding the weapon, &c., &c. We are not acting under a Procedure in which no amendment is allowed, and any variance form very precise charges would be fatal. Under our Procedure, one count charging each specific offence, and describing it with a reasonable degree of certainty, would seem to suffice.

On the other hand, one important point does not seem to be noticed either by Judge or Magistrate, *viz.*, whether deceased was above 18 years, so that his consent should suffice (other points apart) to exempt the prisoners from a charge of murder [*see* Penal Code, Section 300, Exception 5]. If they were not protected by the last-mentioned Exception, the case might have gone so near the confines of murder, that it might have been prudent to try the prisoners on a count for murder. The finding of the Sessions Judge, indeed, is in so far somewhat obscure; for, if, as he finds under the two counts, the prisoners knew that their act was likely to cause death, the fact must be that the wound *was* likely to cause death. If so, there was culpable homicide under the first count, by intentionally inflicting such bodily injury as was likely to cause death ; and this latter offence, coupled with the knowledge that death was likely to result, found by the Sessions Judge, would be murder under Section 300, Clause 2.

Although, however, the Committing Magistrate and Judge only speak of the deceased as above 12 years of age and "a grown man," still, in the proceedings before the Magistrate of Bhaugulpore, he is described as a man of 25 years, and we may give the prisoners the benefit of the supposition that the deceased was in fact above 18 years, when he consented to take the risk of death. It is also possible that the prisoners were in fact ignorant men, who did not know that a fatal result was probable. They were all eunuchs, upon whom a similar operation must have been perfomed. The case being then one in which a man of full age submits himself to emasculation (performed in this rough and dangerous way), of what offence are the prisoners guilty, and of what degree of punishment are they worthy? Their appeal in the main amounts to this, that they never understood the practice of emasculation to be forbidden ; that they acted under the free consent, and at the express request, of the deceased; and that, till the practice is publicly forbidden, they should not be punished. There is also some question as to the degree of guilt of the minor actors, and the principal actor is a decrepit old man of 70. We think the Court below is right in holding that Section 88 of the Penal Code, coupled with the explanation appended to Section 92, does not justify the infliction of such an injury (although it was not intended to cause death for the mere pecuniary benefit of the person voluntarily submitting to it), and that (without going into particulars of the various counts) the prisoners are rightly convicted of culpable homicide. But looking to the full and intelligent consent of the deceased, to the possible ignorance of the prisoners, and to the age of the most guilty among them, we think the sentences passed unnecessarily severe, and substitute the following : Mukhun and Hossein Buksh, each three years' rigorous imprisonment; Baboolun and Suniroo, each two years' rigorous imprisonment.

The 15th January 1866.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Confiscation.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Jhundoo Sing and others, *Petitioners.*

The Joint Magistrate's order of confiscation set aside, (1) because made without permitting the accused to show cause against the confiscation of his goods, (2) Because the confiscation ought not to be carried out where the accused has been apprehended and brought to trial before the passing of the order, and (3) because the Joint Magistrate acted in contravention of the order of the Magistrate releasing the property from attachment.

We think the order of the Joint Magistrate in this case ought to be set aside.

First, because the petitioner has not been heard. We consider that he ought to have been permitted to show cause against the confiscation of his goods; and that the Joint Magistrate was not at liberty to consider such a hearing superfluous on the ground that the petitioner's plea had been overruled in his trial for the substantive offence with which he was charged.

We have also grave doubts whether the confiscation ought to be carried out in a case where the accused has been apprehended and brought to trial before the order is passed.

We are further inclined to think that the Magistrate's direction to his subordinate to write to the Collector, and authorize the taking off of the attachment, amounted to an order releasing the property from attachment, and that the Joint Magistrate's proceedings, in contravention of that order, were unwarranted.

We, therefore, set aside the order of the Joint Magistrate, and direct that the proceeds of the property sold be refunded to the petitioner, or, if not sold, that the property itself be restored.

The 16th January 1866.

Present :

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Perjury and Forgery (committed before 1st January 1862)—Procedure.

Miscellaneous Case.

Radhajeebun Moostaffee, *Petitioner.*

A case of perjury or forgery alleged to have been committed in a case before a Civil Court before the 1st January 1862 can be dealt with only under the old Procedure Law (Act I. of 1848), according to which the sanction of the Court before which the offence is alleged to have been committed is necessary before criminal proceedings can be instituted.

Phear, J.—This petition seeks to have the sanction given by the Judge of Hooghly to the institution of certain criminal proceedings against the petitioner, declared void and inoperative, by reason of its having been given without jurisdiction. The material facts of the case, as detailed by the Judge himself, are as follows.

On the 30th July 1859, the present petitioner sued one Ramkisto Turkolunkar before the Moonsiff of Pundooah for the enhancement of the rent of certain land held by the defendant. The plaint was verified by the plaintiff's mooktear, Dinonath Dutt. Ramkishto's defence was that the land was held at a fixed jumma under two pottahs which he produced. The Moonsiff considered the pottahs to be proved, and dismissed the suit. The Principal Sudder Ameen on appeal affirmed this decision, and finally, on the 12th June 1863, the proceedings being brought before the High Court by special appeal, this Court refused to interfere.

At the original trial of the suit, which, for some reason or another, extended over a considerable period of time, Dinonath Dutt appeared as a witness for the plaintiff, and was examined on the 17th September 1859. Afterwards, on the 17th December 1859, the plaintiff's vakeel filed certain *jumma wasilbakee* papers, which supported Dinonath Dutt's evidence, and were completely inconsistent with the terms of the alleged pottahs relied upon by the defendants: also, on the 22nd November 1859 and 6th January 1860, one Madhub Chunder Chowdhry and one Gobind Mundal respectively made oral depositions confirmatory of that of Dinonath Dutt.

When this litigation had come to an end, Ramkisto, not satisfied with his success, by a petition to the Moonsiff, dated 11th July 1864, sought his permission to prosecute the

plaintiff and his witnesses, and, by a second petition, dated the 3rd January 1865, he specified the charges which he desired to make as follows: *viz.*, against the present petitioner he wished to charge the offences described in Sections 199, 209, 193, and 109 of the Penal Code; against Dinonath, the offences described in Sections 109, 299, and 193 of the Penal Code; and against Gobind and Madhub, that described by Section 193 of the same Code. Again, on the 1st July 1865, Ramkisto further petitioned to be allowed to prosecute Madhub under Section 199 of the Penal Code, as well as under Section 193. The Moonsiff granted all these applications simultaneously by an order, dated the 1st July 1865, and, accordingly, on the 23rd August 1865, proceedings were taken against these four persons before the Magistrate.

Once more, on the 11th July 1865, Ramkisto applied to the Moonsiff for permission to prosecute; this time he asked to be allowed to make a charge under Sections 471 and 109 against the plaintiff in respect to the above mentioned *jumma wasilbakee* papers, and against the plaintiff's vakeel under Section 471. The Moonsiff refused to give the permission requested in this last petition, giving, as the reason for his refusal, "that the "Civil Courts in which the suit and appeals "were tried had made no comment on the "said documents, and that, as he had not "himself tried the case, he was not so com-"petent to determine now as to the truth-"fulness or falsity of the documents; and "that it is not the intention of the law that a "party should be permitted to bring con-"tinual charges by splitting them up into "different forms; and that, as Radhajeebun "was a zemindar, it was not probable that "he was cognizant of the alleged falsity "of the documents."

On the 31st October of the same year, Ramkishto petitioned the Judge to give him the permission which was refused by the Moonsiff. The course which the Judge took with reference to this application is thus described by himself:—

"I was of opinion, after perusal of the "record, that the reasons given by the "Moonsiff were not tenable. The fact of his "having already given permission to pro-"secute Radhajeebun for abetting the al-"leged giving false evidence in the suit "based on these very documents, and the "fact that the Civil Original Court and "Appellate Court had rejected these very "documents, on the principle that the pot-"tahs, in every way opposed to these "documents, were true, were quite suffi-"cient to justify permission to prosecute on "a charge of abetting the offence under Sec-"tion 471 with regard to these documents, "while it was absurd to refuse permission "to prosecute on the ground that, as a zemin-"dar, it was not probable that Radha-"jeebun was cognizant of the alleged falsity "of the documents when permission had "already been given to prosecute that very "zemindar for abetting the offence of giving "false evidence, &c., as regards those very "documents; and, as the law does not forbid "a person to prosecute another on various "separate charges one after the other, and "as the case under Section 199, &c., was "still under enquiry by the Joint Magistrate, "I, on the 4th ultimo, under Section 170 of "the Code of Criminal Procedure, gave the "required permission to prosecute Radhajee-"bun; but, not being satisfied of any valid "grounds for prosecuting the said Abdool "Ali Vakeel (who was indeed a material "*witness* as regards the filing of these docu-"ments), I refused permission to prosecute "him."

It is not for us to say whether the determination of the Moonsiff in this particular matter, or that of the Judge, the better recommends itself to our minds. Of course, a stale charge of this character would, without hesitation, be rejected by an intelligent Jury, unless extremely good reasons were shewn to them why it was not promptly instituted immediately upon the alleged offence being committed, and unless, further, the vexatious and harassing circumstances which apparently attend the making of the charge were well explained away, and doubtless the Judge acted with the full apprehension that it was his special duty to take care that Radhajeebun should not be subjected to a trial which could only lead to such a result. But, if this case is governed by the Criminal Procedure Act alone, the bare sanction of the Judge, given in the due exercise of his judicial discretion, will be sufficient to give validity to the prosecution, notwithstanding the previous refusal of the Moonsiff (*see* re Dinobundho Chuckerbutty, decided by this Court on the 8th August 1865, and the case referred to in that judgment). Moreover, we are not disposed to assume, merely from the absence of any indication to the contrary, that the Judge, when giving the permission in question, did not bear fully in mind that his discretion was invoked by the Legislature for the sole purpose of protecting

the person sought to be charged from uncalled-for harassment. And there may well be matter not disclosed to us which will render this prosecution a reasonable and proper one, in spite of the seemingly adverse circumstance that the whole period occupied by the appeal-proceedings, not less than 5 years, was allowed to go by before it was instituted, and that, even then, the prosecutor was unprepared to make at once all the charges which he eventually, by successive additions extending over exactly 12 months, became bold enough to accumulate together.

The only question which we can here entertain is whether or not the Criminal Procedure Act, and that Act alone, applies to this case. That Act came into general operation on the 1st January 1862, and the criminal charges were sought to be made in the years 1864 and 1865. But, on the other hand, the offences which form the subject of these charges, if established according to the allegations of the prosecutor, were committed in the year 1859; and with regard to offences committed before the 1st January 1862, and prosecuted afterwards, some special legislation was effected by Act XVII. of 1862. A considerable number of Acts and Regulations are set forth in the Schedule to that Act, and the first Section says in effect that so many and so much of those Acts and Regulations as provided for the "punishment of offences," "except as to any offence "committed before the 1st day of January "1862," "shall be held to have been, and "are hereby, repealed from the 1st day of "January 1862" throughout the whole of the territorial limits, up to which they were respectively in operation at that date. The second Section in like manner declares that the whole of the Acts and Regulations mentioned in the Schedule, which are not dealt with by the first Section, "shall be held to "have been, and are hereby, repealed from "the 1st day of January 1862," "except as to any offence committed before" that date throughout all the territorial area over which those Acts and Regulations were then in operation, and in which the Code of Criminal Procedure then came into operation. In short, these two Sections, taken together, enact that, at least in places where the Criminal Procedure Code came into operation on the 1st January 1862, there all the Acts and Regulations mentioned in the Schedule were immediately and from that time repealed, "except as to any offence committed before that day." But, of course, the effect of this exception is to enact that, as regards offences committed *before* the 1st of January 1862, the Acts and Regulations in question remained in force from and after the 1st January 1862, unless otherwise repealed. Consequently Act I. of 1848, one of the Acts mentioned in the Schedule, so remains in force, unless it has been repealed otherwise than by the two first Sections of Act XVII. of 1862; and it is admitted that, if it is still in force as regards offences committed before 1st January 1862, then the sanction of the Judge pretended to be given to the prosecution in this case is altogether a useless and void proceeding, because confessedly the prosecution is not set on foot by the Court before which it is alleged that the offences were committed or even on any suggestion from it, and the 1st Section of Act I. of 1848 forbids Magistrates from receiving any charges of these kinds, except when actually sent to them by the Civil Court in the manner provided by the 2nd Section of the same Act. But it is said that, although Sections 1 and 2 of Act XVII. of 1862 leave Act I. of 1848 unrepealed, yet the subsequent Sections 4 and 6 impliedly effect its repeal. We think this is not so. The 6th Section is directed solely to the case of *sentences* actually passed before the passing of this Act, and can have no bearing on the point; and Section 4 says: "In the investigation "and trial of offences committed before the "1st day of January 1862, the Criminal "Courts of the several grades, and the "officers of police shall, after the passing "of this Act, be guided by the provisions "of the Code of Criminal Procedure so "far as the same can be applied." This, it is urged, brings into play Section 170 of the Criminal Procedure Act. No doubt, it does so in all cases where there is scope for its action. But we are unhesitatingly of opinion that it does not of itself by implication repeal any law for the purpose of affording such scope. The words "so far as the same can be applied" seem to us to have been expressly employed to guard against any construction being given to this Section, which should have the effect of repealing existing law. But, even had those words been absent from Section 4 of Act XVII., we should have come to the same conclusion as we now do, because the object of Section 170 of the Criminal Procedure Code is, properly, not mere matter of procedure, but to throw a certain degree of protection over the person charged with the particular offence there mentioned. The

object of Act I. of 1848 is also (although in a different manner) to give him protection in a similar case. We cannot declare that the one privilege is to be in substitution of the other unless the Legislature has unmistakeably notified its intention that it should be so. There are, however, no words to this effect, and in our judgment the last provision of Section 4 of Act XVII. is in spirit opposed to any unsupported supposition that the Legislature desired to take away any advantage already enjoyed by persons situated as is the petitioner now before us.

We declare that the sanction of the Judge, mentioned in the petition, is inoperative to give validity to the institution of criminal proceedings before the Magistrate, and we direct that it be withdrawn.

Glover, J.—I would merely add to the above judgment, in which I fully concur, that the words used in Section 4, Act XVII. of 1862, "so far as the same" (the new Criminal Procedure Code, that is) "can be applied," must mean a just and reasonable application, and cannot have the effect of placing those accused of offences committed before the Act came into operation in a worse position than they were before, or by an "*ex post facto*" legislation make a man guilty under circumstances which would, under the old procedure, have freed him from liability. And as, under the old procedure, the person accused of perjury or forgery in a case before a Civil Court was in the hands of that Court only, it would be unjust to subject the accused in this case to a procedure which takes away from him the benefit of the Moonsiff's refusal to commit, which refusal would, before the 1st January 1862, have been final, and have operated as an estoppel to any subsequent prosecution.

The 16th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence—Accomplice—Corroboration—Section 28, Act II. of 1855.

Queen *versus* Godai Raout.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of abetment of the offence of administering stupefying drug, with intent to facilitate the commission of theft.

A Jury may convict upon the evidence of an accomplice, though not corroborated so as to show the prisoner's actual participation in the offence.

Section 28, Act II. of 1855, applied only to the old Supreme Courts, and the rules and practice prevailing in them, and does not show that in the Courts of the Mofussil corroborative evidence is legally requisite to support the testimony of an accomplice.

We have heard Mr. Cochrane for the appellant in this case, and we have given the point raised very full consideration.

The appellant has been found guilty of abetment of the offence of administering a stupefying drug to certain women, with intent to facilitate the commission of theft, in consequence of which abetment the offence was committed. He appeals on the ground that he has been convicted on the uncorroborated evidence of an approver (already himself convicted of the offence), and that, as a matter of law, he should, on such evidence, not have been convicted. He further appeals on the ground that the Sessions Judge misdirected the Jury, inasmuch as he did not direct them that there was no evidence corroborative of that of the approver.

On the evidence of the approver, it appears that, while two other persons went to the house of the women in question, and actually drugged and plundered them, the approver and the appellant remained at a spot some little way off on a bridge, where they were afterwards joined by the other two on their return from the house with the booty. In addition to the statements of the approver, there is nothing against the prisoner, except that the women identified him as being a person who, on various occasions for fifteen days prior to the drugging, had come to their house in company with one of the two persons who actually did drug and rob them. There is, in fact, no corroborative proof of the prisoner having actually participated in the offence charged. The case was tried by a Jury, and the Sessions Judge in his summing up warned the Jury carefully that the approver's evidence must be received with suspicion and guardedly, and that it must be corroborated. But he did not direct the Jury that the approver's evidence was not corroborated, and he left the whole question of fact to them, directing them on a review of the whole evidence to say whether the appellant was or was not guilty of the offence charged. The Jury having found the prisoner guilty, he appeals to this Court on the grounds stated above.

The appeal must be dismissed. The conviction was on a trial by Jury, and in such a case an appeal is admissible *on matters of law only* (Section 408 of the Criminal Procedure

Code). It is, no doubt, true that Judges will, in their discretion, advise a Jury not to convict a prisoner upon the testimony of an accomplice alone and without corroboration; and except, under special circumstances, it is not the practice for the Jury, when so advised by the Judge, to convict a prisoner upon the sole and uncorroborated evidence of an accomplice. But no positive rule of law exists on the subject, and the ury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement (*see* Taylor *on Evidence*, 2nd Edn., pp. 778, 779, and the cases there cited). And—as indeed appears from the report of a case specially cited in support of the appeal, *Regina* vs. *Farler*, 8 Car. and Payne 106—the Judges do not, in such cases, withdraw the cause from the Jury by positive directions to acquit, but only advise them not to give credit to the testimony.

Under the circumstances, neither the direction of the Judge, nor the conviction by the Jury, is shewn to be wrong in any matter of law, and the conviction must be upheld by us.

It has been contended that Section 28 of Act II. of 1855 shows that corroborative evidence is legally requisite to support the testimony of an accomplice. But we do not think that that Section shows this, or in any way alters the law as previously existing on this subject Section 28, after declaring that, except in cases of treason, the direct evidence of one witness who is entitled to full credit shall be sufficient proof of any fact, provides that this declaration shall not affect any rule of practice that requires corroborative evidence in support of the testimony of an accomplice. But this Section applied, not to the Courts of the Mofussil, but only to the old Supreme Courts, and the rules and practice prevailing in them. This appears from the words "*such* Courts" used in Section 28, which words must be necessarily read as referring to the Supreme Courts which are specially mentioned in the 27th Section which is immediately preceding. Moreover, the object of Act II. of 1855 was to relax rather than to increase the strictness of the rules of evidence, and it concludes in Section 58 with the following words: "Nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which, but for the passing of this Act, would have been admissible in such Court."

The 16th January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Commitment (Powers of Sessions Judge)—Assault—Hurt—Grievous Hurt.

Queen *versus* Ramtohul Sing and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of grievous hurt.

A Sessions Judge has no authority to interfere and direct a commitment in the case of a conviction for assault under Section 352, or of hurt under Section 323 of the Penal Code, both of them being offences triable by the Subordinate Court.

When the result of a joint attack by several persons on one party is fracture of the arm of the party assaulted, the offence committed is grievous hurt, and not assault; and, as the attack was made in furtherance of a common object, all are equally guilty of the same offence.

WITH regard to the appeal of Sheonarain, we think that the Sessions Judge, in quashing the Deputy Magistrate's order, and ordering the prisoner to be committed to the Sessions, acted without jurisdiction.

Section 427 of the Code of Criminal Procedure enacts that such an order can be passed only when the conviction is of an offence *not triable* by the Subordinate Court; but in the present instance, Sheonarain was convicted before the Deputy Magistrate of assault under Section 352 of the Penal Code, and punished for that offence, so that, as the offence of which he was convicted was one *triable* by the Subordinate Court, the Sessions Judge had no authority to interfere and direct a commitment. It follows of course that the sentence of ten months' rigorous imprisonment passed upon Sheonarain must be remitted, and the original order of the Deputy Magistrate be restored.

But, on looking at the record of the original case, we observe that the Deputy Magistrate was *primâ facie* wrong in convicting Sheonarain under Section 352 of the Code of Criminal Procedure at all.

The action taken by this man appears to have been excessively violent, and the result of the joint attack was fracture of the arm of the assaulted party. Now, as all the accused took part in this attack, and as the attack was made in furtherance of their common object, all were guilty of the same offence, which amounted to grievous hurt.

Although, therefore, we are bound to annul the sentence passed on Sheonarain

by the Sessions Judge on a technical point, we think it is still open to him to refer the Deputy Magistrate's proceedings to this Court under Section 434 of the Code of Criminal Procedure, with a view to their being reversed as illegal, and a new trial ordered.

These remarks apply equally to the case of the appellant Ramtohul. The offence of which he was convicted by the Deputy Magistrate was hurt under Section 323 of the Penal Code, and was one properly triable by that officer, so as to take the case out of the jurisdiction of the Sessions Judge under Section 427 of the Code of Criminal Procedure.

With regard to the remaining prisoner Jeena, we see no reason to interfere; his committal and trial by the Sessions Judge are regular, and on the evidence we think his conviction amply justified.

The 17th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Misdirection—Evidence.

Queen *versus* Choonee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of abetment of robbery.

The omission of a Judge to point out to the Jury the weakness of the evidence against the accused, and the possibility of other persons being the guilty parties, does not amount to a positive misdirection. Where there is some evidence to go to a Jury, the Court cannot interfere. There must be a misdirection or some error in law. The case commented on, however, as unsatisfactory.

We have sat together in this case, and have fully considered the appeals of these prisoners, who have been heard by their pleader. We have also heard the Junior Pleader of Government in support of the conviction.

The only point on which we could interfere in this case, which was tried before a Jury, would be that there had been a positive misdirection by the Judge to the Jury, or that there was a total failure of the legal evidence necessary to support the conviction, such failure amounting to error in matter of law.

We cannot term this case by any means a satisfactory one. There is no evidence whatever to show when or by whom the deceased Deokee Ram was murdered or robbed. Indeed, the prisoners have been acquitted of abetment of murder, and have been convicted of abetment of robbery. The robbery on the charge framed by the Magistrate is stated to have been committed between the Stations of Futwa and Buktiarpore; but there is not a tittle of evidence to show where the deceased was actually murdered and robbed. The stations in question are next in order on the line to the South of Patna City. The evidence goes to show that the murdered man was found dead by the Station Master of Dinapore when he opened the carriage, and that the prisoners had been seen to enter the carriage with the deceased when the same train left Jumalpore at 10 o'clock on the 10th of December 1864.

The evidence for the prosecution, including that of the chief witnesses, Meetun and Pultoo Singh and others, goes to show that the deceased stayed at Jumalpore on the night of the 9th of December, having left Burdwan by the 11 o'clock train of that day; that the deceased was escorted to a lodging by the orders of the prisoner Choonee Jemadar, who is employed on the Railway; that the next morning he was advised by the Jemadar not to go up by the day-train as it was much crowded, but to wait for the night-train; that Choonee Jemadar procured him his ticket, and that this prisoner put the deceased into his carriage, together with the three appellants now before the Court. The evidence also shows that the prisoners Pultoo Moodee and Daboo are servants of Choonee Loll. Sheoburt appears to be unconnected with the others, though he got into the same carriage with them. The prisoner Choonee, who is admitted to have never left Jumalpore, in his defence pleaded enmity on the part of one of the principal witnesses, Pultoo Singh. The other prisoners, Pultoo and Daboo, pleaded that they had never left the Station of Jumalpore, while Sheoburt gave evidence to show that he had gone up the line to Azimghur, but on a different date.

Of the value of this evidence, which was commented on by the Judge at length, it was wholly for the Jury to decide, and it is clear to us that they must have discredited the defence, as well as that they must have given full credit to the principal witnesses who spoke of the interest taken by Choonee Loll in the movements of the deceased and to the simultaneous departure of the deceased and the prisoners in the same carriage with no one else.

We think that it would have been well if the Judge had pointed out more strongly to the Jury the weakness of the evidence and

the possibility of the deed, whether robbery or murder, or both, having been committed by other parties, seeing that between Jumalpore and Dinapore, a distance of 110 miles, there are no less than ten stations. But we cannot say that this omission amounts to a positive misdirection; neither can we say that there is such a total failure of evidence as amounts to a want of the legal evidence necessary to uphold a conviction. There is *some* evidence, connecting the prisoners with the deceased both at the station of Jumalpore and at the time of their departure; and, if the Jury thought fit to believe and to couple this evidence with a failure on the part of the prisoners to account for their leaving the train, or with a false or discredited defence, it is impossible for us to say that there was not some evidence to lead them to a conviction. The evidence against Sheoburt, who is not shown to have manifested any interest in the movements of the deceased, is even less than those against the other prisoners; for he is only proved to have got into the train with the rest. In the case of Gunesh, another prisoner in the case, whose conviction was previously quashed by the High Court, there had been a positive misdirection on the part of the Judge with regard to an important confession, which was no confession at all.

It is our opinion that we cannot interfere, as there has been no misdirection in this instance, and as there was some evidence to go to a Jury, and no error in matter of law has been shown to us.

The appeals must be dismissed.

The 19th January 1866.

Present:

The Hon'ble L. S. Jackson, J. B. Phear, and F. A. Glover, *Judges.*

Land disputes—Jurisdiction of Magistrate.

Miscellaneous Criminal Appeal.

Dewan Elahee Newoz Khan and Aftabonissa

versus

Suburunnissa.

In cases of disputes concerning the possession of land under Section 318 of the Code of Criminal Procedure, the Magistrate has no jurisdiction to interfere unless he is first satisfied of the existence of a dispute likely to cause a breach of the peace.

Glover, J.—THE argument in this case has been allowed to go far beyond the scope of the petition of appeal. As, however, the points at issue are of considerable importance, I have no objection to dispose of the appeal with reference to them, as well as to the point specially noted in the petition.

The Deputy Magistrate's order there is declared illegal—

(1.) Because the dispute referred to the right to collect a share of certain rents, and not for possession of any defined portion of land.

(2.) Because the parties to the suit are not either of them in actual manual possession of the land in question.

(3.) Because the Deputy Magistrate has not recorded any formal proceeding under Section 318 of the Criminal Procedure Code, stating his grounds for believing that a breach of the peace was likely to occur.

Lastly. The Sessions Judge is declared to be wrong in not hearing the appeal

The last objection is not very clearly recorded. It is not contended by the petitioner's pleader that there is any appeal, properly so called, from an order of a Magistrate passed under Section 318. So far the Sessions Judge's order on the petition, to the effect that he had no jurisdiction, was correct. The object of the petitioner was apparently to get the Sessions Judge to look into his objections touching the nature of the claim, and to refer the case to the High Court under Section 434 of the Procedure Code. The Sessions Judge, no doubt, mistook the nature of the petitioner's application, but, as the whole case is now before the Court under Section 401, there is no necessity for sending it back for a formal order.

With regard to the allegation that the dispute is for a fractional share of profits of an *ijmallee* property, I think that the appellant has altogether failed to make out his case. The record describes the property, of which possession is sought, as a regularly defined and demarcated shikmee talook, with a specific name, and it is alleged to consist of a 14½ annas share of the parent zemindary. There is nothing to show that the claim was for a share of the rents of an undivided estate. Another point would be that this appeal comes under Section 404. The error complained of must be one of law, and there is no power in this Court under the Section to enquire into the truth of facts found by a Lower Court. Here the Deputy Magistrate has distinctly held that the dispute is not for the shares of a talook or mehal, but that the subject of dispute is one entire talook comprising the 14½ annas share of ten mouzahs, and with such a finding I apprehend this Court could not interfere.

Then, as to the *second* objection, I have no doubt that Section 318 refers to and includes all parties concerned in the dispute, "whether" (to use the words of the old law, Act IV. of 1840) "proprietors, dependant talookdars, farmers, under-farmers, ryots, or other persons," and that it is not essential that the parties to such a suit should be or claim to be the actual and manual possessors of the land. The words of the present law are very broad; they are that, when a dispute exists concerning any land, the Magistrate is to call upon *all parties* concerned, &c., &c., and it seems to me impossible to restrict the meaning of the word *all* to the narrow limits of resident cultivators. It appears fairly and consistently to include all the parties mentioned in Section 2, Act IV. of 1840. That Act was framed to enlarge the provisions of the old law on the subject, Act XV. of 1824, which restricted the Magistrate's interference to cases where proprietors of land were concerned; and, had Act XXV. of 1861 been intended to reduce the law's action to narrower limits, doubtless Section 318 would have distinctly said so. So far from doing that, it appears to me to follow the meaning of Act IV. of 1840, and to use the same form of words, *viz.*, "all persons concerned in such dispute."

I am of opinion, therefore, that the present case was rightly brought under Section 318.

Lastly, as to the Deputy Magistrate's omission to record any formal grounds for apprehending a breach of the peace.

Strictly speaking, the objection does not apply to the Deputy Magistrate's proceedings at all, but to those of his immediate superior who ordered the case to be brought under Section 318, and sent to the Deputy Magistrate for enquiry into the fact of possession; but, taking it in its broadest sense, I do not think that the Magistrate's omission to record in a separate statement his reasons for believing a breach of the peace likely is sufficient to nullify the Deputy Magistrate's subsequent action. It is nowhere required by the law that the officer directing an enquiry under Section 318 should himself take or record evidence on the subject; he is merely to be satisfied "that a dispute likely to induce a breach of the peace exists," and to state the grounds of his being so satisfied. Now, in the great majority of instances, these grounds would be the reports of the police officials, who had visited the spot, and had seen the preparations for a riot or unlawful assembly; and, were the Magistrate to record them, they would, in all probability, be written in almost the very words used by the police. It appears to me, therefore, although I admit the proceeding to be irregular and deserving of blame, that a Magistrate endorsing a police officer's reasons for apprehending a breach of the peace by stating his concurrence in them, and ordering in consequence an enquiry under Section 318 is sufficiently within the meaning of that Section to prevent an Appellate Court's annulling his order for illegality. Though not in strict rule, the Magistrate's proceeding carries out the intention of the law, which is that the officer trying a case or directing it to be tried under the above Section should be himself responsible for taking the matter out of the usual course of law on the ground that by doing so he was preserving the Queen's peace.

For these reasons I would reject this application, and uphold the order of the Lower Court.

Phear, J.—I am of opinion that this application should be granted.

Had it not been for the strongly expressed opinion of Mr. Justice Glover, I should certainly have been disposed to think that the "possession of land, &c.," contemplated in Section 318 of the Criminal Procedure Code, was (as the Section itself expresses it) "actual" possession, and not constructive possession by the receipt of rents. It seems to me that the breach of the peace intended to be anticipated is something in the way of a personal struggle for the actual enjoyment of the immoveable property described, and, had I been unassisted, I should have considered that the primary sense of the words employed supported that view and no other. It would not have occurred to me that the directions given in the earlier Act to assemble at the enquiry all the various proprietors, &c., concerned in the dispute, so far enlarged the other words of the Act as to indicate that the Peace Officer was to deal with any thing beyond a local and tangible subject of quarrel. If "possession" is here intended to embrace any meaning beyond that which involves direct enjoyment of the subject, there is nothing to confine the occurrence of the dispute and consequent breach of the peace even to the neighbourhood of the immoveable property which defines it, and, in that case, it is difficult to imagine why the Legislature should consider it necessary to distinguish violent disputes about rights of immoveable property from those in which questions as to rights to moveable property have inflamed the passions of the parties.

But, whatever might be the conclusion to which further and mature consideration might lead me on this point, I think the Magistrate has no jurisdiction to enquire into the matter of possession at all, unless he is first satisfied that a breach of the peace is actually likely to occur in reference thereto. It necessarily follows that he must adjudicate definitely upon this point, and the Legislature also adds that he must record his reasons for being so satisfied. In this case he does not appear to have done either of these things. Perhaps it might be immaterial to the validity of the proceeding before him whether or not he finally recorded his reasons as directed by the Act; but, as the imminence of a breach of the peace constitutes the substantial ground for his interference being involved at all, it ought, in my judgment, to be distinctly adjudicated upon by him. So far is this, which I consider to be a requirement of law, from being fulfilled that the Deputy Magistrate does not even allude in his decision to a breach of the peace. The document which exhibits his judgment is headed as if the case were a civil suit between parties, and certainly the inference from the passage, which suggests itself to my mind, is that the proceedings before the Magistrate were conducted as a piece of private litigation without any reference whatever to the main purpose of the Legislature. I think we are specially bound in this country to take care that the action of our Courts of limited jurisdiction is not diverted from its proper end, and is not in any way made to pander to the unhealthy craving of the people for litigious contest. Moreover, I may add that, in this particular instance, not only is there no adjudication on the point, but I cannot gather from the facts disclosed that there was any real ground for apprehending a breach of the peace. The reports of the police officers distinctly negative the allegations made by the complainant with regard to it, and only say that the dispute was one which might not improbably lead to a breach of the peace. As much might truly be said of almost any dispute whatever between persons belonging to the classes of society who are the less accustomed to self-restraint, and if it is sufficient to support the jurisdiction of the Magistrate under Section 318 of the Code of Criminal Procedure, I am at a loss to conceive why the Legislature should desire the reasons which satisfy the Magistrate to be recorded.

The case must go before a third Judge.

Jackson, J.—I concur with Mr. Justice Phear to this extent that, as the root of the Magistrate's jurisdiction in cases under Section 318 of the Code of Criminal Procedure is the necessity of preserving the public peace, and, as the Legislature has made it a condition precedent to his interference in such cases that he should be satisfied of the existence of a dispute likely to occasion a breach of the peace, the proceedings in this case are defective, as it does not appear, in the face of them, that the Magistrate or any Magistrate was so satisfied.

Various parties presented petitions to the Magistrate of the district, inviting his interference, and the police officers made reports, in which it was stated that a disturbance was probable. On this the Magistrate appears to have passed an order, directing a Subordinate Magistrate to place the case on the file, and proceed under Section 318.

From this it is not clear whether the Magistrate intended anything more than that the Subordinate Magistrate should proceed to hold the enquiry, if he were satisfied that a breach of the peace was likely to occur.

At any rate, it does not appear from the record that either the Magistrate of the district or the Subordinate Magistrate was actuated by that belief, which, I think, is essential to authorize his interference.

I am very strongly of opinion that it is of the highest importance to restrict the action of the Criminal Courts in their interference with property to the cases in which such interference is expressly authorized by law.

And for this reason I concur in setting aside the order as made without jurisdiction.

It does not appear to be necessary that I should record my opinion on the other points raised in the judgment of my learned colleagues.

The 20th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Transportation (Term of—under Sections 412 and 59, Penal Code).

Queen *versus* Mohanundo Bhundary and others.

Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Beerbhoom, on a charge of dacoity.

A sentence of transportation under Sections 412 and 59 of the Penal Code cannot exceed 10 years.

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Seton-Karr, J.—I SEE no reason whatever to distrust the judgment of the Court and the Assessors in this case.

There was every probability of the woman Ahladi's recognizing the prisoner Bipun, and the evidence as to the finding of the stolen property as against the other prisoners seems quite full and conclusive.

I doubt, however, whether under Sections 412 and 59 the prisoner Ramessur can be sentenced to 14 years' transportation. Section 59 says that the transportation is not to be less than seven years, nor more than the term for which the prisoner would be liable to imprisonment. Now, by Section 412, the imprisonment can only extend to 10 years. Therefore, it seems to me that the transportation commuted under Section 59 cannot be more than 10 years.

I would reduce the punishment of Ramessur to 10 years' transportation in this view of the law.

The other appeals are rejected.

Macpherson, J.—As the sentence of 14 years' transportation above referred to is expressly stated to be given under the two Sections 59 and 412, I concur with Mr. Justice Seton-Karr in thinking (for the reasons assigned by him) that the sentence must be reduced to 10 years' transportation.

The 23rd January 1866.

Present:

The Hon'ble G. Campbell, *Judge.*

Judgment of Judge—Grounds of commitment—Evidence.

Queen *versus* Ishur Manjee and others.

Committed by the Magistrate of Bancoorah, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity.

A Judge is bound to state in his judgment the evidence on which he convicts. The evidence in this case commented on, as well as the omission of the Magistrate to give in the grounds of commitment any particulars of the case.

I DO not consider that this case comes before this Court in the shape in which it ought to come. I think that the Judge is bound to state in his judgment the evidence on which he convicts the prisoners. He merely says: "It is beyond doubt that a dacoity occurred, and that the prisoners, each and all of them, took part in the offence." The judgment then goes on to give an extraordinary, and, to me, unintelligible reason for not coming to any finding as respects the more serious charges of dacoity with grievous hurt, and in fact formally acquits the prisoners on those charges. It seems to me that, if one word of the evidence is to be believed, and any offence at all was committed, it was dacoity with grievous hurt under Section 397 of the Penal Code, and that not only prisoner No. 1 (who, according to the evidence, struck the blow), but all the other prisoners, members of an unlawful assembly, prosecuting a common object, were guilty of that offence (not of abetment of it as charged by the Magistrate) under Section 149. The Judge says: "There is no direct proof that the mother of Bholanath sustained grievous hurt, and there is no necessity, &c.," when, in fact, there was the evidence of the woman herself and of the other witnesses, of the Civil Surgeon (examined before the Magistrate, and sent to the Judge, but not examined by him); in fact, I do not see what evidence could have been more direct. Then the Judge thought fit to omit to examine some of the witnesses sent up by the Magistrate, though, as they are entered in the Calendar, it seems to me that Nos. 9 and 10, who did not profess to recognise the dacoits, but heard the cries, would have been important as impartial witnesses to certify whether the more direct witnesses to recognition mentioned the names of the dacoits at the very moment, and the witness, No. 11, who is said to have recognised the dacoits, was especially important, not being the prosecutor's witness, but (it would appear) a person sent for at the instance of the prisoner's mooktear. Again, the Judge ought in such a case invariably to insist on the attendance of the police witnesses, who could testify to the manner in which the property was discovered, and the confessions, &c., obtained. And the Magistrate should always send such witnesses when, as in this case, their evidence is important. The evidence against the prisoners consists in—

1.—Witnesses to recognition at the time of the dacoity.

2.—Some small articles of property said to have been found in the house of No. 1.

3.—The partial admission of the prisoner No. 7.

The police ought to have proved that the complainant named the prisoners from the first, how and under what circumstances the articles of property were recovered (the finding is only proved by a formal witness called for the purpose), and how the admission was obtained; this is not shown at all.

Notwithstanding, however, the omissions mentioned above, I find that the first police-reports (though not properly proved as they should have been) do not mention the names of the prisoners ; that the witnesses examined swear very positively to the recognising of the dacoits ; that there is some evidence, such as it is, to the finding and identity of the property, and that the admission of one of the dacoits was recorded at the time before the Deputy Magistrate ; that the prisoners have not set up or proved any good defence, and that, with the exception of Boro Nuddea Manjee, No. 2, to be presently noticed, they do not allege any good ground of appeal before me.

That being so, and the prisoners being convicted of dacoity by the unanimous verdict of the Judge and Assessors, I do not see sufficient ground for interference in this case, and dismiss the appeal of all the appellants, except Boro Nuddea Manjee, No. 2.

Boro Nuddea Manjee urges that he is a leper, and physically incapable of committing the offence alleged against him ; and he appeals to his physical appearance. He seems to have made the same defence before the Judge, but the Judge omits to notice it. I therefore think it necessary to call on the Judge to certify whether in his opinion the prisoner is or is not physically capable of the offence imputed to him.

I must add that I notice defects in the investigation prior to its trial at the Sessions. I cannot understand why it is that, with so highly paid a police force, the most important cases are so often left to inferior officers. This case of dacoity with serious wounding was only investigated by a subordinate police officer called by the witnesses the Bukshee, that is, I suppose, one of the old Mohurrirs dressed in uniform as a head constable ; and I must again bring to the notice of the Judge of the English Department the wide-spread practice of sending away the witnesses from the Magistrate's Court till a more convenient season, so as to preserve the shadow without the substance of rapid disposal of business. In this case the witnesses were sent in on 24th September, but the Deputy Magistrate, Alla Mahomed, sent them away again for a time, without any examination whatever. They were sent in a second time, and examined for the first time on 5th October.

The Magistrate also seems to omit to give in the grounds of commitment any particulars of the case. He should then make an official record of the circumstances and evidence by which, and the dates when, the case was brought to light, and should, in fact, render his grounds of commitment a proper and complete act of accusation.

The 25th January 1866.

Present :

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Evidence—Accomplice.

Queen *versus* Dwarka.

Committed by the Officiating Magistrate of Monghyr, and tried by the Sessions Judge of Bhaugulpore, on a charge of abetment of murder, &c.

The testimony of an accomplice is not alone sufficient for a conviction. The corroboration must be on matters directly connecting the prisoner with the offence of which he is accused ; and the evidence of two or more accomplices requires confirmation equally with the testimony of one.

HAVING considered this case together, we find that the Sessions Judge has convicted the prisoner, appellant, upon the evidence of two accomplices, which evidence, as to the appellant's participation in the crime, is not in any way corroborated.

We think that the rule by which our Courts of Criminal Jurisdiction must be guided is that the testimony of an accomplice is not alone sufficient for a conviction ; that the corroboration must be on matters directly connecting the prisoner with the offence of which he is accused ; and that the evidence of two or more accomplices requires confirmation equally with the testimony of one.

We observe that, in this case, if the evidence of the accomplice-witnesses be true, the prisoner has taken part in a deliberate and atrocious murder for the meanest motives, and, if he be guilty, it would be against the interests of justice that he should escape.

It appears to us that, if the accomplices have told the truth, a little inquiry ought to lead to the obtaining of evidence by which their testimony might be confirmed.

We direct, therefore, under Section 422 of the Code of Criminal Procedure, that the Court of Session shall make enquiry whether the prisoner is known to have associated with the accomplices, or with the man Gurbhoo who has been hanged for this crime, or whether he is known to have frequently absented himself from his house about the time of the commission of this crime without legitimate cause, whether he was

seen at the place where the deceased men were poisoned, or where the poison was bought about the time of the transaction; and that the Court shall receive such evidence as may be offered on the part of the prosecution upon these or other points bearing upon the guilt of the prisoner.

After recording such evidence with all the precaution which the peculiar circumstances of the case will suggest to the Judge, and allowing the prisoner to allege any thing, or bring any counter-evidence which he may have to offer, the Judge will return the proceedings to this Court for final orders.

The 26th January 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Conviction and sentence on several charges—Rioting—Hurt—Grievous Hurt.

Queen *versus* Azgur and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of riot being armed with deadly weapons, &c.

Conviction and sentence both for rioting and for grievous hurt upheld, the punishment being on the whole not more severe than might properly have been awarded, if the conviction had been for grievous hurt only.

A person convicted of rioting should not be convicted of hurt or grievous hurt caused to himself.

In this case fifteen prisoners have been found guilty, *1st*, of rioting being armed with deadly weapons; *2nd*, of causing grievous hurt by means of an instrument for stabbing or cutting; and, *3rd*, of causing hurt by the like means. On the conviction for rioting, they have been sentenced to three years' rigorous imprisonment each; on the conviction for grievous hurt, two, namely Azgur and Roshundee, have been sentenced to an additional term of two years' rigorous imprisonment, while all the others have been sentenced to one additional year. No punishment is awarded on the conviction for causing hurt, the punishments given under the other heads being deemed sufficient.

There is no question as to the propriety of the finding of fact as to the riot, and as to one of the prisoners, Fukeer Mahomed, having been hurt "grievously," and as to another prisoner, Ahmed Ally, having been hurt in the riot.

The prisoners appeal, all of them, on the general ground that, as they were all convicted of the riot, they ought not also to have been found guilty on the other counts. But we think there is nothing legally wrong in the convictions, as the rioting did not necessarily lead to grievous hurt, and as the causing of grievous hurt was in respect of one person, while the causing of hurt was in respect of another. Moreover, the sentences are not in the whole heavier than might properly have been inflicted, had they been found guilty of causing grievous hurt alone.

Fukeer Mahomed and Ahmed Ally, the two prisoners who were hurt, have, however, a very substantial ground of objection to the convictions and sentences as to them. They have, no doubt, been rightly found guilty on the first count for rioting. But, as Fukeer Mahomed is himself the person to whom the grievous hurt with which the prisoners were charged was caused, it seems somewhat absurd, and it is wholly inconsistent with justice, that he should be found guilty of the offence of causing that grievous hurt. His conviction and sentence under the second count of the charge (*viz.* for causing grievous hurt, &c.) are quashed and set aside. In like manner, as Ahmed Ally is himself the person to whom the hurt which is the subject of the third count was caused, it is absurd to find him guilty of the causing of it. He is not sentenced under that count, but it is impossible for us to say how far his conviction under it may have influenced the Judge in his fixing the sentence under the second count; and, as he is sentenced to a long period of imprisonment for the offence of rioting, we think that the sentence passed on him in the second count (for causing grievous hurt) should also be set aside.

As regards the other prisoners who have appealed, the appeal is dismissed.

The 30th January 1866.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Robbery—Extortion.

Queen *versus* Duleelooddeen Sheik and Jameer Faqueer.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of extortion.

Where a person through fear, &c., offers no resistance to the carrying off of his property, but does not deliver any of the property to those who carry it off, the offence committed is robbery, and not extortion.

In this case I do not think that the facts found warrant a conviction for *extortion*, inasmuch as, although the boatmen through fear offered no resistance to the prisoners carrying off their property, they did not *deliver* any of the property either to the prisoners or to any one else. Delivery by the person put in fear is (according to the definition contained in Section 383 of the Penal Code) essential in order to constitute the offence of extortion. I think the prisoners ought to have been convicted of (as they were charged with) *robbery ;* for the facts found clearly amount to robbery within the definition contained in Section 390. The prisoners, in order to the committing of theft, voluntarily caused, or attempted to cause, fear of instant wrongful restraint to the persons whose property they took. They stopped the prosecutors' boat in the stream, represented themselves to be persons in authority, and said that the boat must be taken to Rampore Beauleah, where it was required by the Magistrate to carry treasure, and then they plundered the boat. In this there undoubtedly was the causing, or attempt to cause, fear of "wrongful restraint," which is (Section 339) defined to be the voluntarily obstructing "any person so as to prevent that person from "proceeding in any direction in which that "person has a right to proceed."

Under Section 426 of the Criminal Procedure Code, however, I shall not reverse or alter the sentence of the Lower Court, because the persons accused have not been sentenced to a larger amount of punishment than could and ought to have been awarded for the offence of which, in my judgment, the accused ought, upon the evidence, to have been found guilty. The accused have been, in no way, prejudiced by the error.

The appeal is dismissed.

The 27th January 1866.

Present :

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Murder—Capital Punishment.

Queen *versus* Khoaz Sheik.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of culpable homicide amounting to murder, &c.

The punishment of death should not be inflicted in a case where there was no intention to cause death, but merely a reckless assault with a deadly weapon, which inflicted a bodily injury likely in the ordinary course of nature to cause death.

Whatever suspicion we might have, that the witnesses who were, they say, beaten for calling *dohai* were not so disinterested spectators as they represent themselves, and that the affair may not have been so entirely one-sided as it is represented ; still, when prisoners make no substantial defence, but set up false *alibis*, it is very difficult to say that the evidence for the prosecution is false, and in this case we cannot take upon ourselves to disturb the finding of fact of the Assessors and the Judge that the prisoner, whose case is referred to us, having had a quarrel with deceased, did afterwards, having obtained the assistance of others, make an entirely one-sided assault on the deceased. If that be so, and if, looking to the character of the weapon, and the whole circumstances of the assault, it is rightly found that the prisoner intended to inflict such bodily injury as he knew to be likely to cause death, and he did inflict a bodily injury sufficient in the ordinary course of nature to cause death, and which, in fact, did cause death ; then, no doubt, the prisoner is guilty of murder. We see no sufficient reason to do otherwise than to accept the finding of the Sessions Court on this point. But we do not think that such a case as this, in which there was no intention to cause death, but merely a reckless assault with a weapon which inflicted a bodily injury likely in the ordinary course of nature to cause death, *viz.*, a club of a very lethal character, is one in which the last punishment of death is at all proper. We deem it more consistent with justice to sentence the prisoner Sheik Khoaz, and do sentence him, to transportation for life. Several other prisoners who did not strike the fatal blow were at the same time convicted of murder, and sentenced to transportation for life, a sentence which seems extremely severe, but which is the lowest lawful sentence, if the prisoners are rightly convicted of murder. As no appeal from the prisoners is before us, and the exact limits of the offence of murder has been the subject of discussion before a Full Bench of this Court, whose judgment has not been delivered, we do not at present think it desirable to exercise our general power of revision in regard to these prisoners, deeming that such power should only be exercised when there is clearly error.

The 31st January 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Criminal Breach of Trust—Deficit of Salt in Salt Golahs.

Queen *versus* Brinbadhur Putnaik.

Committed by the Officiating Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of criminal breach of trust.

The mere fact of there being a large deficit of salt, without distinct proof of a criminal misappropriation, is not sufficient to convict the Salt Darogah in charge of the golahs of criminal breach of trust under Section 409 of the Penal Code.

Glover, J.—THE prisoner in this case, a Salt Darogah in Cuttack, has been convicted under Section 409 of the Penal Code of criminal breach of trust, &c., and sentenced to three years' imprisonment with a fine of 10,000 rupees.

The facts of the case have been given in very full detail by the Sessions Judge, and it is only necessary for me to state shortly, that the prisoner was admittedly in charge of the Booreah Salt Golahs, three in number, from 1861 to 1865, the period during which he was on leave excepted; and that there is a very large deficiency of salt to be accounted for. Such deficiency, however, would not *per se* render the Darogah criminally liable: there must be distinct proof of a criminal misappropriation of some part of the missing salt before the prisoner can be convicted under Section 409.

Before considering the evidence on this point, I must correct a mistake of the Sessions Judge in respect of the quantity of salt said to have been damaged by the fire. The Sessions Judge has held, and the circumstances seems to have had great weight with him in determining the question of the prisoner's guilt, that the Salt Agent's Sheristadar, who went to inspect the Golahs, reported that not above 100 maunds were damaged by the fire, and that the Darogah never objected to that report. I have read this report (dated 9th June 1864) carefully, and do not find any such estimate. The Sheristadar describes the appearance of the Golah—the posts of which were then burning—and states that he could not say what amount of injury had been done, but that the salt was disclored to various depths in all directions. He nowhere in his report estimates the loss at 100 maunds, and therefore the Sessions Judge's presumption against the prisoner in consequence of his omission to object to that report at once falls to the ground. In connection with this part of the case I may remark that the fire took place during the prisoner's absence on leave, and that, directly he returned, he reported very strongly to the Agent the necessity of having the salt removed from the golahs, and reweighed in order to ascertain the extent of the damage. He even refused to take charge or give out salt on *rowannahs* unti this was done, and only yielded after the repeated orders of his superior. Looking to this portion of the evidence, I think the prisoner is fully cleared from all suspicion of laches; from the time of his return, till peremptory orders from the Salt Agent rendered it useless, he kept continually remonstrating against being made responsible for losses, the extent of which had not been ascertained.

The particular charges on which the prisoner has been convicted arose in this way. When the Darogah reported two of his Golahs empty, the Sheristadar (witness No. 1) was sent down to make enquiry, the deficiency amounting to several thousand maunds of salt. In the course of it, his attention was directed to a fleet of salt boats lying at a ghât within a couple of miles of the Golahs, and in seven of these he considered that the cargo was not properly protected.

Of these seven three belonged to one Jogee Behara, and on board were 700 maunds of salt. Jogee Behara produced two *rowannahs*, one in this own name for 621 maunds, and one in the name of Bhugwan (alleged to be his brother) for 99 maunds. These two *rowannahs* more than covered the quantity of salt on board, but the Sessions Judge has held it not to have been protected, because Jogee Behara's *rowannah* was post-dated: the document, that is to say, was dated the 31st July, whilst the visit of the Sheristadar took place on the 30th. It does not appear to me how the post-dating of the *rowannah* proves any criminality on the part of the Darogah, or how it can shew that the salt in Jogee's boats was improperly come by. No doubt, it was a circumstance demanding enquiry, but the explanation given by the Darogah, though not exonerating him from the charge of carelessness and impropriety, seems to me, as it did to the Assessors, natural and probable. He says that, as there were still some remaining old form *rowannahs* to come in, he wished to keep the new forms, such as had been presented by Jogee Behara, back for a few days until all the old ones had been entered; for this reason he post-

dated Jogee's papers to the day when he calculaled he would be able to enter them in his books, and in the mean time kept a separate account. This last part of his story is, at all events, borne out; for amongst the papers given up to the Sheristadar were receipts on the part of Jogee and Bhugwan for the salt delivered to them; and there can be no doubt, I think, that the salt found on the three boats of Jogee Behara had been properly received from the Darogah, and was regularly protected.

The same remarks apply to the boat owned by Seboodass. This party held a *rowannah* for the quantity of salt found on board. The only circumstance of suspicion against it was the post-dating of the *rowannah* to the 31st of July; for the reasons already given, I think that the Darogah's explanation may be received.

Two other boats belonged to Juggobundoo, and one to Muddoo. *Rowannahs* were produced (after some little delay, the owners apparently not being on the spot) to cover the salt. The Sessions Judge mistrusts all these documents; in Juggobundoo's case, because the *rowannah* he produced was not in his own name; and in Isshur's and Muddoo's cases (Isshur, I would mention, was said to own part of the salt in Juggobundoo's boat), because the dates of delivery were many days anterior.

I do not see how the fact of Juggobundoo's boat containing salt covered by a *rowannah* in another person's name proves anything at all against the Darogah. If it were the rule, that parties taking *rowannahs* from a Salt Agent were bound themselves to take delivery of the salt mentioned in them, their neglect of this rule would not affect the Salt Darogah. He was bound to deliver the salt to the holder of the *rowannah*, and, having done that, he was *functus officio*.

Then, as to the suspicion supposed to arise from the dates of delivery in the case of these two persons, it is proved by the evidence of the boatmen that, for some days at least after Juggobundoo's salt was given out by the Darogah, it remained heaped up on account of some repairs which had to be done to the boat, and that, after these were finished and the salt put on board, the boat remained a week or more at the ghât before it was seized by the police. As to Isshur's salt no such doubt could arise; for he does not appear to have taken delivery of it till the 28th.

The same remarks apply to Mudhoo's boat. He produced a *rowannah* for his salt, and the mere fact of his having taken delivery some 10 days before, cannot invalidate that document, or prove that the salt seized in his boat was not the salt protected by his *rowannah*.

In short, taking all the evidence into consideration, I think that the case for the prosecution breaks down altogether. No act of criminal breach of trust is proved, and the mere fact of there being a large deficit, although it may make the prisoner civilly liable, cannot bring him within the provisions of the Penal Code.

I would reverse the Sessions Judge's order and sentence, and direct the release of the prisoner.

Kemp, J.—I entirely concur in this judgment. There is no evidence of a dishonest misappropriation of trust property, and the prisoner must be acquitted.

The 31st January 1866.

Present:

The Hon'ble C. B. Trevor, L. S. Jackson, and F. A. Glover, *Judges.*

Appeal—Convictions under Police Act V. of 1861.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order No. 18, dated the 15th July 1863.

Thakoor Doss and Godai Shek.

Convictions under the Police Act V. of 1861 are appealable like other convictions. Where the appellants are convicted by an officer exercising the powers of a Magistrate, and sentenced to imprisonment exceeding the limit prescribed by Section 411 of the Code of Criminal Procedure, the appeal lies to the Sessions Court.

We think it clear that convictions under Act V. of 1861 are appealable in the same way as other convictions.

Section 21 of the Code of Criminal Procedure provides that "the Criminal Courts of "the several grades, according to the powers "vested in them respectively by this Act, "shall have jurisdiction in respect of offences "punishable under the Indian Penal Code, "or under *any special or local law*, and in "the investigation shall be guided by the "provisions of this Act."

Act V. of 1861 is a special law on the subject of police; and persons charged with offences punishable under that law must be tried under the provisions of the Code of Criminal Procedure.

Section 409 of the same Code provides that any person convicted on a trial held by the Magistrate of the District, or other officer exercising the powers of a Magistrate, may appeal to the Court of Session to which such Magistrate is subordinate (subject to the limit prescribed in Section 411).

The appellants in this case are persons convicted on a trial held by an officer exercising the powers of a Magistrate, and sentenced to imprisonment exceeding the limit fixed by Section 411. They were, therefore, we think, entitled to an appeal to the Sessions Court. We, therefore, direct the Sessions Judge to hear the present appeal, and to pass such orders as the circumstances may require; and we further direct that a copy of this decision be laid before the Judge in the English Department.

The 7th February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, Shumbhoonath Pundit, and G. Campbell, *Judges*.

Evidence (in cases of Perjury)—Single witness—Corroboration.

Queen *versus* Lal Chand Kowrah Chowkeedar and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of giving false evidence, &c.

HELD by the majority of the Court (Campbell, J., dissenting) that the evidence of one witness uncorroborated is not legally sufficient for a conviction of perjury.

Peacock, C. J.—THE question which has been referred to this Court in the present case is whether a person can be convicted of perjury in the Mofussil upon the evidence of a single witness uncorroborated. Section 28 of Act II. of 1855 lays down a general rule in the following words: "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact *in any such Court or before any such person.*" But the rule is subject to a proviso in the following words: "But the provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury."

It is said that Section 28 does not extend to the Mofussil Courts, and that it applies only to the High Court on its Original Side, inasmuch as the Act was intended to apply only to Her Majesty's Supreme Courts. That depends upon the construction which is to be put upon the words in the general rule laid down in Section 28, "in any such Court," or "before any such person." Now, it so happens that Section 27, which immediately precedes the Section in question, says: "The rules of evidence in Her Majesty's Supreme Courts as to matters of Ecclesiastical or Admiralty Civil Jurisdiction shall be the same as they are on the plea side of the said Courts; and it is argued from that, that when Section 28 uses the words "in such Court," it means in any such Court as is lastly abovementioned, *viz.*, Her Majesty's Supreme Courts. But it appears to me that that construction is not correct. Section 27 was not intended to alter the rules of evidence in every branch of the Supreme Courts, but only to make the rules of evidence in matters of Ecclesiastical or Admiralty Civil Jurisdiction the same as those on the plea side of the said Courts. That was the sole object of Section 27, and it did not apply to matters of Criminal Jurisdiction. But Section 28 applies to cases of treason and perjury, and to all cases of every kind; and it appears to me that the words "before any such Courts" were intended to refer to all Courts of Justice in territories then in the possession and under the Government of the East India Company as mentioned in Section 2 of the Act. The words "or before any such person" cannot refer to persons mentioned in Section 27, as no persons are mentioned therein. They, in like manner, refer to the persons mentioned in Section 2, *viz.*, all persons having, by law or consent of parties, authority to take evidence." Sections 3, 5, 7, 11, and other Sections use the words "all such Courts and persons aforesaid;" and Sections 6, 9, 12, and other Sections use the words "all such Courts and persons aforesaid," referring to the Courts and persons mentioned in Section 2. The Act was passed for the improvement of the law of evidence, not only in the Supreme Courts, but in all the Courts of the country. Neither the Title nor the Preamble limit the Act to the Supreme Courts.

If the words "such Courts" in Section 28 refer to the Supreme Courts, because those were the Courts last mentioned, Sections 30, 41, and 45, which use the words "such Court or person," must, upon the same reasoning, be constituted to refer to the Supreme Courts. The Act recites that it is expedient further to improve the law of evidence, and then pro-

ceeds to enact that, "within the territories in the possession and under the Government of the East India Company, all Courts of Justice, and all persons having, by law or consent of parties, authority to take evidence, shall take judicial notice," &c.

Further, the Proviso under Section 28 shows that "any such Court" was not intended to refer simply to the Supreme Courts. It says, "but this provision," that is, the provision that the evidence of one witness, who is entitled to full credit, shall be sufficient for proof, "shall not affect any rule or practice of *any Court* that requires corroborative evidence in support of the evidence of an accomplice or of a single witness in the case of perjury."

Now, the words "of any Court" would not have been used in the proviso of the preceding part of the Section, had they been intended to apply only to the Supreme Courts; whereas, if my construction is correct that the words "such Courts" and "such person" refer to the Courts and person mentioned in the 2nd Section of the Act, the words "of any Court," &c., are applicable and correct. According to the law as administered in the exercise of Original Criminal Jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict of perjury, because it is governed by the rules of the Law of England. I do not mean to say that every rule of the law of evidence, as administered in England, applies to the Mofussil. But I cannot think that we ought to put such a construction upon Section 28, Act II. of 1855, as would allow a person to be convicted of perjury at Allipore or in other parts of the Mofussil upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its Original Criminal Jurisdiction. Such a construction would not be very consistent. But, if the law is so, we are bound by it. If there was any rule or practice in the Sudder Court or in the Courts in the Mofussil which, before Act II. of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in Section 28. Now, there is a case which was decided by Mr. Samuells in the Sudder Court (*see* Nizamut Reports, Vol. IX., p. 212, Government *versus* Goreeb Peada) in which the rule was laid down as follows: "Perjury is not to be assumed, because the story of one man appears to be more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false." That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. This rule, which was laid down by the Sudder Court in the case, is supported by other cases, and is in accordance with the principle of the English Law. Indeed, I think, I may safely say that it was the practice of the Sudder Nizamut and of the Mofussil Courts not to allow a conviction of perjury upon the uncorroborated evidence of a single witness. Consequently, the case does not fall within the general rule of Section 28, inasmuch as it is taken out of that rule by the provision which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in a case of perjury.

We do not sit here to make the law, nor to exercise the functions of Legislators, but to administer the law as in our consciences we believe it to exist. It is unnecessary, therefore, to enquire whether the rule of English Law or the rule or practice of the Mofussil Courts are founded upon sound and correct principles or not.

Bayley, J.—In this case of perjury referred by Messrs. Justices Norman and Campbell, I would distinctly confine myself to the case as one of perjury. The question then is, whether, when *A* has deposed one way, and *B* has deposed exactly the contrary, and upon this *B* is accused of perjury, the statement of *A* on oath, which is one statement against that of *B*, also on oath, will require some corroboration before *B* can be convicted of perjury. I think that the principle laid down in the decision of Mr. Samuells, in the case in page 212, Vol. IX. Nizamut Adawlut Reports, is that which should be followed. That case is very analogous to this. The principle I would follow here is enunciated in the words underlined:—

"The conviction which is founded simply on the oath of the persons accused by the prisoner cannot stand. If I were to affirm such a conviction, no person bringing a charge against a Darogah, who happened to enjoy the good opinion of the Judge and Magistrate of that district, would be safe. *Perjury is not to be assumed, because the story of*

one man appears to be more credible than that of another. There must be certain proof adduced, independent of the oath of one of the parties, that the deposition of the other is false."

As I said before, the case before us is a case of perjury, and therefore I would not go beyond it or enter into any other question of the construction or application of Act II. of 1855 irrespective of this case of perjury.

Norman, J.—THIS is an appeal from a conviction before Mr. Pigou, the Judge of Hooghly.

The prisoner Lal Chand was convicted and sentenced to three months' imprisonment under Section 193 of the Penal Code, on a charge of giving false evidence in a stage of a judicial proceeding, by falsely asserting to the Joint Magistrate that he had not told the Inspector of Police that he had taken bamboos from Kartick Ghose, Rakhal Sahee, and others.

The proceedings before the Joint Magistrate shew that a charge was pending before him against one Nissa Ahmed, the Head Constable of Kulsinee, to whom a sum of money had been entrusted for the purpose of building a hut, that he had obtained materials without paying for them. The prisoner stated before the Joint Magistrate, "I received from the head constable the "price of all the bamboos I collected. I did "not tell the Inspector that I received "bamboos from Kartick Ghose, Rakhal "Sahee," and others named.

The evidence of Inspector Cavanagh is as follows:—

"I was investigating the conduct of the "Kulsinee head constable regarding the ac-"counts of the zemindary dâk building at "Nobogram. I remember that the prisoner "told me that he had collected some bam-"boos for the purpose of that building. "Lal Chand told me the names of certain "persons from whom he had received some "bamboos. I don't remember the names "he mentioned, but I wrote them down "from his mouth at the time in a memo-"randum." Producing Memoranda A. and B., he says: "These are the memoranda I wrote with my own hands." Refreshing his memory from them, he said: "Lal Chand "told me he received bamboos from Kartick "Ghose, Rakhal Sahee, and others. I "took the names down at the time in my "memoranda as the prisoners mentioned "the names. They of their own accord "gave the names. I am quite certain that "this is the prisoner who made the asser-"tion. I am quite certain that I made no "mistake, and, as each prisoner mentioned "the names, I wrote them down." Pointing to another document, he said: "This is the "original diary written by me from the me-"moranda, and is the report referred to in "my deposition before the Joint Magistrate."

The Judge summed up the case carefully to the Jury. He said: "You have to deter-"mine whether you believe the Inspector or "the prisoner; if the former, you must con-"vict; if the latter, if you think that the pri-"soner unintentionally made the false asser-"tions, you must acquit. It is nothing to "you whether the alleged false evidence "was or was not on a point material to the "issue of the case in which it was given, or "whether it was on a trifling or on an im-"portant point, or whether there is any valid "reason for their making a false statement. "You have to decide whether the prisoners "have falsely stated in their depositions as "witnesses in the case against the head "constable as to the matter of the building "of the zemindary dâk house that they did "not state as recited in the charge. There "is only one witness for the prosecution; "but, under Section 18 of Act II. of 1855, "the evidence of that one witness, if you "believe it, is sufficient for the conviction "of the prisoner, for there is no law or "practice of the Mofussil Sessions Courts "which requires evidence corroborative of "such single evidence in cases of false evi-"dence."

I may observe that the prisoner was called before the Joint Magistrate to prove that, by the desire of the head constable, he had taken bamboos without paying for them from Kartick Ghose and other villagers. He denied it. The question, whether he had told the Inspector that he had not done so, was apparently put to him in order to show that his statement before the Magistrate was at variance with the statement made by him to the Inspector, and consequently that his evidence, in exculpation of the head constable, was not to be relied on as opposed to that which it was expected that Kartick Ghose and the other villagers would give. It was clearly material as affecting his credit and the credibility of his statement on oath before the Magistrate.

It is, therefore, not necessary for me to express any opinion as to whether a false statement, made by a witness on a point wholly immaterial to the issue in a cause, is a giving of false evidence, and, as such, punishable under the 193rd Section.

The only other point is that the prisoner was convicted of giving false evidence, the only proof that the testimony was false being that of a single witness. Section 28 of Act II. of 1855 enacts that, "Except in cases "of treason, the direct evidence of one wit-"ness, who is entitled to full credit, shall be "sufficient for proof of any fact in any Court, "&c. But this provision shall not affect "any rule or practice of any Court that "requires corroborative evidence in support "of the testimony of an accomplice or of a "single witness in the case of perjury."

An accomplice can hardly be said to be a witness entitled to *full credit.* I am disposed to think that, by the law of evidence in this country, and the practice of the late Sudder Court, the testimony of an accomplice required confirmation (*see* Regulation X. of 1824). I think that, by the rule and practice of the late Sudder Court, some corroborative evidence was required to prove the falsehood of the statement on which perjury is assigned; that a conviction for perjury was not allowed to stand, where there was the mere uncorroborated oath of the prosecutor against the oath of the prisoner. *See* a case in Beaufort's Digest, paragraph 4508, in which, however, the rule was probably misapplied. *See* also the case of Goreeb Peada, Nizamut Reports, 1859, page 212; 1 Nizamut Reports, page 314; 2 Nizamut Adawlut Reports, page 168. I am sure that the rule rested on sound policy.

After a very careful consideration, I am disposed to think that the evidence of two witnesses, or at least some corroborative evidence of the oath of a single witness, is still necessary to prove the falsehood of any statement charged to be false evidence. But I feel considerable diffidence on the subject. My view, however, is apparently in accordance with the opinion of Mr. Norton in his Work on Evidence, Section 622. The cases of the other prisoners, who were tried at the same time, are precisely similar. I would quash the convictions. I should regret the acquittal of the prisoners on this ground, the less because of the shape which the charge in the present instance has assumed. The substantial offence of which the prisoners were apparently guilty was that of giving false evidence in order to screen an offender. In order to punish them for that offence, of which there was no sufficient proof, they are charged with having spoken falsely, by denying that they made a particular statement to the police officer.

The confessions of persons accused, made before police constables, are not admitted as evidence of guilt; and it would certainly seem to be a dangerous practice that one who has made such a statement or confession before a single police constable should be compelled to repeat or admit that he made the confession before the Magistrate or Judge on pain of being charged with perjury if he retracts and denies that he made the statement. If the statements of the prisoners made to the Inspector are true, they probably are able to be charged as guilty of or of abetting offences under the 105th or the 409th Section of the Penal Code.

The case having been referred to the Full Bench on the *second* point, as the majority of such Court agree with me, the convictions will be quashed.

Shumbhoonath Pundit, J.—I believe that in the late Sudder Nizamut the Judges almost invariably convicted prisoners tried for perjury, when the oath against the former oath of the prisoner was corroborated; and so I should hold in this case that the testimony of one witness is not sufficiently legal to convict the prisoner.

Campbell, J.—The question arising in this case is a point of law in a criminal appeal from a conviction by Jury, for false evidence, first heard by Mr. Justice Norman and myself. There was a difference of opinion, on account of which we thought it necessary to refer the case to a Full Bench.

If I were charging a Jury, or advising an inexperienced Judge, I should probably say that, in ninety-nine cases out of hundred, a single witness would not suffice for a conviction in a case of this kind. As a matter of credibility, I have no doubt that it is so. But we are now called on to determine the matter simply as a dry point of law, and of law only. The prisoner has been convicted of false evidence in a trial by Jury in the Sessions Court upon the evidence of one witness which the Jury and the Judge deemed worthy of entire credit; and my learned colleague and myself, who sat on the Division Bench, were agreed that, as a question of fact, we neither had the power to interfere, nor saw any reason for interfering, with that conviction; that, in this respect, the appeal could not be sustained. The only question is whether, that being so, we are, as a matter of technical law, bound to quash the conviction, to say we have no doubt of the truth of the evidence

for the prosecution, we have no doubt of the guilt of the prisoner, we have no power to interfere with the finding of a Jury on the facts; but still we are, in a case of perjury, bound by a technical rule to release the prisoners, because the evidence of one witness is in law, as distinguished from fact, insufficient for a conviction, and the Jury cannot legally find a verdict upon it. I concur in the view of Act II. of 1855, Section 28, which has been taken by my learned colleague. The *first* sentence of that Section lays down the general law of British India, *viz.*, that one witness of unimpeached credit is (if believed by the Court) sufficient for a conviction in a case of perjury or in any other case. The *second* sentence makes an exception in regard to Courts where a contrary rule or practice is already established. It is not, I think, necessary here to discuss whether in English Courts there is really on the subject a rule of legal effect whether, in a case of perjury proved by a single witness, the question is one for the Jury or for the Judge. I have no doubt that, since the English Law prevailed in the late Supreme Courts, and it was not in 1855 thought necessary to go beyond that law for the purpose of rendering the law of those Courts uniform with that of British India in general; the *second* sentence of Section 28 was intended to reserve the law of England in those Courts in regard to the point now before us, whatever the Judges might construe that law to be. Up to the present moment, the Criminal Procedure is entirely different within and without the limits of the Original Jurisdiction of the High Court, and it seems to me that in 1855 the Legislature recognized and contemplated a very wide difference in the Criminal Law and Procedure within and without the Mahratta Ditch. But the wording of the *second* sentence of Section 28, even if specially designed for the Supreme Courts, in terms extends to all Courts in which there had been previously established a rule or practice requiring corroborative evidence in support of the testimony of a single witness in the case of perjury. The question is, therefore, narrowed to this, *viz.*, whether, in the Courts of Bengal, such a legal rule or practice had been established. I think, however, that, when the Legislature had laid down a broad and liberal rule for British India, and allows only of exception in regard to certain Courts, then, before we establish the exception in the Courts of Bengal, before we give effect to a highly technical rule at variance with the general law of British India, we must be satisfied that in reality such a rule was clearly, distinctly, and definitely established as matter of law. Previous to the Penal Code, the Criminal Law of the Mofussil Courts was very vague and uncertain. It may be that, both in criminal and civil matters, single Judges may occasionally have somewhat loosely quoted what they supposed to be rules of English Law. But I cannot think that two or three isolated instances of such references, culled from a vast number of decisions extending over very many years, would suffice to establish a rule of law. In this instance, so far as I have seen, even such *dicta* are quite wanting. A great deal depends on the way in which the word "practice" is understood. I quite admit that it may be found that in practice, in a very great many cases, a single witness uncorroborated was not deemed sufficient for a conviction for perjury. But that is, in my view, a question of the credibility, not of the admissibility, of the evidence. The question is whether there is a practice elevated to the dignity of an absolute rule of law, *viz.*, that, though we may to the fullest extent believe the evidence, we cannot convict upon it, and must set aside the verdict of a Jury. Such a rule of law must, it seems to me, have been clearly enunciated and consistently acted on before it can be binding upon us under the terms of the Statute.

I cannot see that it has been so. I do not find it clearly and broadly expressed in unambiguous terms in a single case which has come to my notice. Beaufort quotes one case in which the Judge refused to convict for perjury on the evidence of two witnesses, because it was oath against oath. That can hardly be applicable. One or two other cases have been examined, and especially one is relied on, decided by Mr. Samuells, in which it seems to me that the expressions used mean that in the particular case the Judge did not think, and in similar cases would not think, the unsupported testimony of one or two witnesses interested in the matter sufficiently credible. In truth, on examining this case (Nizamut Adawlut Reports, Vol. IX., p. 210), I find that there were *two* witnesses who directly swore to the perjury, "the Darogah and a Burkundaz named Meheroollah." Mr. Samuells also says: "The only evidence against the prisoner is that of the *Darogah and the Burkundaz whom he had accused*," and "the conviction founded simply on the oath of the *persons* accused by the prisoners cannot stand." It is evident that

this case is not in point, nor have I seen any other more so. I cannot see that any rule of law on the subject was established in the Courts of Bengal, and therefore I would not give effect to such a technical rule in opposition to the general law of India.

The appellants having been convicted by the Jury, I would dismiss the appeal.

The 12th February 1866.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Circumstantial Evidence—Proof of guilt—Moral conviction of Judge.

Queen *versus* Sorob Roy.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of murder.

The guilt of a prisoner must be clearly proved before he can be convicted, and a weak case cannot be strengthened by the fact that the police has had many difficulties thrown in their way.

Absconding is but slight evidence of guilt usually.

Convictions must be based on substantial and sufficient evidence not merely "moral convictions."

THE prisoner in this case has been found guilty of the offence of murder, and has been sentenced to death. The Sessions Judge and the two Assessors by whom he was tried were unanimous in the conviction. The case has been referred to the High Court for confirmation of the sentence. Having fully considered the evidence on the record and the judgment of the Sessions Judge, the conclusion at which we have arrived is that the evidence is wholly insufficient to support the conviction, and that the prisoner ought to have been acquitted.

The person murdered was a woman by name Nagirja, the mistress of the prisoner, who seduced her about three or four months before her death from the house of her husband at Dinapore. She lived with her mother Bhagaruttia, and was constantly visited by the prisoner, who usually passed the night with her. The prisoner lived in the same village, in the house of his father who was a man of some position and influence, being the Tehsildar of that and some neighbouring villages.

On the night of Tuesday, the 3rd of October, or rather early in the morning of the 4th, the deceased was found dead in her house, where she usually slept, her throat having been cut. On the 4th, constables from neighbouring stations reached the spot, and, on the morning of the 5th, a native Inspector of Police from Arrah arrived. The latter found that nearly all the villagers had run away, and could get no information or assistance from any one. In consequence of his representations, a Deputy Magistrate on the 9th went to enquire into the case, and the result of his enquiries was that he committed the prisoner for trial on a charge of murder. So far there is no question as to the facts.

There is no direct proof against the prisoner, the case being one entirely of circumstantial evidence. In order that our reasons for not concurring in the finding of the Lower Court may be distinctly understood, it is essential that we should go at length into the details of the evidence. We must premise, however, that, whatever may have been the difficulties thrown in the way of the police, and however much the officers who had charge of the preliminary investigation may have been obstructed, it is not less necessary in this than in any other case, that the guilt of the prisoner should be clearly and conclusively brought home to him before he can be properly convicted. A case weak and inconclusive in itself cannot be in any degree supplemented or strengthened by the fact that every exertion has been made to prevent the police from discovering the truth. Much as it is to be regretted that the perpetrators of a foul murder should not be brought to justice, no Judge can rightly permit that feeling to influence his judgment, when the question which is before him is whether or not it is proved beyond all reasonable doubt that a particular individual is the murderer. When it is distinctly proved that an accused person has attempted to remove or destroy that which is evidence of his guilt, or to keep out of the way witnesses who, it is shewn, could prove the case against him, such a fact may properly be used in support of the prosecution. But that is a very different case from the one now under consideration, where all that is alleged (and it is not strictly proved) is that the prisoner and his relations have such influence in the village that those who know what happened will not come forward and speak the truth.

The person who, no doubt, could clear up the whole matter, if she chose to do so, is Bhagaruttia, the mother of the murdered woman. She and her daughter lived in the same house, though they slept in different rooms. On the night of the murder, both of the women slept in the house, and the mother was the first person who, in the morning,

found her daughter lying dead. Unfortunately the statements which this woman has made since the murder are so varied and contradictory that it is, in our opinion, impossible to rely upon them as proving anything. At first, on discovering that her daughter had been killed, she seems to have said that the prisoner had killed her daughter. The constable who reached the house on the evening after the murder says that she told him that thieves had broken into the house, and committed the murder. To the Police Inspector, who arrived the next morning, she first said that thieves had done it, but afterwards she said the prisoner had done it. To the Deputy Magistrate she said she did not know who did it. Before the Sessions Court she said that thieves did it, and she saw three men running away. Again, before the Magistrate she admitted that the prisoner had seduced her daughter, and kept her as his mistress; while in the Sessions Court she absolutely denied that she ever said anything of the kind, and declared that the prisoner never had any connection with Nagirja. It is very unfortunate that this witness, who probably knows all, will not disclose what she knows. As it is, her testimony is of no weight against the prisoner. If it be true that she did at first say that the prisoner had killed her daughter, this does not prove that he really did kill her. What she said is evidence only so far as it goes to show that the statements subsequently made by her are untrue. Moreover, if she did at first cry and say that the prisoner had killed her daughter, it may very possibly be that she said so without meaning to say that it was his hand that did the deed; for, by whomsoever her throat actually was cut, there is no doubt whatever that it was on account of her connection with the prisoner that the deceased was murdered. We consider that the case must be dealt with wholly irrespective of the statements made by the deceased's mother, whether at the moment of discovering the murder or subsequently. Such as they are, they cannot be satisfactorily or justly used either for or against the prisoner. The story as to thieves being the murderers, rests solely on this woman's evidence. We quite agree with the Lower Court in rejecting this story as utterly unworthy of credit. It is quite clear that it was not for the purpose of theft that this murder was committed.

Apart from the evidence of the mother, the case for the prosecution is that, on the night of the murder, the Chowkeedar of the village, in going his rounds, heard the voices of the deceased and the prisoner as they talked inside her house; that the prisoner was seen on the morning of the murder to leave the house of the deceased soon after daylight; that early on that morning he was seen near his own house coming from the direction of the deceased's house with stains of blood on his clothes, and that, as he was coming along, a certain conversation took place between the prisoner and his brother Sarawuth, in which allusion was made to the death of Nagirja; that he was afterwards seen at a well, where blood was observed on his clothes; that the day before the murder he borrowed a *hanswa*, such as *taree-walas* use, with which the throat of the deceased may have been cut; and that he absconded immediately after the murder.

Let us consider the evidence on which this case rests. Three women, Gurbhini, Purwa, and Ramonia, say they saw the prisoner coming away from Nagirja's house soon after daylight, "about two *ghurrees* of the day," as they went to draw water. Gurbhini says she saw him come out at the door of the house of the deceased. Purwa says she saw him coming from the house "near a *peepul* tree close to the house, fifteen paces off." Ramonia says, first, that she saw him come out at the door, and then that she saw him near the *peepul* tree, "which is about 20 feet from the house." All three women agree in saying that, immediately after they saw the prisoner, they heard the mother cry out that he had murdered her daughter. Then the Chowkeedar Soobkaran says that, as he went his rounds through the village, he heard the prisoner and the deceased talking in her house on the night of the murder, but they were not quarrelling. In the morning he saw the prisoner "at sun-rise going towards "the south from the direction of Nagirja's "house, about 25 paces from it." Then the Chowkeedar went home to his own house, which is some distance away from the village, whence he returned soon after, on news of the murder reaching him. This Chowkeedar noticed the dress worn by the prisoner, and saw that he had a *dholee* and *gilaf*: yet he did not observe that it had blood on it—an important fact when it is borne in mind that two other witnesses, on whose evidence we shall presently touch, speak to stains of blood being visible. The women apparently were asked no questions as to the dress of the prisoner. They ought to have been examined on this point, seeing that the case for the Crown is that his clothes were visibly stained

with blood—seeing also that, before the Deputy Magistrate, Gurbhini and Purwa deposed that the prisoner, when they saw him, had only *dhotee* and a cloth round his head, and that he had no cloth round his body, and that all three women deposed that they saw no marks of blood. Again, the women who say they saw the prisoner near or leaving the house of Nagirja declare that, immediately after seeing him, they heard the mother's cry that the prisoner had killed her daughter. Yet the Chowkeedar, who, according to the evidence, must at that time have been close at hand, heard nothing of this, but went quietly home.

The witness who comes next in the order of events is Azghaibi Oopadhya. He says that, on the morning of the murder, "at early dawn before sunrise," he met the prisoner as he approached his (the prisoner's) own house, and that there was blood on his *dhotee* and *chudder*. The prisoner's brother Sarawuth was there too—it does not appear how or why—according to this witness, who relates a most extraordinary conversation which he says then took place between the brothers. The witness says: "I saw blood on his *dhotee* and *chudder*. "His brother Sarawuth asked how it came "there. He said: 'You have killed my "woman, and yet you ask me where the "blood comes from?' Sarawuth said, 'I have "just reason, what do I know about your "woman?' I then heard a cry in the village "that the prisoner had murdered the shep-"herdess (the deceased)." We utterly disbelieve that any such conversation ever did take place; and if it did take place, it would not, in our opinion, indicate that the prisoner was the murderer. The story is, that the prisoner having murdered, deliberately and in cold blood, the mistress with whom he was living on terms of the closest intimacy, walks by daylight openly away from the scene of the murder with stains of blood visible on his clothes; that he does not shun being seen by the village-chowkeedar and others as he leaves the house where he has committed the murder; and that, in the presence of a stranger, he holds the remarkable conversation which we have just given in full as to the source of the blood-stains. Such a tale is incredible if it be supposed that the prisoner was the murderer: it is credible (if at all) only on the supposition that he was *not* the murderer, although both he and his brother knew that the woman had been murdered and by whom.

Another witness, Mahomed Ali, is the only person, save Azghaibi Oopadhya, who speaks as to having seen blood-stains. He says that, on the morning of the murder, the prisoner and his brother were bathing at the well, and he saw blood on the prisoner's *dhotee*. What can be more improbable than this? The woman is murdered; the whole village names the prisoner as the murderer: yet he goes with his brother, and bathes quietly at the well with a blood-stained *dhotee* exposed to the public view. On the whole, we do not consider it to be in any degree proved that the prisoner ever was seen on the morning of the murder leaving the house of the deceased or with stains of blood on his clothes.

The witness Mahomed Ali testifies to the prisoner having borrowed from him a *hanswa*, such as *taree-walas* use, the day before the murder, and he is corroborated by Neeamut. The theory for the prosecution is that this *hanswa* was used by the prisoner to cut the throat of the deceased. This theory, however, is not borne out by the evidence. For, though it may be proved that the wound might have been inflicted by a *hanswa*, it is not proved, nor even suggested, that it might not equally well have been inflicted by a common knife or some other instrument not a *hanswa*, and there is not a scrap of evidence to show that the woman's throat was in fact cut with a *hanswa*, much less that it was cut with the one which Mahomed Ali says he lent to the prisoner. The *hanswa* which is said to have been borrowed has not been shown to have been ever seen in the possession of the prisoner, nor has it been found since the murder. Even if it be believed that the prisoner did borrow a *hanswa* from Mahomed Ali, the mere fact that he has never returned it, scarcely, if at all, strengthens the case against him.

In absconding when the murder was discovered—and no doubt he did abscond—the prisoner only did what was done by almost every body else in the village. Under certain circumstances, the case against an accused person is certainly strengthened by his running away, and it is so to some extent in the present instance. But a man who runs away may be, and often is, innocent, and any presumption of guilt which may arise from such a course is usually but a very small item in the evidence on which a conviction is based. There are many considerations other than those of his own guilt, which, as it appears to us, may very possibly have

moved the prisoner to act as he did in this respect.

Reviewing the whole case, we are of opinion that, while the positive evidence fails to prove the prisoner's guilt, the probabilities are much in his favor. There is no proof of any such motive as might be expected to lead to the commission, by him, of this crime. The woman was his mistress and on good terms with him. There is no evidence that they had ever quarrelled. Why then should the prisoner murder her in the cold-blooded way in which he did it, if the case for the prosecution be true? The Sessions Judge says on this part of the case: "What "the prisoner's motive was is not disclosed "by the reluctant witnesses; but the Inspect-"or says the girl had begun to go after "other men, and this of itself is sufficient to "account for the prisoner's bad feeling towards "her. Rajpoots seldom tolerate infidelity." The Judge was wrong in considering that he had before him any legal evidence whatever of the deceased having been unfaithful to the prisoner. All that the Inspector says is—"Kanjalye Sing, Constable, came and said: "The prisoner had murdered the girl, because "she had gone wrong with other men." What the constable said to the Inspector was mere hearsay, and not evidence. Kanjalye was not himself examined in the Sessions Court, although his deposition was taken by the Deputy Magistrate, before whom he said nothing as to any infidelity on the part of the deceased towards the prisoner. If the Sessions Court thought it desirable that Kanjalye Sing's evidence should be before it, that person ought to have been examined, when the Court would have been able to see what his information was worth. But the Court had no right to take his statements at second-hand from the Inspector, and act upon them as if they were evidence against the prisoner. As it is, we have no evidence whatever of any infidelity which could have been the motive for the committing of this murder by the prisoner. On the other hand, a woman, by name Jamonia, who was examined by the Deputy Magistrate, but not by the Sessions Court, says expressly that it is not the case that the deceased was unfaithful to the prisoner or went wrong with other men. Many witnesses were examined by the Deputy Magistrate who were not examined in the Sessions Court. This, of course, may very properly be so. But the depositions of witnesses taken before the Committing Magistrate may (when the witnesses are not examined at the trial), and in fairness ought to be referred to, when they are favorable to the prisoner, although they cannot be read as against him From the depositions of two witnesses of this class, Golam Ali Khan and Zarut Hossein Khan, we find indications of a state of feeling on the subject of the connection of the deceased with the prisoner, which show that it is highly probable that persons, other than the prisoner, may have desired to get rid of her. The former of these witnesses tells the Deputy Magistrate how the prisoner had quarrelled with his father and brother on account of the deceased; how they had in consequence incited the *gureryas* of the village (the men of the caste from which it is proved she had been ejected on account of her connection with the prisoner) to beat him; and how the prisoner, being enraged thereby, went and murdered the unfortunate cause of what had happened. The latter says that, when the murder became known, it was first said that the deceased had been murdered by the low *gureryas* of the village, on account of her misconduct. There is no evidence that the facts are as spoken to or suggested by these witnesses. We do not allude to their depositions as being evidence of these facts or otherwise than as indicating that, so far merely as motive and probabilities are concerned, there were other persons in the village who may have been at the least as likely as the prisoner to desire to put the deceased out of the way and to compass her death.

The question we have to decide is not whether it is proved that the prisoner did not commit this murder, but whether it is proved beyond all reasonable doubt that he did commit it. We think it quite impossible to say that, on the evidence to which alone we can look, it is established beyond reasonable doubt that the deceased was murdered by the prisoner; on the contrary, we entertain the gravest doubts on the subject. There is no doubt that it was because of her connection with the prisoner that the deceased's life was taken away; but there is very great doubt in our minds as to the prisoner being the person who either desired or brought about her death. The case is in no degree conclusively proved against him: and the "*unbiassed moral conviction*" of guilt, which the Sessions Judge says he felt in this instance, is no sufficient foundation for a verdict of guilty, unless that moral conviction is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty.

It is not proved that the prisoner committed this murder. We, therefore, acquit him of it, and order his release.

The 20th February 1866.

Present:

The Hon'ble G. Campbell and J. B. Phear, *Judges.*

False charge of offence (What constitutes).

Queen *versus* Bonomally Sohai.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of making a false criminal charge with intent to injure.

To prefer a complaint to the police in respect of an offence which they are competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the meaning of Section 211 of the Penal Code.

In this case the question of fact was one eminently to be dealt with by the Court which heard the evidence ; and in the Sessions Court, the Sessions Judge and the majority of the Assessors have come to the conclusion that the charge made by the prisoner was false and malicious, as did the Local Magistrate who investigated the case. We see no ground for the interference of this Court with such a finding of fact.

As respects the question of law on which the Assessors differed from the Sessions Judge, we are of opinion that to prefer a complaint to the police in respect of an offence which they were competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the meaning of Section 211 of the Penal Code. We dismiss the appeal.

The 22nd February 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Murder—Culpable Homicide not amounting to Murder—High Court (Power of—to interfere with failure of Judge to convict on graver charge).

Queen *versus* Sobeel Mahee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of murder and culpable homicide.

Where a Judge acquits a prisoner of intention to kill, but admits that the prisoner struck the deceased with a highly lethal weapon with the knowledge that the act was such as was likely to cause death, the conviction should be for murder, and not culpable homicide not amounting to murder.

The failure of the Judge to convict the prisoner on the graver charge is not an error of law with which the High Court can interfere under its revising powers.

The prisoner in this case has not appealed. The case was sent for by the Sessions Judge in the English Department, and comes before me under Chapter XXIX. of the Code of Criminal Procedure.

That the finding of the Sessions Judge on the evidence is wrong, I have no doubt. It is amply proved that the prisoner struck the deceased repeated blows with a highly lethal weapon (a *dao*), and the Sessions Judge himself admits that he did so with the knowledge that the act was such as was likely to cause death, although he acquits the prisoner of intending to kill.

This finding appears to me altogether inconsistent both with the evidence and with the Sessions Judge's own remarks. The conviction should have been for murder.

There seems to be, however (and I have taken advantage of the delay in disposing of the case to consult some of my learned colleagues on the points), no way of remedying the mistake now, or of bringing the Sessions Judge's order within the provisions of Section 405 of the Criminal Procedure Code. The facts found by the Sessions Judge and Assessors are not absolutely inconsistent with the lesser offence of "culpable homicide not amounting to murder," and their failure to convict the prisoner on the graver charge, a charge which was amply supported by the evidence, is not an error of law with which this Court could interfere under its revising powers.*

Since writing this order, it has been brought to my notice that the prisoner did prefer an appeal after the case was sent for by this Court. The circumstance does not affect the decision which I have already come to on the evidence. I find from that evidence that the prisoner is clearly guilty, and ought to have been punished much more severely than he has been.

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* A Full Bench (*present*, Peacock, *C.J.*, and Kemp and Seton-Karr, *JJ.*) laid down the law on this point (*see* Torab Sheikh, W. R., Vol. V., p. 2).

The 26th February 1866.

Present:

The Hon'ble J. P. Norman, G. Campbell, and J. B. Phear, *Judges.*

Murder—Culpable Homicide not amounting to Murder.

Queen *versus* Gokool Bowree, Kishto Bowree, and Mussamut Oodoy Bowree.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of murder.

HELD by the majority of the Court that the offence committed was murder where the death of a weak half-starved old woman, who was detected stealing, was caused in the exercise of the right of private defence by the doing of more harm than was necessary for the purpose of such defence; Campbell, J., *contra*, being of opinion that a man who detects a thief stealing his property, and who, acting on the sudden impulse of the moment, inflicts on the thief blows so severe as to be likely to cause death, but which he did not at the time know or feel to be likely to cause death, and which would not necessarily have caused death to a person in ordinary health, but which, owing to abnormal weakness in the deceased not known to him, did cause death, is not guilty of murder, but of culpable homicide not amounting to murder.

Norman, J.—THE prisoners, male and female, have been convicted of murder, and sentenced to death by Mr. Tucker, the Judge of West Burdwan, and the case sent up to us for confirmation of the sentence.

The prisoners appeal.

The case has not been satisfactorily tried.

In the depositions, as given by several of the witnesses before the Magistrate, circumstances appear, into which it was most material that enquiry should have taken place before the Judge. The Judge appears to have put hardly any question to the witnesses, by way of cross-examination, in order to explain their omissions, and clear up the discrepancies between the statements before him, and those before the Magistrate.

The evidence is as follows:

Kishto Bearer.—"I heard a noise, as if a hyena was killing a man. I came out, and saw Gokool, Kishto, and Oodoy. Gokool and Kishto had hold of Kumnalli's arms, one on each side, and Oodoy was following. I asked Gokool, 'Why have you beaten Kumnalli?' He said, 'She was pulling up my rice.' Kumnalli said nothing. It was half-past ten. It was a dark night. I don't remember whether it was dark or moonlight. I saw them from a distance of two or three cubits."

Munda Khinnee says: "About suppertime, hearing from my sister Daro that my mother Kumnalli had been killed by Kishto and Gokool, I came out of my house, and saw Gokool, Kishto, and Oodoy dragging along the body of my mother. She did not speak, so I supposed she was dead. I followed them to the common house of the three prisoners. The body of my mother was carried into the house. I sat under the eaves of the house, and began to cry. Then Kishto abused me, seized me by the neck, and pushed me away Before they dragged my mother into the house, they let her fall, and her head struck against the wall, which was sprinkled with her blood. I went home. I was crying when the chowkeedars came towards the end of the night. I told them what I had seen, and told them to give notice. I don't know what quarrel there was between the prisoners and my mother. There had been a quarrel in consequence of prisoners' pigs rooting up my mother's '*urhur kullye*' plants. My mother had gone out to Heerapore, about 5 o'clock, to get some *bokool*—medicine for sores."

Daro says: "A little daylight was remaining, when my mother went out to buy medicine. At half-past ten I heard a noise, the cries of my mother. I went running to Bholoy manjee's tank, the land close to the tank about 400 or 500 cubits from my house. There I saw Gokool and Kishto beating my mother. Gokool had a sickle with which he struck my mother on the head. Kishto was striking her with a (*tenga*) short club. Gokool had also a *tenga*, and Oodoy was kicking and striking my mother with his foot, and Gokool struck her also with the *tenga*. I fell at their feet, entreating them not to beat my mother. Gokool was about to beat me, but Oodoy, his wife, caught hold of him, and prevented him. Then the three prisoners dragged my mother to their house. In the meanwhile, I had given notice to my sister Munda. We both saw the prisoners take my mother's body into their house. We tried to enter, but they abused us. Next day the police came at dawn, and took my mother's corpse from the prisoners' house. The night was a moonlight night. My mother had told me there was a quarrel between her and the prisoners. 'We must take care and avoid those enemies of ours.'"

Before the Magistrate she said that her mother had no *bokool* in her hand, that she did not know if her mother had any quarrel with the prisoners.

Rhedhoy Chowkeedar heard a noise, went up, and found Munda crying. She said that Gokool had killed her mother. He enquired of Gokool, who said that she came to steal

his rice, and he beat her. He and Sham remained in charge of the prisoner and of the body.

To the Court.—The prisoners' cultivation is about one mile from their house; there was paddy, but I do not know if it was ripe. Their cultivation lies south from the house. Bholoy manjee's tank lies south from the house. People can go to Heerapore by the tank, but it is not the direct road.

Cross-examination by Gokool.—You did not make over-charge to me of Kumnalli, and of stolen paddy that night. When it was near dawn, you shewed the dead body and some paddy, which you said she was stealing.

The Civil Surgeon says: "There were two severe contused wounds on the scalp, over a little above the forehead, on the left side, and the other on the crown of the head, each about 1½ inches long. On raising the scalp, much blood was found extravasated, but there was no fracture of the skull, or laceration of the brain, or effusion of blood within the skull; there was a contused wound over the upper part of the right shoulder-blade, and that bone had been fractured.

"The *ulna*, one of the bones of the fore-arm, was fractured *in both fore-arms.* There was blood on both hands, and several abrasions. The second phalanx of the ring finger of the left hand was fractured. On the right hand there was a contused wound between the index and middle fingers, and on the knuckle of the little finger. There were abrasions on the right and left fore-arms, on the right arm, inside the right knee, and on the right shin. The above injuries may have been caused by blows from heavy *lattees.* Death may have been due to the concussion of the brain, or to the shock to the system, caused by the above numerous injuries, the woman being weakly, and evidently ill-nourished. I examined her internal organs. They were in a healthy state, but all the mucous membranes were very pale, probably caused by want of nourishment. The woman was very thin, and her bones were small and slight. It would require a very severe blow to break the bone of her shoulder-blade, as it was protected by flesh and muscle, &c."

Before the Magistrate, the witnesses, Munda and Daro, said that, after the prisoners had taken the body of the deceased to the house, they warmed the body of the deceased before the fire.

A witness, whom the Judge did not think proper to call, says that he saw the deceased lying dead in the house of the prisoners; there were about three seers of *dhan* lying near the deceased in a basket.

The prisoner, Gokool bearer, before the Magistrate, said: "I went out to look after my rice, and found four people stealing my rice, three of them ran away, and I caught the fourth, and beat her. It was a dark night, and I could not distinguish whether the deceased was a man or a woman. I had a stick in my hand. While beating her, she spoke, and I found she was a woman. I then took her by the hand, and gave her over to Rhedhoy Chowkeedar. In the morning, the villagers assembled, and found she was dead."

Before the Judge he says: "Kumnalli, the deceased, came to steal my paddy. It was a dark night, and I struck her with a *lenga* five or six times. I took Kumnalli with the rice from my field to the door of my house, and there I made her over with the rice to Rhedhoy Chowkeedar."

The other two prisoners, by way of defence, say that they were not out that night, and that assertion has been throughout corroborated, so far as it is a corroboration, by the express statement of Gokool.

The Judge considers that the deceased was way-laid and murdered by the three prisoners. He convicted the prisoners of murder, and would sentence them all to death.

I see nothing whatever in this case which would warrant me in disbelieving the three chief witnesses for the prosecution. Their evidence appears to be given temperately and dispassionately. Daro admitted before the Magistrate that, so far as she knew, her mother had no quarrel with the prisoners, and that she had no *bokool* in her hand. Her silence, the absence of complaint of the other villagers, as they went along, may well be explained, if we suppose that, hearing the prisoners charging the deceased with having stolen rice, she may have been conscious that her mother, who had previously committed small thefts, and was then suffering from poverty and starvation, was but too likely to have been guilty of the offence. There is a great want of evidence as to what took place between half-past ten, when the prisoners were seen dragging home the body of the deceased, and half-past two or three o'clock, when the Chowkeedar came. But it is a very important matter. According to the evidence of Rhedhoy given before the

Magistrate, it was not until three o'clock in the morning, after the old woman had been ascertained to be dead, and Daro had gone to fetch the police, that the prisoner Gokool set up a shout of *chor dhoragacha* (I have caught a thief). The numerous injuries found to have been inflicted on the person of deceased support the theory of the prosecution that the attack was not made by a single person.

The broken shoulder-blade must have been caused by a blow from behind, and the wound over the forehead, and the broken arms, apparently by blows from a person standing before her. Now, the two male prisoners were seen dragging along the apparently insensible body by Kishto and Munda, and all the three prisoners were seen by Daro beating the deceased. I am satisfied that the defence of the second and third prisoners is false, and that Daro's story is true. I think that in favor of the prisoners it may be taken that the deceased had stolen, or was supposed by the prisoners to have stolen, their rice. Indeed, no other intelligible motive for the attack, except that assigned by the prisoners themselves, is suggested.

After a careful consideration of the facts, I think it clear that there is nothing to shew that the prisoners were acting in defence of their property so as to bring the case within Exception 2 in Section 300 of the Penal Code. According to the evidence of the witness Rhedhoy, the prisoner's cultivation is about a mile from the house. How far it is from the spot where Kishto heard what was probably the cry of agony of the deceased, the Judge did not enquire. And, in favor of the prisoners, it may be assumed that the attack on the deceased was made either in or immediately after she had left the cultivation of the prisoners with *dhan* belonging to them in her possession. Still, looking at the terrible character of the injuries sustained by the deceased, a wretched weakly half-starved old woman, it is impossible to come to any other conclusion than that the two male prisoners at least inflicted them *with the intention of doing more harm than was necessary for the purpose of the defence* or recovery of their property. Their object was no doubt to capture and revenge themselves on a plunderer. I think, therefore, that the two male prisoners have been rightly found guilty of murder. As they appear to have acted under provocation, and not to have intended actually to kill the deceased, which appear to me proved by their bringing home her body to their own house, and placing it by the fire to warm it, I would not confirm the sentence of death, but would sentence them to transportation for life.

As the only evidence against the female prisoner is that she struck and kicked the deceased, and as it may well be, and is probably the case that, in abetting the attack by the other prisoners, she was aiding or defending their common property, and had no intention of doing or causing any serious harm to the deceased, I concur in acquitting her.

Phear, J.—The three prisoners have all been convicted of murder in a trial held before the Court of Session of West Burdwan with the aid of two Assessors. The two Assessors concurred with the Judge only with regard to the first prisoner Gokool. They were unanimous in thinking that the evidence was insufficient to establish the guilt of Kishto and Oodoy. Under these circumstances, sentence of death was passed upon each prisoner, and the case now comes before this Court for confirmation of these sentences. The three prisoners have also appealed, and thus all the questions, both of law and fact, which arise upon the evidence (and they are several), are open before us. It is, strictly speaking, only necessary for me to state, as shortly as I can, the view which I take of the facts as I gather them from the depositions. But I think I am bound to remark at the outset that the record sent to this Court by the Judge as his notes of what the witness deposed to at the trial before the Court of Session is most meagre. If nothing more was elicited from the witnesses than appears on these sheets, I have no hesitation in saying that the trial was very incomplete and insufficient. There is nothing to indicate that the slightest cross-examination of the witnesses was attempted, nothing to show this Court that any enquiry was made into several circumstances of time, place, and motion, which suggest themselves on the evidence of the witnesses, and which, unexplained, render that evidence very unsatisfactory. Fortunately, the depositions taken at the preliminary investigation before the Assistant Magistrate, to some extent, supply what is wanting in the Judge's notes, and induce me to suppose that more came out at the trial than the Judge has put upon paper. If I am wrong in this supposition, the Judge was inexcusably negligent; for he must have had for his guidance in the conduct of the trial the depositions taken by the Assistant

Magistrate to which I have alluded, and which seem to me extremely good. Indeed, if I did not give the Judge the benefit of this supposition, I should be obliged to say that the preliminary enquiry before the Assistant Magistrate was much more full and searching than that at the final trial before the Court of Session. But, to return to the facts of the case, it seems to me tolerably certain that Gokool caught the old woman Kumnalli either actually stealing his paddy or coming from the direction of his plot of ground, under such circumstances as might well lead him to believe that she had been stealing it. The place where she was set upon was clearly not in the direct road from Heerapore; and, if the old woman had, as her daughters wish to have it believed, been returning from that place late at night, she would hardly have gone so far out her way as the back of Bholoy manjee's tank. Moreover, it is not said that any of the medicine which she is alleged to have gone to Heerapore for the purpose of fetching was found either on her person, or on the ground in the neighbourhood of the spot where the affray took place; nor has the medicine vendor been called to prove that she was at Heerapore at all on that evening. No doubt, this is negative reasoning, but I think the prisoners are entitled to the benefit of it; for it was clearly incumbent upon the prosecution to put these points beyond all doubt. Further, it seems certain that the old woman had committed thefts of this kind before. She was evidently very poor and half starved; and in this time of scarcity we need not seek further for an *à priori* probability in favor of the prisoner's story, so far as it regards the stealing; and, if the medicine errand is a fabrication, great corroboration is given to the hypothesis of the old woman's dishonesty, which is further strengthened by what I believe to be an admitted fact, namely, that the place where Kumnalli was attacked was either very close to Gokool's paddy field, or on the way thereto from Kumnalli's; but I put on one side the evidence as to the *dhan* relied upon by the prisoners, because there was so much opportunity for manufacturing it after the fact as to render it worthless; but it is, I think, to be regretted that no attempt was made to ascertain whether the basket in which the *dhan* was contained was capable of being identified as belonging either to the deceased or to the prisoners. On the whole, then, I think Gokool did, as he says, fall upon the old woman, and beat her under the belief that she was engaged in stealing his paddy. I also think that the two other prisoners were with him at the time, because Kishto, an apparently disinterested witness (although I would remark by the way that he seems of the same caste, if not family, as the deceased, and yet no enquiry appears to have been made whether he was or not) distinctly speaks to seeing them assisting Gokool in leading Kumnalli to his house. How far they took part in the actual beating is the next material question. To a certain extent the false *alibi* (as I believe it to be) set up by these two prisoners raises presumptions unfavorable to their innocence. The evidence of Kumnalli's daughter Daro is the only direct evidence on the point; and to my mind that is tainted with much suspicion of untrustworthiness. There are discrepancies of importance between her and her sister, and between what both these women said at the trial and their respective depositions made before the Magistrate; also they both speak to the presence of the prisoner's daughter at a time when the witness Kishto states that he did not see her, and when he must have seen her had she been there, as they say. However, according to Kishto, they were with the party when the deceased was being led home, and I do not doubt that Daro at least saw the beating. Her description of the occurrence is very natural and graphic. Indeed, to my mind it is more than probable that both these women were engaged with their mother in the act of stealing. It is mark-worthy that they alone, of all the village, except Kishto, heard the old woman's cries, and that so quickly that Daro was able to be on the spot sufficiently soon to see nearly all the beating. If the two women were with their mother, or close to her, the prisoner Gokool's statement is not altogether without foundation, although it would amount to a gross exaggeration of the actual facts. If these two witnesses said no more at the trial than is reported to us by the Judge, there has been, I feel obliged to repeat in my judgment, a lamentable failure of investigation in the case, considering that the lives of these persons depend entirely upon the color given to the facts by Munda Khinee and Daro. Their own conduct, during the whole of this eventful night, ought to have been most carefully sifted, and yet we are scarcely furnished with a single scrap of positive information on the point. When Kishto saw them by his account, they were crying and going on before their mother who was being led by two of the prisoners. By their

own account, they were following, at any rate they were making no alarm, and did not even complain to Kishto. The irresistible conclusion to me is that they were at that time more conscious of fault on their own side, than impressed with the wrongful conduct of Gokool. Again, this was certainly about 10½ o'clock at night by their own account and by that of every body else who could speak to it, and it is equally certain that no alarm was given or complaint made by the daughters to the police before 3½ A. M. What was the reason for the silence of these women during these intervening five hours; and what were they doing all that time? Munda Khinee, the first of the daughters, says that, after crying at the prisoners' door, she went home, and remained there till the Chowkeedars came to her in the morning. At the trial, Daro does not seem to have been asked a question on the subject. Before the Magistrate she said she went to call three Chowkeedars whom she named; but she did not mention the time of night when she did this, and Rhedhoy, a Chowkeedar, not one of these three, said that he went to Gokool's house at about 3 in the morning in consequence of hearing a noise, and that he found Munda Khinee crying there. In the commencement of his deposition before the Magistrate, he said that, while on his beat about 3 A. M., his attention was first called to the matter by hearing Gokool shout out that he had caught a thief. Further on, he gave another hour for this occurrence. He seems also to imply that the three Chowkeedars mentioned by Daro were with him, and that they all four went together to the house of Gokool. When they arrived, Munda Khinee was there crying. Daro was not there. The evidence of the other three does not accurately agree with this. Poresh says before the Magistrate that Daro came to call him in the road, coming from his *parah*, where she had been for him. He went to the house, and found the other Chowkeedars already there; and Sham, the third Chowkeedar, distinctly said that Daro came to him at his *parah*. While the fourth Chowkeedar Nobin deposed before the Magistrate that, when he was returning early in the morning from his rounds, he met Daro crying, and that was the cause of his going to the place. It thus appears that, while Daro clearly brought three of the Chowkeedars to the spot, about 3 or 3½ in the morning, the first Chowkeedar Rhedhoy came there in consequence of Gokool's calling him, possibly at a much earlier time, and so far the prisoner's story is supported. I cannot help thinking that there may also be truth in the prisoner's assertion that he made over the unfortunate woman and the daughter to Rhedhoy at an early period of the transaction. Undoubtedly, this part of the case ought to have received a most searching investigation, and yet the Sessions Judge considered it unnecessary at the trial even to take the evidence of the two last Chowkeedars at all. Whether or not the prisoner Gokool did, as he says, at an early period, invoke the aid of the police, he certainly led or carried the old woman to his house after the beating, and there (according to the evidence given by the daughters themselves before the Magistrate, but unaccountably not elicited at the trial) washed her, and tried to revive her by warming her before the fire. This seems to me entirely consistent with Gokool's statement that he had beaten the unfortunate wretch, because he found her stealing his paddy, and goes far to negative the supposition which the Judge appears to have entertained that he attacked her with the deliberate purpose of taking away life. Keeping in mind, then, all the conclusions to which I have arrived, bearing adversely on the conduct of the mother and daughters, and in some degree favorably to the prisoner, I cannot avoid further observing that both the daughters admit the existence of a quarrel between their mother and the prisoners, and both exhibit an anxiety by groundlessly implicating Kheti, to include every member of the prisoner's family in the present charge. To my mind all the foregoing considerations greatly affect the trustworthiness of Daro's evidence, when she, in describing the attack which she saw made on her mother, speaks of the active part which she makes the prisoners Kishto and Oodoy to take in it. Before the Magistrate she accused Kheti of having beaten her mother in concert with the prisoners; but at the trial she mentions the prisoners alone as the assaulting persons. Therefore, judging from the paper evidence only, I should be reluctant to convict Kishto and Oodoy solely upon Daro's testimony, with regard to their having inflicted blows on the deceased. Then I find that both the Assessors who sat with the Sessions Judge at the trial, and had the opportunity of observing the witness in the box, entirely disbelieved her; for they say: "There is no eye-witness "to Kishto and Oodoy having taken part in "the beating, as the evidence of the wit-"ness Daro is sufficient." Under these cir-

cumstances, I think I ought not to allow the specific statements which she makes against Kishto and Oodoy to have weight on my mind. Consequently, as far as I can gather from the evidence, the case stands thus: Gokool with his wife and son came upon Kumnalli stealing, or apparently stealing, his paddy about 10½ o'clock at night. It is not clear whether the prisoners were lying in wait up to the time of the occurrence, or had just then come out; but I have no doubt they were on the spot with the purpose and expectation of detecting thieves. On seeing Kumnalli (and possibly her daughters with her), Gokool, by his own confession, rushed forward, struck the unfortunate woman down with a *lattee*, and beat her most severely. I am not satisfied that his wife and son inflicted any blows themselves, or, at any rate, blows of a serious character; still, I think they intentionally aided and facilitated the commission of the act of beating. This being so, they are responsible as abettors of Gokool to the extent of their intentions when so abetting him. That these intentions reached to murder, or to the commission of any of those grave acts, which must, some one way or other, be found as an ingredient in the case before it can amount to even culpable homicide, I do not believe. To some degree, of course, the intentions of parties to a wrongful act must be judged of by the event. If nothing more were known than that Kishto and Oodoy were associated with Gokool in an attack upon Kumnalli which deprived her of life, it would be presumed against them that they intended the natural consequences of the attack. But here the case is not so. It was night, and there is nothing to shew that they were aware of the character of the blows actually inflicted by Gokool, while it is reasonably clear that their common purpose at the beginning was the innocent purpose of protecting their property. In carrying this out, they probably went a step farther than the strict letter of the law would allow; they desired to inflict, and intended to aid in inflicting chastisement upon the offender. Still, on the whole, I cannot bring myself to conclude that they were guilty of a higher offence than an assault. But the actual striker of the blows is very differently situated. The medical evidence shews that these were of a very brutal nature. The shoulder blade was fractured. The ulna of each fore-arm was broken. The phalanx of the left ring finger was also broken. There were contusions and abrasions all over the body, and the marks of two severe blows on the head; death ensued within a few hours, and was, without the least doubt, caused by the beating. The woman was not laboring under any disease, all her organs appear to have been perfectly healthy; on the other hand, she was very slightly formed, in a half-starved condition of body. Probably, too, no single one of the injuries inflicted, unless it were the blow on the head, would of itself have proved mortal. But, notwithstanding these latter considerations, I feel that there is no reasonable ground upon which I can withhold the conclusion that Gokool must have known when he was so barbarously using the poor old woman that he was thereby likely to cause her death; he must have known that his blows were collectively so imminently dangerous that they would in all probability cause such bodily injury as is likely to cause death. They did, in fact, cause death, and I must therefore find him guilty of murder, unless I can give him the benefit of one of the exceptions laid down in the Penal Code. The only exceptions which are in any way applicable to the case are the *first* and *second*. The *first* provides "that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation. Now, I certainly cannot say that the wretched Kumnalli gave Gokool grave and sudden provocation to beat her to death. In the *first* place, the provocation was not *sudden*, because Gokool by his own account *expected* to find somebody stealing his paddy; and, in the *next* place, it was not in my judgment (notwithstanding the very considerable value of the paddy to a poor man in a time of famine prices) so grave as to have reasonably deprived him of the power to moderate his blows. I am of opinion that it is not every case where self-control is lost which is protected by this exception, but only such cases as exhibit a provocation, which would, in the common course of things, be expected *à priori* to deprive the offender of self-control to a sufficient extent to admit of the fatal act being committed. The *second* exception provides that culpable homicide is not murder "if the offender in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the

purpose of such defence." With regard to this I need not explain what I conceive to be the proper scope of these words. It appears to me sufficient to remark that in this case the mere defence of the paddy certainly did not at most require more than a very slight imposition of hands. The injuries inflicted by Gokool were not simply *an excess* beyond what the law would have allowed for the purpose of such defence, but were altogether done beyond the pale of the law. In my opinion, therefore, neither exception shelters Gokool, and I am obliged to find him guilty of murder. Under all the circumstances of the case, however, I think that the extreme sentence of the law passed by the Sessions Judge is too severe, and I would commute it to transportation for life. The other two prisoners ought, in my opinion, to be acquitted.

Campbell, J.—I take the same general view of the facts as my learned colleagues. I have little doubt that, in truth, the deceased was detected stealing the prisoner's grain, and that on the impulse of irritation caused by her act she was very violently and brutally assaulted, and died in consequence.

The Judge does not give any good reason for the view which he takes, and, while condemning the Magistrate, does not, in fact, suggest any hypothesis whatever on which his own contrary view is founded. All question of deliberate assassination is, I think, clearly and positively negatived by the evidence. It is wholly impossible to suppose that, if the prisoners had planned the murder of the deceased, and waylaid her for the purpose, as assumed in a bare and unexplained way by the Judge, they would have openly brought her home to their house in the presence of her daughters, and tried to revive her by washing and warming her, as distinctly stated by the real prosecutrixes before the Magistrate. It seems to be perfectly clear that the prisoners had no intention of killing the deceased, but that one or all of them did brutally beat her, and so intentionally cause such severe injuries as were likely to cause death, and did, in fact, cause death, thereby committing culpable homicide of one kind or other.

As respects the guilt of the individual prisoners, Mr. Justice Phear has already written a judgment in which he enters so fully into the matter that I have only to express my general concurrence in his view of the evidence. The only evidence against Kishto and Oodoy is that of the woman Daro. Unless in the capacity of a co-thief (as suggested by Mr. Justice Phear), I should doubt her having really witnessed the assault at all. I can hardly imagine an attack of this kind to take so long that Daro could have come out of the village and actually witnessed it. If she was not one of the thieves who fled rapidly, I deem it quite as likely that she merely found the prisoners bringing home her mother, and, learning what had occurred, accused the whole family of the deed. At any rate, I do not think this woman's evidence sufficient to convict the prisoners Kishto and Oodoy, and I would release them.

It must be remembered that the first prisoner, Gokool, has throughout consistently stated that he struck the deceased five or six blows with his stick, and that he alone did so. Severe as the injuries are, I see nothing incredible in the statement of this man that he inflicted them by repeated blows.

The question remains, of what offence was Gokool guilty, *i. e.*, of culpable homicide only, or of culpable homicide amounting to murder?

In my view, the definition of murder in the Penal Code (which ties our hands, takes away judicial discretion, and renders necessary a very severe sentence for that offence) should be strictly and exactly construed. We are not to introduce any of the presumptions of law which, in regard to the offence of murder, have in England established a wide variance between law and fact, and have rendered murder in many cases as it were an artificial offence of a complicated and embarrassing character (*see* the late Report of Her Majesty's Commissioners on the subject). We are not, as I think, to presume that a man intended or knew the consequences of his acts, unless, looking to the whole evidence, we believe that he actually did know them. In this knowledge is one of the main distinctions between culpable homicide and murder. The prisoner Gokool intended to inflict blows on the deceased, and such blows were likely to cause death. That is culpable homicide. If it further appears that he knew that the blows were likely to cause death, then the culpable homicide is murder. But I construe the word "know" to signify a real and actual knowledge present to the mind at the time—not a constructive knowledge. If we suppose that Gokool, when

beating the woman, really did know and think that he was likely to kill her, it would be murder. I doubt whether he had any such knowledge, or thought of anything but beating her severely.

Again, independent of knowledge, if the blows intentionally inflicted were not only dangerous, but, more than that, were sufficient, in the ordinary course of nature, to cause death, the offence would be murder. Here I have considerable doubt upon the medical evidence. It is clear that none of the wounds were what would be called "mortal wounds," and the medical evidence leads me to doubt whether, combined, they would have been mortal to a man or woman in ordinary health: for the medical officer explains that he believes death to have resulted from the shock to the system of a person in the peculiarly weak and ill-nourished condition in which he describes the deceased—a condition which the prisoner, in the moment of catching a thief, could not know.

Further, it seems to me that the case comes under Exception 1, Section 300 of the Penal Code. The effect of that Exception appears to me to be that, when a homicide is committed without premeditation upon the passionate impulse of serious provocation, it is not murder, but what would be called in England "manslaughter" and under the Code is "culpable homicide." In the case, then, of a poor man whose early rice in these days of scarcity is peculiarly valuable to him, and who, after working in the day, is compelled by repeated thefts to sit up and watch it, who catches a thief in the act of stealing that rice, and who, on the impulse of the moment, rushes at the thief, and belabours him with a stick in a fatal way, is there not really grave and sudden provocation? Did he not act on the passionate impulse there resulting? I think that he did. In my view, then, this man who detects a thief stealing his rice, and who, acting on the sudden impulse of the moment, inflicts on her blows so severe as to be likely to cause death, but which he did not at the time know or feel to be likely to cause death, and which would not necessarily have caused death to a person in ordinary health, but which, owing to abnormal weakness in the deceased not known to him, did cause death—this man is on several grounds not guilty of murder, but only guilty of culpable homicide. The result will be that, under the sentence of Justices Norman and Phear, Gokool prisoner will be transported for life on the conviction of murder, while Kishto and Oodoy will be released on the concurrent order of Justice Phear and myself.

The 27th February 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Appeal (after time)—Rejection of.

Queen *versus* Hullodhur Ghose and *others.*

Committed by the Assistant Magistrate, and tried by the Officiating Sessions Judge of Nuddea, on a charge of dacoity.

An appeal preferred out of time and without any explanation of the delay may be rejected at once under Section 415 of the Code of Criminal Procedure.

THIS appeal has been preferred out of time, and might, therefore, as no explanation of the delay has been given, be rejected at once under Section 415 of the Code of Criminal Procedure.

I have, however, gone over the Sessions Judge's charge. All the evidence appears to have been fully and carefully laid before the Jury; and, as a majority found all the prisoners guilty, there is (no point of law being either raised or involved) no ground for interference.

The appeal must be rejected.

The 8th February 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Murder—Grievous Hurt—Referred case (Power of High Court as to wrong conviction in).

Queen *versus* Sheikh Solim, Bysagoo, Sheikh Bengoo, and Sheikh Koreem.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of culpable homicide not amounting to murder, &c.

It is not murder, if a person kills another without intending to take his life, and if the acts done are not such as conclusively indicate an intention to cause such injury as was likely to cause death.

In a referred case, and not an appeal, if the High Court deems a conviction wrong, the only course open to it is to annul the conviction, and order a new trial for the proper offence.

THIS is a case referred to the High Court by the Court of Session for confirmation of the sentence of death which has been passed upon four prisoners who have been convicted of murder. After reading the whole of the evidence, and giving the case the fullest consideration, the conclusion at which we arrive is that we cannot confirm the sentence, and that the conviction for murder is wrong. There is no question that the deceased was treated by the prisoners in a very cruel and barbarous manner, and that he died in consequence of that treatment. Nevertheless, we think it clear that the acts of the prisoners were not accompanied by that *intent* or that *knowledge* which are essential under the Penal Code to the offence of murder.

The deceased was caught the night before his death in a house which he had entered for the purpose of committing theft. The owner of the house, after being seriously wounded by the deceased, secured him. In the morning the headmen of the village were sent for, and, having come and seen the thief, went away, leaving him in charge of the village chowkeedar. The deceased was then sitting in the verandah or door-way of the house, where he was caught; one hand was loose, the other hand and his feet were tied, and the end of a rope which was passed round him was secured to one of the beams or posts of the house. The chowkeedar being left in charge, many of the neighbours appear to have come to look at the thief, and amongst others came the four prisoners. Then commenced the ill-treatment, of which the deceased eventually died. On the evidence, it seems clear that all the prisoners at intervals struck the deceased with their fists and kicked him, and the prisoner Bysagoo (and probably also the prisoner Bengoo) also struck the deceased with a *pera*, a small wooden foot-stool, which was lying close by; one or two very violent blows were struck with the *pera*, and by one of them the nose of the deceased was broken. It is this use of the *pera* which, in our opinion, alone affords any sort of evidence on which a conviction of murder could be based. But, considering the nature of the instrument (the Sessions Judge, who saw it, says it was not a heavy one), we do not think that its use necessarily leads to the conclusion that the person using it did so with the intent or knowledge necessary to constitute murder. The medical evidence shows that the deceased did not die from the effect of any one blow, but that he sank from the shock which his system received from the continued pommelling and blows, which were such as to cause considerable internal injuries, although no one of these injuries in itself would have caused death. Throughout the ill-treatment the chowkeedar (who is one of the witnesses for the prosecution) stood by and never assisted the deceased in the least. In the course of a couple of hours, the deceased became insensible, and soon after died. Looking at all the circumstances, we cannot concur with the Sessions Judge in the finding that the prisoners acted, as they did, with the intention of causing death, or with the intention of causing such bodily injury as was likely to cause death, or with the knowledge that they were likely by such acts to cause death. Without such intent or knowledge the prisoners have not committed the offence of culpable homicide (Section 299), and consequently have not committed the offence of murder (Section 300). As it appears to us, the prisoners ought to have been tried and convicted on a charge of voluntarily causing grievous hurt, which offence they did commit, inasmuch (even supposing there were no other evidence of it) as the bone of the nose of the deceased was broken. They did intend to beat the deceased severely, and did commit grievous hurt, and they should be punished accordingly. But they did not intend to take the man's life, and the acts they did are not such as conclusively indicate an intention to cause such injury as was likely to cause death. The whole occurrence took place in the presence of the

chowkeedar, whose conduct was as bad as possible, and it appears to have commenced with the prisoner Solim, who struck and kicked the deceased on his saying to the chowkeedar that it was he (Solim) who had instigated him to the theft. Bengoo, on coming in, said: "We work all day, and this wretch will not let us sleep at night," and then struck him. And so it went on till the deceased sank under it. Barbarous as were the acts of the prisoners, we cannot say that we think they amount to murder.

As we think the conviction is wrong, the only course open to us, under Section 399 of the Criminal Procedure Code, is to annul the conviction, and order a new trial for voluntarily causing grievous hurt to the deceased.

We regret that, as the minor offence for which we think the prisoners ought to have been tried is in fact included in the major offence for which they have been found guilty, we cannot at once alter the conviction and sentence, and so dispose finally of the case. But it seems to us that, as this is a *referred case*, and not an *appeal*, Section 399 makes it imperative on us to annul the conviction, and order a new trial. We cannot deal with the case as a Court of Revision, for none of the Sections applicable to revision contemplate a case such as this. And Section 426 does not in any way assist us, because we have not this case before us either on appeal or revision.

The conviction and sentence are annulled, and a new trial is directed for voluntarily causing grievous hurt.

The 12th February 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Murder—Culpable Homicide not amounting to Murder—Actual, not constructive, intention.

Queen *versus* Gureeboollah, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder, &c.

Under the Penal Code, no constructive, but an actual, intention to cause death is required to constitute murder. Thus, where a lad of 15 years, in the heat of discovery of the deceased in the act of adultery with a near relative's wife, and, without the use of any lethal or other weapon, joined that relative in committing an assault on the deceased who died from the effects thereof: HELD that the offence committed was culpable homicide not amounting to murder.

IN this case, it is found by the Court of Session that Surat and Gureeboollah (appellant) together inflicted on deceased such injuries as they knew to be likely to cause death, and which, in fact, did cause death. The Sessions Judge finds that in truth the assault was committed in consequence of the discovery of deceased in the act of adultery with Surat's wife, and in the heat of that discovery. This he considers a sufficient provocation to reduce the offence to culpable homicide in the case of Surat the husband, but not in that of Gureeboollah. He accordingly sentences Surat to one year's imprisonment for culpable homicide, and Gureeboollah, a lad of 15, to transportation for life for murder! We think that this is one of the cases in which Sessions Judges seem of late to have a good deal overstrained the Law of Murder. Under the Penal Code, no constructive, but an actual, intention is required. It is admitted that the prisoners had no intention to cause death, and there is much in the evidence (*e. g.*, the treatment of the deceased after the beating, the sending for his mother and for a doctor, &c.) to negative the theory that they knew they were likely to cause death. At any rate, it may be doubted whether the appellant, a lad of 15, really knew it. Moreover, we think that, as it is shown that the lad Gureeboollah was with Surat at the time of the discovery of the wife's adultery, and that he was a near relation of Surat's, there was sufficient provocation in his case also to excuse or mitigate his conduct in assisting Surat to beat the deceased. In this case, there is no evidence of the use of any weapon of a lethal character, or, in fact, of any weapon. Still the injury actually inflicted was so severe that we are not prepared positively to say that the conviction is wrong to the extent of culpable homicide, but we do not think that the homicide amounts to murder. We accordingly, so far, alter the conviction, and, in place of the sentence passed on Gureeboollah, pass a sentence of one year's rigorous imprisonment.

The 26th February 1866.

Present:

The Hon'ble L. J. Jackson and F. A. Glover, *Judges.*

Forgery in Civil Court (before 1st January 1862)—Criminal prosecution how to be instituted.

Queen *versus* Enayet Hossein.

Committed by the Judge of Patna on a charge of forgery.

In a case of filing a forged *vakalutnamah* in a Civil Court before 1st January 1862, the prosecution can only proceed in the ordinary way, *i. e.*, by way of commitment by a Magistrate on the complaint of the party aggrieved.

THIS is an application complaining of an order of the Judge of Patna, by which the petitioner, Enayet Hossein, has been committed for trial on a charge under Section 471 of the Indian Penal Code.

The commitment has been made by the Judge himself under Section 173 of the Criminal Procedure Code.

* * * * *

The charge relates to a *vakalutnamah* filed in the name of certain defendants in a suit where Enayet Hossein, the petitioner, was plaintiff in 1858, under which a confession of judgment was entered, and decree accordingly passed against the defendants.

A suit was afterwards brought to set aside this decree as obtained by fraud, and the High Court, in giving judgment on appeal in the case (14th September 1864), ordered enquiry into the circumstances with a view, no doubt, to a criminal prosecution being instituted.

The Judge has gone very fully into the enquiry—as fully, it seems, as if he was trying the charge of forgery or using forged documents—and has committed the petitioner for trial.

The objections to this commitment are two—*first*, that, as the offence (if any) was committed in 1858, the provisions of Chapter XI. of the Code of Criminal Procedure will not apply; *secondly*, that, if they did, the Zillah Judge was not the proper authority to make the commitment, inasmuch as his Court was not the "Court of Civil Judicature before which the offence was committed" (Section 173, Code of Criminal Procedure).

We think both these objections are valid.

On the *first* point we follow the precedent at Vol. V., Weekly Reporter, p. 8, in the case of Radha Jewun Mustafee, petitioner (Phear and Glover, Judges), where, in an analogous case, it was held that, with adverten ce to the provisions of Act I. of 1848 (which was held to apply), the prisoner could not be brought to trial otherwise than with the sanction of the Court before which the forgery was committed; and that the sanction of the Superior Court, which, by the wider terms of the Criminal Procedure Code, Section 170, would be sufficient, could not be lawfully given in case of a forgery committed before the 1st of January 1862, and was, therefore, inoperative.

In that view we concur, and we are of opinion that the present case also must be governed by the rules of criminal procedure as they stood previously to the coming of the new Code into operation.

The case before us was not a case to which Act I. of 1848 applied, because, as held by the late Court of Nizamut in several cases (which may be found in Mr. Beaufort's very useful Digest), that law referred only to "Deeds and Papers offered in evidence against the adverse parties," and did not extend to *vakalutnamahs* alleged to have been fabricated.

In such a case, the prosecution would proceed in the ordinary way, *viz.*, by way of commitment by a Magistrate on the complaint of the party aggrieved.

The commitment by the Judge in the present case was, therefore, wholly without jurisdiction.

And on the *second* head of objection, it appears that the *vakalutnamah* was filed and possibly "used" within the meaning of Section 471 of the Indian Penal Code in a subordinate Civil Court (that of the Principal Sudder Ameen), and not in that of the Judge.

If, therefore, Section 173 applied to the case, it would be the Principal Sudder Ameen, not the Zillah Judge, who could commit. But it is doubtful whether the terms of this Section, any more than those of Section 1 of Act I. of 1848, apply to a case like this.

For these reasons, finding the order of commitment made by the Judge to be made without jurisdiction, we order that it be quashed, and that all proceedings thereon be stayed.

The 3rd March 1866.

Present :

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Defamation—Proof of publication (Despatch by Post).

Queen *versus* Kally Doss Mitter and others.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of defamation.

In a case of defamation, proof of despatch by post to a certain district of the paper containing the defamatory matter is tantamount to proof of publication thereof in that district.

THIS case turns on the question whether or not the Editor of the Dacca Newspaper sent a copy by post to Backergunge, where it would, in the due course of events, be opened and read. If it were proved that he did so send the paper, he would in law be considered as having published it in the Backergunge District (*vide* this Court's Ruling, No. 1043, 14th December 1863).

The Joint Magistrate appears to have taken up this question, and to have decided it in favor of the defendants, on the ground that there was no proof of the Editor's having posted the newspaper to the address of the witnesses in Backergunge. This finding may very probably not be justified by the facts of this case: still it is a finding on evidence with which this Court cannot interfere under Section 434 of the Criminal Procedure Code.

The 3rd March 1866.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Transportation—Imprisonment.

Queen *versus* Shonaullah and Adoo.

Committed by the Magistrate of Fureedpore, and tried by the Sessions Judge of Dacca, on a charge of hurt and rape, &c.

A sentence of transportation cannot be less than 7 years. To bring Section 59 of the Penal Code into operation, the punishment awarded in each offence alone must be not less than 7 years' imprisonment. A general sentence of transportation for two or more offences, when only one of the punishments awarded is 7 years' imprisonment, is illegal.

WE think the evidence in this case sufficient for conviction, and see no reason to interfere with the Sessions Judge's order so far.

But it has been frequently ruled by this Court (Queen *versus* Motee Kora, 2 W. R., p. 1) that a sentence of transportation cannot be for less than 7 years, and that, to bring Section 59 of the Penal Code into operation, the punishment awarded in each offence alone must be not less than seven years' imprisonment. A general sentence of transportation for two or more offences, when one only of the punishments awarded is seven years' imprisonment, is illegal. We desire to know whether any notice has been taken of what appears to have been great negligence on the part of the police in not taking up this case for nearly a month after it was reported at the station. A charge of such gravity, involving rape, hurt, and robbery, should have been investigated at once, and not have been postponed under any circumstances.

The convictions are affirmed, but the sentence is altered in the case of both prisoners to seven years' transportation on the first, and five years' rigorous imprisonment on the others.

The 3rd March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor and J. P Norman, *Judges.*

Distinctions between Murder and Culpable Homicide—Also between Appeal and Revision—Powers of High Court as a Court of Revision—Abetment.

Queen *versus* Gora Chand Gopee and others.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of murder, &c.

Several important distinctions pointed out between murder and culpable homicide.

Sections 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the High Court, as a Court of Revision, thinks it right to take up. The difference between appeal and revision explained.

The High Court, as a Court of Revision, can interfere with a judgment of acquittal or conviction, and can also enhance punishment.

The High Court can act as a Court of Revision, after it has acted as a Court of Appeal, in order to correct an error in law which could not be set right on appeal.

The High Court, as a Court of Revision, cannot reverse the finding of a Jury.

If several persons go out together to apprehend a man and take him to the Thannah on a charge of theft, and some of the party in the presence of the others assault and ill-treat the man, all present do not necessarily by their presence assist every act done, nor are consequently liable as principals.

Peacock, C. J. (Trevor and *Norman, J J., concurring).*—THERE are, in my opinion, several important distinctions between murder and culpable homicide. An offence cannot amount to murder unless it falls within the definition of culpable homicide : for Section 300 merely points out the cases in which " culpable homicide is murder." But any offence may amount to culpable homicide without amounting to murder.

Culpable homicide is not murder if the case falls within any of the exceptions mentioned in Section 300.

The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in Section 300.

Causing death with the intention of causing bodily injury to any person, if the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, in my opinion, falls within the words of Section 299 " with the intention of causing such bodily injury as is likely to cause death," and is culpable homicide. It is also murder, unless the case falls within one of the exceptions in Section 300, Clause 3.

Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder even if it does not fall within any of the exceptions mentioned in Section 300, unless it falls within Clause 2, 3, or 4 of Section 300, that is to say, unless the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or with the intention of causing bodily injury to any person ; and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or unless the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death.

In speaking of acts, I, of course, include illegal omissions.

There are many cases falling within the words of Section 299 " or with the knowledge that he is likely by such act to cause death " that do not fall within the 2nd, 3rd, or 4th Clause of Section 300, such for instance as the offences described in Sections 279, 280, 281, 282, 284, 285, 286, 287, 288, and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But, although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in Clause 2 or 3 of Section 300.

As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as to bring the case within

the 4th Clause of Section 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for ten years, or imprisonment for ten years with fine (*see* Sections 304 and 59); or, if a European or American, he would be subject to penal servitude instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of Section 304 would not apply to the case. That applies only to cases which would be murder if not falling within one of the exceptions in Section 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, &c., as in Clause 4, Section 300.

From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

Suppose a gentleman should cause death by furiously driving up to a Railway Station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus; that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one, and to cause death. Would any one under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the Judge or Jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing of death was such that he must have known and did know, that his act must in all probability cause death, &c., within the meaning of Clause 4, Section 300.

If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment.

It appears to me that the rules contained in Sections 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the Court, as a Court of Revision, thinks it right to take up.

An appeal is a matter of right in all cases in which an appeal is given, but a revision is in the discretion of the Court. An appeal is for matter of fact as well as for matter of law. A revision is only on matter of law. The two cases, therefore, are very different.

When Section 407 says that an appeal shall not lie from a judgment of acquittal, it means that the prosecutor shall not, as a matter of right, be entitled to apply to reverse the judment of acquittal, either upon the facts or upon the law. But Section 404 authorizes the Court to call for and examine the record of any criminal trial in which it shall appear that there has been error in the decision upon a point of law, and may determine any point of law arising out of the case, and thereupon pass such order as to the Court may seem right. Section 405 enacts that it shall be lawful for the Court to call for and examine the record of any case tried by a Court of Session for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of the Court. If it appear to the Court that the sentence passed is too severe, the Court may pass any mitigated sentence warranted by law. If the Court shall be of opinion that the sentence or order is contrary to law, the Court shall reverse the sentence or order, and pass such judgment, sentence, or order, as to the Court shall seem right, or, if it deem necessary, may order a new trial. The word "sentence" in the latter Section may mean the award of punishment merely, or the whole judgment including the finding. If it refers only to the award of punishment, the finding would stand; and I can scarcely see the necessity or use of the words "or may order a new trial." The words "sentence or order" are in many Sections used as including the finding, and not merely the award of punishment (Sections 415, 416, 417, 420); but whatever may be

the construction of the word "sentence" in Section 405, there can be no doubt that, under Section 404, the Court may set aside a judgment of acquittal for error in point of law. Suppose the decision of a Judge should be monstrously absurd. Suppose, upon an indictment for murdering a child, the Judge and the Assessors should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned in Section 300 of the Penal Code. But suppose they should also find that the child was under the age of six months, and the Judge should hold that it was not murder to kill a child under that age, and should, therefore, acquit the prisoner, and order him to be discharged, could it be contended that the judgment of acquittal could not be set aside, and that the prisoner should go free for ever? I apprehend that the Court, as a Court of Revision, would clearly have the power to set aside the judgment of acquittal, and declare that, upon the facts found, the prisoner was guilty of murder, and sent the case back to the Judge, ordering him to apprehend the prisoner (if he had been discharged), and to pass the proper sentence upon him.

If, in the case above supposed, the Judge were to say it is not necessary to try whether death was caused by an act done with the intention of causing death, because, if it was so caused, the prisoner was not guilty of murder, I find that the child was under the age of six months, and, therefore, acquit the prisoner. In such a case, there would be no finding on the facts, and the Court, as a Court of Revision, would merely set aside the acquittal, and order a new trial. I have supposed an error in law which is not likely to occur. I put it merely as an illustration. There are many constructions of law equally erroneous, though not so clearly so.

Again, suppose a Magistrate, in a case triable by him, should convict of an offence, and the Sessions Judge on appeal should, without going into the facts, reverse the decision upon a point of law, and order the prisoner to be discharged, stating that, assuming the facts to be as found by the Magistrate, the prisoner was not guilty of an offence. This Court, if the Judge were wrong in point of law, could, as a Court of Revision, reverse his decision, and direct him to try the appeal upon its merits.

If a Judge on appeal should uphold the finding of a Magistrate on the facts, and reverse his decision on a point of law, and pronounce a judgment of acquittal, and order the prisoner to be discharged, then, as the acquittal would be merely on a point of law, this Court, as a Court of Revision, might reverse the judgment of acquittal, and order the sentence of the Magistrate to stand.

There are also cases in which, notwithstanding Section 419, the Court, as a Court of Revision, could enhance a punishment.

In the case of Bourne *versus* the King (9 Adolphus and Ellis's Reports, p. 58) it was held that a sentence of transportation for an offence for which the only punishment was death was erroneous, and must be reversed. The Court held that they could merely reverse the erroneous sentence, but could not pass the right one, and the prisoners were discharged.

The law was amended by 11 and 12 Vict., c. 78, by which the Court, upon reversing an erroneous sentence, may give the proper judgment. Here, under Section 405, the Court, as a Court of Revision, has a similar power; but, in order to do so, it may be necessary to enhance the punishment. In the case suggested by Mr. Justice Campbell, if a Sessions Judge should pass sentence of rigorous imprisonment for 14 years for murder, such a sentence would be bad, for it is not authorized by law (Section 302 of the Penal Code); or, if he should pass sentence of transportation for 7 years for the offence of murder committed by a person under sentence for transportation for life, the sentence would be contrary to law (*see* Section 403, by which death is the only punishment which can be awarded).

In such cases, the Court, as a Court of Revision, could under Section 405 reverse the sentence, and pass the proper sentence, notwithstanding that in such a case the sentence must be enhanced in order to pass a legal sentence—in the former case from 14 years' rigorous imprisonment to death or transportation for life—and in the latter from transportation for seven years to sentence of death. Section 405 says: "If the Court shall be of opinion that the sentence or order is contrary to law, it shall reverse the sentence or order, and pass such judgment, sentence, or order as to the Court shall seem right, or, if

it deem it necessary, may order a new trial." In the case supposed in which a prisoner under sentence or transportation for life should be found guilty of murder, and sentenced to transportation for 7 years, the Court might think the finding right upon the evidence, and there would, therefore, be no necessity for ordering a new trial. In such a case, a question might arise whether the Court would be bound to pass the only legal sentence, *viz.*, death, or might send the case back to the Sessions Judge to pass the sentence. I am of opinion that the Court might send the case back with an order to pass the proper sentence under the words "shall pass such judgment, sentence, or order," &c.

In the case supposed, of a prisoner being sentenced to 14 years' rigorous imprisonment for murder, upon setting aside the erroneous sentence, the right sentence would be a discretionary one, *viz.*, "death or transportation for life." In such a case, I think, the Court ought to send the case back for proper sentence to be passed in the same manner as it would do under Section 402.

By the Statutes 11 and 12 Vict., c. 78, s. 5, the Court, when it reverses a judgment, may either pass a proper judgment, or remit the case to the Lower Court, in order that such Court may pass the proper judgment. It appears to me that in all cases in which the Court as a Court of Revision thinks it right to reverse an acquittal on a point of law, or to reverse as erroneous a sentence, in order that the right sentence may be passed, if the right sentence would enhance the one already passed, the offender should have an opportunity of being heard by himself, or his pleader or agent, either before the Lower Court if the case is remitted to it, or before the High Court if the Judges pass the proper sentence themselves.

The Court may act as a Court of Revision after it has acted as a Court of Appeal, if it found it necessary to do so in order to correct an error in law which cannot be set right on appeal.

For instance, if a man should be found guilty of a murder, and sentenced to 7 years' transportation, if the prisoner should appeal on the facts, the Court might uphold the finding of guilty of murder on appeal, and afterwards, as a Court of Revision, might set aside the sentence of 7 years' transportation, and pass a legal sentence for murder, or send it back to the Lower Court to pass such sentence, pointing out, as they would in a case under Section 402, what is the proper punishment.

As a Court of Revision, the Court cannot reverse the finding of a Jury.

In the present case, the attention of the Judge should, I think, be called to another error which he committed. He says, the prisoners who were present assisting in taking away Oomadee, and assisting by their *presence in the beating* of him, abetted the commission of culpable homicide not amounting to murder.

It does not follow that, because they were present with the intention of taking him away, they assisted by their presence in the beating of him to such an extent as to cause death.

If the object and design of those who seized Oomadee was merely to take him to the Thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the other, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention.

It is also said that, although a man is present when a felony is committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon.

But if several persons go out together for the purpose of apprehending a man, and taking him to the Thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was; all that I wish to point out is that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.

The 5th March 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

House-breaking and Theft—Punishment for.

Queen *versus* Chytun Bowra and others.

Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of house-breaking, &c.

A person convicted of house-breaking, followed immediately by theft, is punishable only under Section 457 of the Penal Code.

THE point has been frequently ruled. A prisoner convicted of house-breaking, followed immediately by theft, would be punished under Section 457 of the Penal Code only (*vide* Circular Letter, 1842, 6th December 1864; and decisions of High Court, 25th January 1865).

The Assistant Commissioner's order was, therefore, wrong; and, as the prisoners have already been whipped for theft, they must now be released, as only one punishment could legally have been inflicted.

The 5th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Receiving stolen property—Jurisdiction.

Queen *versus* Ghusoo Khan.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of dishonest retention of stolen property with guilty knowledge.

To make it legal to punish at *P* a prisoner committed at *C* on a charge of receiving stolen property, the finding must be that the property was stolen at *P*.

Campbell, J.—THE prisoner has been convicted by a Jury, and urges no ground of law in his appeal. The only point on which I have any doubt is, that there seems to be some want of the precision in the finding which would be strictly necessary to make it legal to punish the prisoner at Patna for an offence committed in Calcutta, *viz.*, receiving stolen property. To give jurisdiction at Patna under Section 31 of the Code of Criminal Procedure, it would seem to be necessary that the property was stolen in Patna, that is in this case that it was the stolen property of Alee Sheikh and Ahad Shah, as alleged by the prosecution; whereas the finding is in very general terms that the prisoner "receivedstolen property having reason to believe the same to have been acquired by theft." I call for the papers, and when they come, the case will be laid before the 4th Bench.

Norman and Campbell, JJ.—The papers have been received. The evidence shews the property to have been stolen at Patna, and, although not directly expressed in words, we may consider that the finding of the Jury was in effect a finding that the property was the property stated by the witnesses to have been stolen in Patna. We dismiss the appeal.

The 5th March 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Bribery—House-trespass—Extortion.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Government *versus* Mahomed Hossein and others.

Where a Constable and others enter a house and apprehend certain persons as gamblers, and afterwards release them on payment of a sum of money by the latter, the offence committed is not house-trespass and extortion, but taking a bribe as regards the Constable, and abetment of that offence as regards the others.

THIS is a case referred for the order of this Court by the Sessions Judge of Gya under the 434th Section of the Code of Criminal Procedure. It appears that, on the 17th October last, certain *bunneahs*, who are the prosecutors in the case, were either writing their accounts, or gambling in the house of one of their number.

The prisoners, four in number, one of whom is a Constable, and one a Chowkeedar, knocked at the door, entered and apprehend-

ed the *bunneahs* (as the Sessions Judge says, bound them with cords, though the Magistrate did not find that fact proved), and subsequently promised them that they should be released on paying 15 rupees, which was accordingly done.

The Joint Magistrate convicted the Constable of "taking a bribe" under Section 161 of the Penal Code, and the three other prisoners of "abetting" that offence.

The Sessions Judge suggests that this conviction is erroneous, and that the prisoners should have been convicted of "house trespass" and "extortion" under Sections 451 and 384 of the Penal Code.

We think it clear that the conviction is correct, and that the offence under Section 161 has been committed. We are by no means sure that the prisoners might not have been convicted of robbery under Section 390; but, as it is clear that the offence under Section 161 has been committed, we see no reason to interfere with the conviction, although we regret that the sentence, which is only 6 months' imprisonment, was not more severe.

The 6th March 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Seduction (of Wife during Husband's temporary absence).

Referred under Circular Order No. 17, dated the 17th June 1863, and Section 498 of the Indian Penal Code.

Mutty Khan *versus* Mungloo Khansama.

Enticing or taking away with a criminal intent a wife living in her husband's house, or in a house hired by him for her occupation and at his expense during his temporary absence, is punishable under Section 498 of the Penal Code, provided the seducer knew, or had reason to know, that she was the wife of the man from whose house he took her.

THE sole point referred by the Assistant Magistrate is whether a woman, who "eloped with defendant from a house in the suburbs of Calcutta, hired for her by the complainant, her husband (who was absent in Assam)," could be said to have been "taken or enticed away from" her husband.

We have no doubt that the defendant, if under such circumstances he enticed or took away the woman, did entice or take her away "from her husband."

We cannot say, as the Sessions Judge says, that "a wife is always the property of her husband, whether he is absent or present;" but we think it quite clear that a wife living in her husband's house, or in a house hired by him for her occupation, and at his expense, is, during his temporary absence, living under his protection so as to bring the case within the meaning of Section 498—provided, of course, that (to make the defendant liable) he knew, or had reason to know, that she was the wife of the man from whose protection he took her, or, on whose behalf the person from whom he took her had charge of her, and also provided that he took her with the intent specified in the Act.

To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code.

Being, therefore, of opinion that the Assistant Magistrate's decision was wrong in law, and seeing that the offence was one which he could not try, we quash his order, and direct him to proceed according to law.

The 6th March 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Jurisdiction—Commitment by Civil Court for Forgery—Estoppel.

Miscellaneous case.

Juggut Misser and others *versus* Baboo Lall and others.

A former decision in a civil suit, in which the issue was the genuineness or otherwise of a kubooleut, and the Court held that it was not genuine, but added (as an *obiter dictum*) that the pottah produced by the other side was authentic, does not bar the jurisdiction of a Civil Court in sanctioning a commitment for forgery in respect of the pottah.

THE papers of this case were sent for by Mr. Justice Kemp and myself on the 15th of February last, and the record is now before the Court.

Mr. Stephen for the petitioner contends that the Court sanctioning the commitment had no jurisdiction, the case in which the *pottah* was presumed to be spurious having been already decided between the same parties, and on the same ground of action, in the Collector's Court, under Act X of 1859.

This does not appear to be exactly the case. In the suit brought under Act X., the point for decision was whether a certain *kubooleut* was genuine or not, and the Court held that it was not genuine, adding that the *pottah* produced by the other side was authentic. Now, any opinion regarding the goodness or otherwise of the *pottah* was an "*obiter dictum*," the point for decision being not whether the *pottah* were genuine or not, but whether the *kubooleut* was so. It has been ruled in the case of Oomanath Roy Chowdhry *versus* Rajanath Mitter and others (Hay's Reports, page 75), one on all fours with this, that a former decision, in which the issue was the *bona fides* or otherwise of a *kubooleut*, was not conclusive against a party suing to have a *pottah* cancelled, and that any remarks on the genuineness of the latter document in the former case were foreign to the issue, and did not prevent the subsequent civil suit.

It is true that the question as to the Civil Court's jurisdiction under Section 20 of Act VIII. of 1859 is now before this Court in special appeal, but, in the face of the judgment above quoted, it would not seem to be in any way necessary to delay the proceedings of the Criminal Courts pending the result of that appeal.

And, had the petitioner made out his case in other respects, I doubt whether, under any circumstances, the proceedings now going on before the Magistrate could be stayed, with advertence to the Full Bench ruling of the 31st of January last.

The 9th March 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Default (by Complainant's Witnesses)—Holding of Court in place not named in Summons.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Luckhim Molloo and others

versus

Gooroo Doss Mookerjee and others.

Where the default of complainant's witnesses was caused by the Deputy Magistrate shifting his Court to a place different from that named in the summons—HELD that it was irregular to throw out the case without giving them a second opportunity of appearing.

WE think that the Deputy Magistrate's order has caused a failure of justice in this case. The complainants did all that the law required of them, and, as the default of their witnesses was caused by the Deputy Magistrate shifting his Court to a place different to that named in the summons, it was irregular to throw out the case without giving them a second opportunity of appearing.

We, therefore, quash the Deputy Magistrate's order, in concurrence with the recommendation of the Sessions Judge, and remand the case to the first Court for a proper and legal investigation.

The 10th March 1866.

Present:

The Hon'ble G. Campbell, *Judge.*

Evidence—Dacoity.

Queen *versus* Modhoo Manjee and others.

Committed by the Magistrate of Balasore, and tried by the Sessions Judge of Cuttack, on a charge of dacoity.

Nature of evidence requisite to be taken in a case of dacoity.

THIS is one of those cases which it is difficult to believe, and at the same time difficult to disbelieve. It seems very improbable that dacoits should in this unsettled country, where no open resistance is made to the Police, commit a dacoity, without the very least disguise, in a place where they were well known, upon persons who knew them well, in the presence of many spectators who also knew them well, and should be recognized and denounced as a matter of course.

In such a case a doubt always suggests itself whether the witnesses really did recognize the prisoners at the time, or whether they merely tell a story, which, on other grounds, they believe to be essentially true. Still, in this case, the evidence to recognition is unusually strong. It is to be observed, too, that the witnesses did not slavishly tell the same identical story. They do not all recognize exactly the same prisoners; and some of the variations, to my mind, tell in favor of their credibility, al-

though, in the case of one or two witnesses, the variations were so excessive that, as the Sessions Judge says, their evidence cannot be relied on. The Sessions Judge has, up to a certain point, very carefully tried the case with a most anxious and impartial desire to do justice, and he thoroughly sifted the evidence for or against each prisoner. So far, then, I should see no ground for interference with the concurrent verdict of the Sessions Judge and Assessors; and, as respects the measure of punishment, it only seems to me that, under the very heinous circumstances of the case, the prisoners have perhaps been too leniently dealt with.

But there is one point on which it seems to me that the evidence is deficient, a point on which I must always absolutely insist in cases of this kind, namely, that it should be made clear exactly when and under what circumstances the prosecutor and witnesses denounced the persons whom they swear to have recognized. And in every case, now that we have not the old Form of Police Record, I consider that it should be an invariable rule that the whole facts and circumstances under which the case was brought to light should be proved in evidence. I regret to say that this is too often altogether wanting; we have not the old Police papers, and we have no evidence in their place. It is so notably in this case. The dacoity occurred on the 18th of July; the case was sent in by the Police on the 18th August, exactly one month later; but of all that occurred during that month, excepting only the formal searching of the houses, and how that search was brought about, does not appear. We have no evidence whatever.

Two Police Constables were examined, but only as witnesses to the formal search of one or two houses. The Inspector of Police, who seems to have enquired into the case, was examined before the Magistrate, but upon that point only; and, though he was put down as a witness before the Sessions Judge, the Sessions Judge, for some reason wholly unexplained, did not examine him at all. From a statement made by the Inspector before the Magistrate, it may be gathered that the District Superintendent of Police took part in the proceedings, but he is neither examined, nor does his name elsewhere appear. The Sessions Judge has also wholly omitted to test the credibility of the principal witnesses to the recognition on the point which I have suggested, by asking when, how, and to whom they first denounced the prisoners. They are well examined as to what occurred at the actual dacoity, but as to their subsequent conduct there does not seem to be a word. I do not think that I can justly dispose of the case without evidence upon this point. The Sessions Judge is, therefore, directed to take evidence to show what was the conduct of these witnesses after the dacoity, whether they at once denounced the prisoners, what were the first reports made to the Police, and by whom and what dacoits were mentioned by name in those reports; how, when, and under what circumstances the prisoners were arrested; what clues led to the search of houses and other proceedings, and generally what was done in the case from the 18th July till it was sent in to the Magistrate. He will summon the Police Officers concerned, including the District Superintendent, require them to produce their books and papers and every thing which may throw light on these facts, and he will take any other evidence likely to clear them up. After which he will submit the papers with his own opinion whether it appears that the witnesses have really, from the very time of the occurrence of the dacoity, consistently stated that they recognized the prisoners.

The 12th March 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Appeal—Plea of guilty.

Queen *versus* Kurmoo Koormee and others.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of false evidence.

Where a Sessions Judge and Assessors find a prisoner guilty on his own plea, there is no ground of appeal.

ALL the prisoners pleaded guilty before the Sessions Judge, and did not claim to be tried.

The Sessions Judge and Assessors found them guilty on their own pleas, and there is manifestly no ground for appeal now.

With reference to the concluding paragraph of the Sessions Judge's remarks, I think that this case should be laid before the Judge in the English Department for such orders as may be deemed necessary.

The 13th March 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

European British subject (Plea of being)—Evidence.

Referred under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863.

Mr. Clark *versus* W. Beane.

A Deputy Magistrate ought to give an opportunity to a prisoner to plead that he is a European British subject.

The mere statement of a prisoner that he is a European British subject, made before the Deputy Magistrate after the trial had been completed, cannot be acted on.

It appears to us on an inspection of the proceedings in this case that the Deputy Magistrate did not give the prisoner an opportunity of pleading that he was a European British subject. Had he put the questions which would have enabled him to fill up the printed form of examination, the prisoner would have had that opportunity.

We think, therefore, that the proceedings on the trial were irregular, that the conviction must be quashed, and the case remanded to the Deputy Magistrate.

We refer the Deputy Magistrate to Beaufort's Criminal Law, Section 4591, as to his duties when a person whom he has reason to suppose is a British subject is brought before him.

Norman, J.—I may add that we cannot act on the mere statement of the prisoner made before the Deputy Magistrate, on the 29th of February, after the trial had been completed, and the Deputy Magistrate's function and jurisdiction had ceased. There is, therefore, in fact, no evidence before us whether the prisoner is a European British subject or not.

The 21st March 1866.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction (of Deputy Magistrate)—Previous Conviction.

In re Sheikh Booluck.

The jurisdiction of a Deputy Magistrate competent to try the offence charged is not affected by the previous conviction of the prisoner.

Owing to the neglect on the part of the Sessions Judge to comply with the orders issued by this Court in Circular No. 18, dated 15th July 1863, the Court have had considerable difficulty in dealing with this case. The Judge has failed to give a brief analysis of the case, or to explain the terms of his order which he seeks to have reversed, or the grounds upon which his application is made. To avoid the delay which a reference to the Judge would entail, the valuable time of the Court has been spent in collecting from the record of the case those points which it was the duty of the Judge to have stated clearly and concisely. The facts of the case appear, as far as the Court can make them out, to be the following :—

Sheikh Booluck was, on 24th November last, convicted under Section 454 of the Penal Code, by Baboo Kooldep Narain Sing, a Deputy Magistrate, whom the returns in the Office of the High Court show to be exercising the powers of a Magistrate, and the prisoner was sentenced to rigorous imprisonment for one year. On his appeal, the Sessions Judge on the 20th December reversed that conviction and sentence, and ordered a re-trial of the appellant on a charge under Section 457 of the Penal Code. It is by no means clear on what grounds the Judge thought himself bound to pass such an order; but from the terms of his judgment and of his letter referring the case, it would seem as if the Judge held that the Deputy Magistrate had acted without jurisdiction in convicting a person charged before him with an offence cognizable only by a Court of Session. An offence falling under Section 457 of the Penal Code is, by Act XXXIII. of 1861, Section 2, made triable by a Court of Session or Magistrate of the District *or Subordinate Magistrate of the 1st Class*, which is a jurisdiction similar to that prescribed by the Schedule to the Code of Criminal Procedure for offences falling under Section 454. Under whichever of these Sections the trial was held, the Deputy Magistrate acted clearly with jurisdiction, and it was not material, as regards the question of jurisdiction, whether or not the appellant convict had been previously convicted. This fact might no doubt influence the Court sentencing him ; it might possibly lead a Magistrate to commit him to the Sessions Court for trial, instead of convicting him himself ; but it would not necessarily place the trial beyond jurisdiction of a Court competent to try the offence charged as in the case now before the High Court.

Under these circumstances, the Court hold that the orders of the Sessions Judge in reversing the sentence passed by the Deputy

Magistrate, and directing a new trial to be held, are without jurisdiction and illegal. The Court accordingly order that the order of the Sessions Judge be reversed, and that the sentence passed by the Magistrate be restored, and that it do have effect from the 24th November 1865. the date on which it was passed.

The Court in conclusion are compelled to record their dissatisfaction with the conduct of the Sessions Judge in this case, as well as with his disregard of so well-known a circular as that issued by them on the 15th July 1863.

The 23rd March 1866.

Present :

The Hon'ble J. P. Norman and L. S. Jackson, *Judges.*

Evidence of witnesses at the Sessions (to be compared with their depositions before Magistrate).

Queen *versus* Bindabun Bowree and others.

Committed by the Assistant Magistrate of Raneegunge, and tried by the Sessions Judge of West Burdwan, on a charge of Dacoity.

A Judge should compare the statements of the witnesses recorded by the Magistrate at the preliminary investigation, with the evidence of the same witnesses at the Sessions.

THE prisoners have been convicted of dacoity, and sentenced by the Judge of West Burdwan to transportation for seven years.

They appeal. Ramtonoo Potedar deposed that, on the last day of Assin, he was sleeping in a small hut with his young son Kaleepershad, aged about 7 years. About 12 P.M. he heard a noise in the thatch. He received a blow from a *lattee*, and then a second on his legs. He was rising up when another blow was struck across his chest; he seized the handle of a *karolli*, and struck one of the dacoits twice with it. There were about eight or nine dacoits. He says he recognized all the prisoners. He fell down. The dacoits struck him with stones on the head, and he became insensible. When he recovered, he found himself in the hospital, where he remained for some time.

Rookhinee, the wife of Ramtonoo. said, she was dragged from her bed by four men, and saw eight or ten thieves. She recognized the four prisoners. She snatched a *kulsee* from one of the robbers, when the prisoner Haradhan came through the *palin* leaf hedge, and took away the *kulsee* from her, escaping by the door. There was blood on the leaves of the hedge.

Kaleepershad, the prosecutor's son, recognized the four prisoners as having been present, and, in fact, on the Police coming up, after an alarm had been given, he said he could show where the prisoners lived, and took the Police to the prisoners' houses which were close by.

Haradhun, when arrested, had a fresh scratch on his leg, and the mark of a blow from a stick on his back. Gunganarain and Bindabun, the chowkeeders of the village, were not to be found when the alarm was given. Bostum is a person who lives in the house of Bindabun.

The Judge and Assessors were unanimous in believing the evidence of the witnesses who swore that they recognized the prisoners amongst the dacoits. There was no real defence set up in answer to the charge. The action of the prosecutor's little son, in taking the Police to the houses of the prisoners, was apparently natural and inconsistent with any notion that the charge was not made honestly. The marks on the body of Haradhun were such as might have been naturally expected to be found on some one of the robbers.

Under these circumstances, we cannot interfere with the finding of the Judge and Assessors who heard the witnesses, and could judge better than we can whether they were persons whose testimonies could safely be trusted.

We may observe, however, that if during the trial the Judge had placed on his desk before him the depositions taken at the preliminary investigation, and compared the statements of the witnesses recorded by the Magistrate, paragraph by paragraph with the evidence as given by the same witnesses at the Sessions, he would have been in a position to put questions on cross-examination, the answers to which might have cleared up some discrepancies, or possibly elicited facts favorable to the prisoners.

We dismiss the appeal.

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*Campbell, J.**—In this case I am compelled to differ from my honorable colleagues. It seems to me that, if the Judge has not done his duty, has not cross-examined the witnesses so that the replies, as observed by my colleagues, "might have cleared up some discrepancies, or *possibly elicited facts* favorable to the prisoners," the omission is not to go against the prisoners, but rather they should have the benefit of any doubt left in consequence. It appears to me that the examination of the witnesses was extremely superficial and unsatisfactory. Much important evidence (especially that of the police and of the neighbours who were first alarmed) is altogether wanting, and what there is goes to my mind rather to induce the belief, that the evidence to recognition is wholly unreliable. There were certain suspicious circumstances against three of the prisoners; and the question, I think, is, did these circumstances suggest a subsequent assertion of recognition, or did the witnesses really recognize the prisoners (neighbours perfectly well-known to them) in the first instance? It is clear that many of the neighbours were alarmed and brought together at the time of the dacoity. Did the witnesses who now say that they recognized the dacoits then say so? I think not. The first witness and prosecutor Ramtonoo says he was knocked over, and became senseless: "how could I tell the villagers?" Before the Magistrate he swore, "*I did not see Gunga.*" Before the Judge he says he *did* see and recognize Gunga, and no question is put to him regarding the discrepancy. I do not think him worthy of credit.

Besides the three eye-witnesses there is only one other witness for the prosecution, the head man of the village, who came to the spot when the alarm was given, and he is a very good witness, so far as he goes. He was not properly questioned, but his evidence leads directly to the conclusion that no dacoit was mentioned till after the regular police came. Gunga was sent for to take the news to the thannah, and on account of his absence another chowkeedar was sent, a statement quite inconsistent with the supposition that Gunga was then known to be one of the dacoits. He goes on without any mention of recognition till the police came, and then tells us, in so many words, that the second (female) witness up to that time said that she could not name any one. We are thus reduced (at this early stage of the case) to the little boy who, up to that time, seems to have said nothing, but who was then in the hands of the police, induced to point out the houses of the prisoners. I should add that it was distinctly stated by the witnesses before the Magistrate that the prisoners had their faces concealed with cloths. The Judge does not put a question on this subject, nor in any way elicit how or by what marks the prisoners were recognized. My belief is that, till the police came on the scene, there was no recognition whatever; that, owing to the absence of the two chowkeedars (Bindabun and Gunga) and the circumstance of a scratch being found on the leg of one of the neighbours Haradhan, some sort of suspicion fell on them; that the boy pointed out their houses, and then the witnesses, amplifying their private belief of their guilt, swore to having recognized them. At any rate, in the imperfect state of the evidence, the case is, I think, fully open to this doubt.

There is very strong evidence that the remaining prisoner Bostum had, when in prosecutor's master's service, detected the prosecutor purloining a hinge, and caused him to be turned out. I think it most unsafe, under such circumstances, to condemn Bostum on such evidence to recognition, without, in his case, a tittle of corroboration.

The 24th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Acquittal of prisoner—Disposal of property.

In re Haree Bundhoo Santra of Cuttack.

Petitioner.

Where a prisoner is acquitted of the offence charged, the Court ought not to order the property in respect of which the offence was charged to be given to the prosecutor.

It appears to us that, as the prisoners were acquitted of the commission of the offence with which they were charged, the

* *N. B.*—This case was heard on appeal by Mr. Justice Campbell also, whose name was inadvertently omitted in the heading of the case at page 54.

Court ought not to have ordered the property to be given up to the prosecutor, or to have made any order transferring the property from those who had possession of it. The case altogether is one which can be dealt with far better by a Civil than by a Criminal Court. We reverse the order complained of, and direct that the property be given to those who were in possession of it when the criminal proceedings were instituted.

The 24th March 1866.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Criminal Misappropriation.

Miscellaneous Case.

In re Sreekant Biswas.

The mere fact that the prosecutor gave the prisoner time to make out his accounts and pay the balance due does not vitiate a conviction for dishonest misappropriation, or shew that the matter is one for the Civil Courts only.

I DISMISS this appeal. I think there is sufficient evidence of dishonesty to justify the Court's finding that the misappropriation was dishonest. And I think that the prosecutor in no degree by his conduct showed that the matter was merely an ordinary one of breach of contract, so as to exclude this case from the cognizance of the Criminal Courts. The prosecutor merely gave the prisoner time to make out his accounts and to pay what was due, but he took no security of any kind from him. The prisoner subsequently, without having made good any part of the admitted deficit, absconded, whereupon the criminal prosecution was commenced. The indulgence granted to the prisoner cannot vitiate his conviction.

No error in law is shown in the proceedings of the Lower Court, and the appeal is accordingly dismissed.

The 24th March 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Jurisdiction—Power of Sessions Judge on appeal to reverse Deputy Magistrate's conviction where no criminal offence committed.

Miscellaneous Case.

In re Punchanun Biswas and others.

A Sessions Judge is quite competent on appeal to reverse a conviction by a Deputy Magistrate, if he thinks that the evidence is insufficient to establish a criminal offence against the prisoner.

WE think that the Sessions Judge would have been quite justified, under the circumstances of the case, in reversing on appeal the Deputy Magistrate's order if he thought that the evidence was insufficient to establish a criminal offence against the prisoners, and it was obviously immaterial whether the crime, as charged by the Deputy Magistrate, was correct or not in point of degree, so long as the Sessions Judge was of opinion that no criminal offence at all had been committed. If he had considered the evidence, which in the Deputy Magistrate's opinion established the charge of theft, to have established the higher crime of dacoity, it would have been a question whether the prisoners ought not to have been committed to take their trial on the graver charge before the Court of Session, by which alone that offence is cognizable. But, as from his letter he seems clearly to have been of opinion that neither theft nor dacoity had been committed, he should, we think, have disposed of the appeal in the usual way, and have ordered the release of the prisoners.

The 24th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Disputes concerning right of use of land or water—Evidence (Police Report).

Sreemunto Duloui

versus

Ramchand Aduck.

The following case was referred to the High Court by the Sessions Judge of Hooghly under Section 434, Act XXV. of 1861, and Circular Order dated 5th July 1863, No. 18.

A Deputy Magistrate has no jurisdiction, under Section 320 of the Code of Criminal Procedure, to order a ditch, which was once a pathway, but afterwards filled up, to be opened out, and a wall built upon it, before any complaint was made regarding the filling up of the ditch, to be pulled down. Even if he had such jurisdiction, he should not pass such an order without legal proof that the use of the ditch and pathway was open to the public or to the prosecutor.

Case.—On the 4th January last, one Ramchand complained before the Magistrate of Howrah that Sreemunto Duloui had obstructed him by shutting up a water-way, and requested the trial of the case under Section 339 of the Penal Code.

On the 16th idem it was transferred to the Deputy Magistrate, Mr. Ricketts, and the prosecutor then deposed that, about one month previously, the accused had *filled up* the whole of a ditch and commenced building a wall thereon, and that this ditch was the boundary between his property and that of accused. The accused deposed that he had filled up no ditch, and that he had commenced to build a wall on his own land. The Deputy Magistrate ordered a local enquiry by the Police. The Police Inspector reported that Ram Keenoo Santara stated that his father had rented to the accused the land on which this ditch had been for 50 years, and that last year the accused filled up one end of it, and during January had quite filled up the ditch, and built a wall of 4 feet high upon it, and that the ditch formed a small pathway, which the Inspector seemed to think was the origin of the dispute. The Deputy Magistrate took no further evidence in the case, and on the 20th January recorded that, having read the police-report and the police diary, and seen a map filed by the Police, "the ditch appearing to have been filled up, and a wall built upon it, I direct, under Section 320 of the Criminal Procedure Code, that the ditch be opened out as before within 15 days from the date of this order, until exclusive possession to defendant be given by a competent Court."

I consider the Deputy Magistrate's order to be illegal, because he does not say that the subject of dispute is open to the use of the public, or any person or class of persons, and because he took no evidence on this point. The police-report is no legal evidence in itself, and it does not assert the above, nor did the prosecutor's deposition assert it. If the Deputy Magistrate was of opinion that a presumption on this point arose, he should have called for evidence on the point, and should not have determined upon such a report alone. The report states that the land was rented to the accused, and that there was a ditch now filled up by defendant, and that the ditch formed a pathway; but that the ditch was open to the use of the public, or that the pathway was used by any person other than the accused, it does not state.

I also think the order was illegal, because I think Section 320 does not refer to *state* cases, and that if, after a wall has been built, a party makes a complaint regarding the land on which it is built, the Deputy Magistrate has then no power under that Section to order the ditch to be opened out (and thereby the wall pulled down). If he has such power under that Section, then a man may wait until not merely a small wall, but a large pucka house, be built, and then apply to the Deputy Magistrate, who could order the said house to be pulled down. I think Section 320 cannot apply to such cases.

I think the Deputy Magistrate's explanation of the 10th ultimo is not satisfactory. He says that the ditch, including the pathway, is shewn by the police report to have been open for half a century to the use of the public. But *first* the report is not evidence; *secondly*, it does not mention the public; and, *thirdly*, it speaks of the ditch having been there 50 years, but does not state that the pathway had been there 50 years. He further says that the accused, by filling up the ditch, excluded the utility of the ditch from the public and the prosecutor; but it has not been proved that the ditch or pathway was open to the use of the public or of the prosecutor.

I therefore think the Deputy Magistrate's order should be cancelled altogether, on the ground of his having no jurisdiction to order, under Section 320, a wall, once built before the dispute was brought to the notice of the Deputy Magistrate, to be pulled down (which is the effect of his order), and that, if he had such jurisdiction, then his order should be stayed, until it was legally proved that the use of the ditch and pathway was open to the public or to the prosecutor.

Judgment of the High Court.—We concur with the Sessions Judge, and, holding the order of the Deputy Magistrate to be altogether illegal, we do hereby set it aside altogether.

The 24th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Discharge by Magistrate—Commitment by Judge.

Miscellaneous Case.

Shoodun Mundle, *Appellant.*

A discharge by the Magistrate under Section 250 of the Code of Criminal Procedure is not final like an acquittal under Section 255, and the Sessions Judge under Section 435 may order the accused to be put upon his trial notwithstanding his discharge by the Magistrate.

It seems to us that the Sessions Judge, proceeding under Section 435 of the Criminal Procedure Code, can still have these persons put upon their trial for dacoity. The discharge of the accused persons by the Deputy Magistrate is expressly under Section 250, and, so far as we can find, no regular charge was ever drawn up, and the acquittal is consequently not final, or such as it would have been, had it been under Section 255. The Sessions Judge must use his own discretion as to the further steps to be taken. We may remark here that the Deputy Magistrate acted, as it appears to us, not without reason in the course he adopted.

The 26th March 1866.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Murder—Intoxication.

Queen *versus* Akulputtee Gossain.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Gya, on a charge of murder.

Intoxication is no excuse for a man throttling to death another and a weaker man who was intoxicated also. The Assessors having brought the case within Exception 4 of Section 300 of the Penal Code without any good evidence or substantial grounds, the Sessions Judge was held to have correctly overruled their verdict, and found the prisoner guilty of murder.

The Sessions Judge appears to me to have correctly over ruled the verdict of the Assessors, and to have rightly found the prisoner guilty of murder.

The Assessors do not appear to me to base their opinion that the case comes within Exception 4 of Section 300 of the Penal Code on any good evidence or substantial grounds.

The prisoner, it is proved, had an intrigue with the wife of the man whom he killed. He was the more powerful man of the two, and his intoxication could be no excuse for his literally throttling a man to death, that man being intoxicated also.

I see no grounds for altering the conviction, which is legal; and, this being so, there can be no question of mitigating the punishment.

Appeal rejected.

The 27th March 1866.

Present:

The Hon'ble W. S. Seton-Karr and L. S. Jackson, *Judges.*

Obstruction of Drain.

Miscellaneous Case.

In re Troylukhonath Bose.

The obstruction of a drain into which the sewage of complainant's premises fell does not fall either under Section 308 or 320 of the Code of Criminal Procedure, but is matter for a civil suit and injunction.

This case, which has already been several times before the Court, has to-day been considered again for the purpose of a decision, whether the order at first made by the Joint Magistrate, under Section 308 of the Code of Criminal Procedure, should not be set aside.

Mr. Twidale, in support of the order, admitting that he cannot support it as made, contends that it is a good order under the 320th Section of the Code.

It may be that, if the last-named Section was really applicable to the case, we might be justified in affirming the order, though purporting to be made under a very different provision of the law, though we do not by any means lay it down that we could do so, as the form of the enquiry and the matter to be decided are very different under the two Sections.

But we are of opinion that Section 320 is even less applicable to the case than Section 308, and that an obstruction of the drain, into which the sewage of complainant's premises fell, does not come within the terms of the Section relating to disputes concerning the use of land or water.

We are, therefore, obliged to reverse the order of the Joint Magistrate. The parties must be referred to a civil suit and injunction.

The 4th April 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Evidence (of accomplices and accessaries after the fact)—Corroboration—View by Assessors.

Criminal referred Jurisdiction.

Queen *versus* Chutterdharee Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of murder.

Case of murder where those prisoners whose conviction depended on the uncorroborated evidence of accomplices, and an accessary after the fact, were acquitted.

In cases of view by Assessors of the scene of the alleged offence, it was held that the Judge could not delegate his own function of examining witnesses on the spot to the Assessors, who cannot, under Section 348 of the Code of Criminal Procedure, speak to or communicate with any other person than the officer appointed to conduct them to the place.

Norman, J.—THE case rests mainly on the evidence of accomplices. It is no doubt true that, as mere matter of law, it is competent for a Jury to convict on the uncorroborated testimony of an accomplice even in capital cases. (*See* Best on Evidence, page 182; Chitty's Criminal Law, page 605.) But the danger of relying on such evidence is so great that in England Judges always advise juries not to convict, or tell them they ought not to convict, unless the story of the accomplice be corroborated.

In Gilbert on Evidence, cited in Archbold's Criminal Pleading, page 226, accessaries are placed in the same category as accomplices. But it is evident that they stand on a very different footing. Their guilt may be infinitely less, and they have not the same interest in making a charge against others to save themselves. It is not every participation in a crime which will make a party an accomplice in it so as to require his testimony to be confirmed. (Best on Evidence, page 223, citing Rex *versus* Hargraves, V. Edition, p. 170, Rex *versus* Jarvis, II. M. and Q. 40.) It is not, however, necessary to say whether we should have treated the evidence of Edoo, who appears to be at most an accomplice after the fact, in all respects as that of an ordinary witness, and not on the same footing as that of an accomplice if the charge had been made recently after the event. But his silence for upwards of four years prevents us from feeling perfectly safe on accepting his testimony unconditionally. In consequence of the late period at which the charge is brought forward, if any member of the gang not concerned in this particular offence, or indeed if any other innocent person were either maliciously or mistakenly included amongst the parties alleged to have been present and engaged in the crime, it would, in the nature of things, be now almost impossible for such person to adduce evidence to rebut the charge.

We think, therefore, that we ought not to convict any of the prisoners except upon evidence of the strongest and most absolutely reliable character; and therefore on that ground, remembering too that the lives of the prisoners are at stake, and that any error on our part would be irremediable, we think it safer in this particular case not to convict on the evidence of the accomplices and the accessary, unless in those instances in which their evidence is corroborated. Such corroboration exists in the case of Chutterdharee Singh and Gopaul Singh. The prisoner Bhanee made a confession before the Magistrate. We are satisfied with the evidence, and agree with the Judge and Assessors that these prisoners are guilty. We think that the sentence of death is a proper one as regards

the two first prisoners, and that of transportation for life as regards the prisoner Bhanee. The other prisoners will be acquitted.

We think it right to notice a serious irregularity in the trial. The Assessors desired to view the scene of the alleged offence. The Judge ordered that certain of the witnesses should attend with the Assessors, and he says that he impressed upon the Assessors the necessity of orally examining the witnesses, if they desired to do so, in the presence of the accused, who would be present in the vicinity of the temple.

It is clear that no such proceeding is warranted by Section 348. In case of a view it is the duty of the officer conducting the Jury or Assessors to the spot, *not to suffer any other persons to speak to or hold any communication with any of the Jury or Assessors,* who, when the view is finished, are to be immediately conducted back to the Court.

In the present case the Judge appears to have committed the grave error of supposing that he could delegate his own high function to the Assessors.

Campbell, J.—In this case I entirely concur with my learned colleague in the view which he has taken. I would only except the quotations of English authorities in regard to the evidence treated as matter of law, the law of England having in my opinion no authority whatever in the branch of this Court in which we are sitting. But, dealing with the evidence as matter of fact, I am sure that nothing can be more applicable to the case than the remarks on the evidence of accomplices contained in the charges to juries by Judges whom we all so eminently respect as Lord Abinger and Baron Alderson, and which are usually quoted on the subject. It was pointed out in very clear language that not only is the evidence of accomplices without confirmation most unsafe, but also, even when the general credibility of the story is confirmed by overwhelming evidence, it is very unsafe to convict without some corroborative evidence *connecting the particular person accused with the transaction;* because the general story may be perfectly true—the accomplice may really have taken part in the crime as he describes—his times, places, and circumstances may be exact; and yet he may at his pleasure put in one man as an actor instead of another. These cautions are especially applicable to this country. I have seen a great deal of the working of Detective Departments, and I well know that, while well worked they have led to great results, they are also very liable to abuse. An accepted approver regularly employed by the Department—a villain of the deepest dye according to his own showing—seems to the people to have life and death in his hands: those whom he denounces are carried before a dreaded inquisitional tribunal; those whom he spares are spared. It is necessary, then, to watch the evidence of such men with very great care; and I am glad to see that these Bhaugulpore cases are not usually sent up without strong corroborative evidence. There may be cases in which the evidence of different accomplices is given under such circumstances and with such real security against any possible intercommunication, that they do, to the most careful mind, in a great degree, corroborate one another. But in this case that is hardly so. The accomplices might have conspired together, and Edoo seems, according to his statement, to have been so much (under the law existing at the time before the operation of the Penal Code) an accomplice after the fact, and to have so long concealed a horrible murder, that we cannot safely treat him as a witness altogether reliable in regard to the actual presence of each of the persons denounced by the approvers. I therefore agree in thinking that the prisoners against whom no other evidence than that of Phool Chund, Budhoo, and Edoo, is to be found, should be acquitted and released.

As respects Gopaul and Chutterdharee, there is strong corroborative evidence, if it is to be believed. The evidence formerly given by those witnesses who were examined as witnesses on the former trial is not inconsistent with their present evidence, though they were then silent on the facts now stated as affecting the present prisoners. With respect, in particular, to the most important witness, Jowahir Tehsildar, it is clear that his former evidence was confined to the very narrowest points affecting other parties then accused, and that he gave no general narrative which might have brought out the visit of Gopaul and Chutterdharee to the Priest. The defence of these prisoners, then, can only be founded on the supposition not only that the approvers have got up a case, but that apparently independent witnesses, with nothing to gain by such a course, have joined the officers of the Detective Department in a vile conspiracy to hang two innocent men. There is no ground for such a belief that I can see. I concur in the sentence of death on Chutterdharee and Gopaul.

Benee's own confession is corroborative evidence against him. The Judge has already sentenced him to transportation for life, and we can hardly do otherwise than confirm that sentence.

The remaining prisoners are released.

The 15th February 1866.

Present:

The Hon'ble *Sir* Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. B. Trevor, W. S. Seton-Karr, L. S. Jackson, and A. G. Macpherson, *Judges*.

Review of Judgment (in Criminal cases).

Queen *versus* Godai Raout.

Petition praying for a review of judgment.

Mr. J. Cochrane for Petitioner.

The High Court cannot entertain an application to review a judgment passed by it on appeal in a criminal case.

Semble. No subordinate Criminal Court has the power to review its own judgment.

This case was referred to a Full Bench by Justices Seton-Karr and Macpherson with the following order:—

Referring Order.—THE prisoner in this case was tried by a Jury, convicted, and sentenced. He appealed to this Court, was heard by his Counsel, and on the 16th ultimo we dismissed this appeal, confirming the conviction and sentence.

Mr. Cochrane, for the prisoner, now applies to us to review the judgment which we passed on the ground that it is wrong in law.

Without entering at all into the merits of that judgment, it appears to us that the application ought to be rejected on the simple ground that this Court, having given judgment in a criminal case regularly brought before it on appeal, has no power to review its judgment. Section 38 of the Charter provides that the proceedings in criminal cases shall be regulated by the Code of Criminal Procedure, "being Act XXV. of 1861, or by such further "or other enactments in relation to Criminal "Procedure as are now in force" or as may be made by the Governor-General in Council in relation to such proceedings. Now, Act XXV. of 1861 gives no power to review a judgment passed on appeal in a criminal case, nor does any other enactment now in force, so far as we are aware, give any such power. A review of judgment in civil cases is given by the express provisions of the Civil Procedure Code; but, in the absence of any such provisions as regards criminal cases, in our opinion, there is no review.

We find, however, that, in the case of the Queen *vs.* Pursoram Doss (reported 3 Weekly Reporter, page 45, Criminal Rulings), a review was admitted, apparently without question or argument, by Kemp and Glover, Judges. As our opinion conflicts with that which those learned Judges must have entertained, and as the point is one of importance, we refer the question for the decision of a Full Bench. The only question referred is the general one whether the Court has any power to entertain an application to review its judgment passed in a criminal case before it on appeal.

Judgment of Full Bench.—The Court is clearly of opinion that a review of judgment will not lie from a sentence or judgment pronounced by the High Court, or by a Division Bench of the High Court in a criminal case upon appeal. By Section 38 of the Charter of the High Court it is ordained "that the proceedings in all cri-"minal cases which shall be brought before "the said High Court of Judicature in Ben-"gal, in the exercise of its ordinary original "criminal jurisdiction, and also in all other "criminal cases over which the said Su-"preme Court now has jurisdiction, shall "be regulated by the procedure and prac-"tice now in use in the said Supreme Court, "and that the proceedings in all other "criminal cases shall be regulated by the "Code of Criminal Procedure prescribed by "an Act passed by the Governor-General "in Council, and being Act No. XXV. of "1861, or by such further or other enact-"ments of the Governor-General in relation "to Criminal Procedure as are now in force."

Regulation IX. of 1793, Section 73, has been relied upon in support of the argument in favor of a review of judgment. By that Section it was enacted that the Nizamut Adawlut should exercise all the powers which were vested in it whilst it was stationed at Moorshedabad, and superintended by the late Naib Nazim Nawab Mahomed Reza Khan.

It appears to the Court that the proceedings in criminal cases in the High Court are not regulated by the provisions of Section 73, Regulation IX. of 1793, even if that Section has not been virtually repealed by the Code of Criminal Procedure. When the Letters Patent declared that the proceedings in all criminal cases shall be regulated by

Act XXV. of 1861, it clearly could not have been intended to vest the High Court with the powers of the Nizamut Adawlut whilst it was stationed at Moorshedabad, and superintended by the Nawab Nazim. It is not shewn, and it is not likely, that the Nawab Nazim ever granted reviews of judgment. This is an answer to that portion of the argument of the learned Counsel which depends upon Section 73, Regulation IX. of 1793.

The next argument to be considered is that which depends upon Regulation XIV. of 1810. In the course of his able argument, the learned Counsel, Mr. Cochrane, referred to Sections 3 and 4 of that Regulation. But it appears to us that those Sections had a very different object from that of conferring a mere power to review a judgment upon the ground of error as regards either the facts or the law. As we understand Regulation XIV. of 1810, it merely allowed the Court to grant a remission or mitigation of punishment whenever they should be of opinion that a prisoner according to the futwa of the Mahomedan Law Officers, or according to the Regulations, was declared liable to a more severe punishment than the case warranted. Section 3 says: "In all criminal trials before "the Court of Nizamut Adawlut (except "for crimes against the State, in which cases "the proceedings held upon the trial are required by Section 5, Regulation IV. of "1799, and Section 5, Regulation XX. of 1803, "to be submitted, with the sentence of the "Court, for the orders of Government), if the "futwa of the Law Officers of the Nizamut "Adawlut, or the sentence of an assembly "of hill chiefs in Zillah Boglepore (held under "the provisions of Regulation I. of 1796), "shall declare a prisoner or prisoners liable "to a more severe punishment than, on due "consideration of the evidence and all the "circumstances of the case, may appear to "the Court of Nizamut Adawlut to be just; "or if a prisoner or prisoners (not charged "with a crime against the State) shall in "any case before the Court of Nizamut "Adawlut, under the provisions of the Laws "and Regulations in force, be liable to a "more severe punishment than may appear "to the Court equitable, though not specifically declared by the futwa of the "Law Officers, or sentence of the hill "chiefs in Zillah Boglepore, it shall be "competent to two or more Judges of the "Court of Nizamut Adawlut to grant such "remission or mitigation of punishment as "may appear just and proper, according to "the evidence and circumstances of the "case, and to pass sentence accordingly: "provided that in all such cases the Court "of Nizamut Adawlut shall record the "grounds upon which a remission or mitigation of punishment may be adjudged "under the discretion hereby vested in that "Court, and shall communicate the same "to the Court of Circuit (or Magistrate of "Zillah Boglepore) before whom the trial "may have been held, with directions to "cause the same to be made known in "open Court to the prisoner or prisoners "concerned."

That Regulation did not give the Lower Courts the power of reviewing their own judgments on the grounds therein mentioned. The power was conferred upon the Nizamut Adawlut alone. But if this Court has power to review a judgment under the Code of Criminal Procedure, the Lower Courts must have that power also. Section 4 of the Regulation did not carry the case farther than Section 3. It declares that the powers vested in the Nizamut Adawlut by the preceding Section shall be considered applicable to all cases in which that Court (meaning the Nizamut Adawlut) may revise a sentence passed by a Court of Circuit, or Zillah, or City Magistrate, or Assistant to a Magistrate, in pursuance of Section 24, Regulation IX. of 1807; or under any other provision in the Regulations. It is also declared applicable to any cases in which the Court of Nizamut Adawlut may see reason to revise a sentence passed by that Court, and to remit any part of the punishment adjudged. But this discretion shall not be exercised without strong and sufficient grounds, to be recorded at large upon the proceedings of the Court.

Now, the words "by that Court" have been very properly argued to mean the Nizamut Adawlut itself. But then the only power of that Court is that given by the 3rd Section, *viz.*, the power to grant a remission or mitigation of a sentence where the futwa of the Law Officers, or the general Laws and Regulations in force, declared a prisoner liable to a more severe punishment than upon a due consideration of the evidence and all the circumstances of the case might appear to the Court equitable or just. These Sections have been altogether repealed by the Repealing Act XVII. of 1862, and therefore no longer exist. But it has been argued by the learned Counsel that there has been one uninterrupted series of authorities for 5 years to shew that the Nizamut Adawlut

exercised the power of review under the general powers of the Court.

No doubt, when this Regulation existed, the Court had the power to revise sentences for the purpose of mitigating them. But a practice even for 52 years under a particular law does not show that a right existed independently of that law, or continues to exist after it has been repealed. The Sections above referred to did not confer a power upon the Criminal Courts of reviewing their own judgment upon the ground of their having come to an erroneous conclusion upon the evidence given before the Lower Court, or of their having committed a mistake on a point of law.

The Code of Criminal Procedure does not contain any Section expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a Section expressly authorizing a review of judgment, but the former contains no corresponding Section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases.

There were certainly one or two cases cited in which the Nizamut Adawlut did grant a review, not simply under the Regulation of 1810, but generally upon the merits of the case. The cases, however, were not so numerous as to shew that there was a uniform uninterrupted practice of granting reviews upon the general merits of the case. There are only three or four cases to which our attention has been called.

One of the Circular Orders of the Nizamut Adawlut was referred to by the learned Counsel. The one of 9th May 1861 has also been brought to our notice. The learned Counsel contends that the ruling in that Circular Order is not correct, inasmuch as it was opposed to the principles of Regulation XIV. of 1810. The Circular Orders are certainly not authorities binding on the Court; but they are useful for the purpose of showing what was the opinion of the Court as to whether there had been an uninterrupted practice or series of authorities on a particular subject. In the Circular Order of 9th May 1861, the Sudder Court (Messrs. Raikes, Trevor, Loch, and Steer) declared that the power vested in the Court by Section 4, Regulation XIV. of 1810, was "a "power of revision, with a view of a "remission of part of the punishment, and "did not extend to the granting a review of "judgment or re-hearing a whole case, which "might eventually end in a sentence opposed to that originally passed." The Circular Order goes on to say that "it is questionable whether the power exists under "Regulation law, and should a case come to "the notice of the Court in which the sentence originally passed appears erroneous, "and the prisoner entitled to acquittal, the "proper course, it seems to the Court, would "be to report the case to Government, in "order that a pardon might be granted to "the prisoner."

It appears, therefore, that, as late as May 1861, there was a Circular Order of the Sudder Court stating that the power vested in the Court by virtue of Regulation XIV. of 1810 did not allow a review of judgment generally upon the merits, but merely for the purpose of remitting a portion of the punishment when it was considered too severe. Surely that is not (as it was contended in the averment) contrary to Regulation XIV. of 1810. It is clearly in accordance with the words of Sections 3 and 4 of that Regulation.

But a further question remains to be considered, *viz.*, whether, even supposing the Sudder Court did, before the passing of Act XXV. of 1861, allow a review, was the same power of granting reviews in criminal cases continued to the High Court by the Charter of which Section 38 (which has already been read) directs that its proceedings in criminal cases shall be regulated by Act XXV. of 1861.

Whether those cases were correct or not, is not material. Even supposing that they were correct, and that the Sudder Court had the power to grant reviews for the purpose of re-considering their judgments pronounced in appeal, it appears to us that that power no longer exists, for the High Court was required by Section 38 of its Charter to regulate its proceedings in criminal cases by Act XXV. of 1861.

Now, the next question is, does Act XXV. of 1861 contain any express or implied power to this Court to review its judgment in criminal cases? We have already pointed out that, notwithstanding there is an express Clause in the Code of Civil Procedure providing for cases in which reviews of judgment may be allowed, the Code of Criminal Procedure is wholly silent upon the point, and therefore, if the power is given by the Act, it is simply by inference from certain

Sections, and those are the Sections to which the learned Counsel has alluded.

First, he has referred to Section 404. That Section contains the following enactment:—

"The Sudder Court may, on the report "of a Court of Session or of a Magistrate, "or whenever it thinks fit, call for the re-"cord of any criminal trial, or the record of "any judicial proceeding of a Criminal Court, "other than a criminal trial, in any Court "within its jurisdiction in which it shall "appear to it that there has been error in "the decision on a point of law, or that a "point of law should be considered by the "Sudder Court, and may determine any "point of law arising out of the case, and "thereupon pass such order as to the Sud-"der Court shall seem right."

That is, that in those cases where an appeal is not expressly given by law, the Sudder Court may, of its own authority, or on the report of a Court of Session or of a Magistrate, call for the record of any criminal case for the purpose of setting the Judge right upon any point of law. But that does not apply to setting a judgment right upon questions of fact; whereas, if the learned Counsel is right in his contention, the Court has the power of altering, upon review, not only a judgment of a subordinate Court, but also its own judgments upon a matter of fact as well as upon a matter of law.

Section 405 was also referred to. It says:

"It shall be lawful for the Sudder Court "to call for and examine the record of any "case tried by any Court of Session for the "purpose of satisfying itself as to the legal-"ity or propriety of any sentence or order "passed, and as to the regularity of the "proceedings of such Court. If it appear "to the Sudder Court that the sentence "passed is too severe, the Sudder Court "may pass any mitigated sentence warrant-"ed by law. If the Sudder Court shall be "of opinion that the sentence or order is "contrary to law, the Sudder Court shall "reverse the sentence or order, and pass "such judgment, sentence, or order as to the "Court shall seem right, or, if it deem neces-"sary, may order a new trial."

The Court has two jurisdictions: one as a Court of Revision to set right matters of law, even though there may be no appeal; and, *secondly*, as a Court of Appeal when an appeal is properly preferred before it.

Section 405 applies to the Court as a Court of Revision.

There is another Section (439) which deals with cases whether brought before the Court as a Court of Revision, or brought before the Court as a Court of Appeal. That Section enacts:—

"No trial held in any Criminal Court shall "be set aside, and no judgment passed by any "Criminal Court shall be reversed, either "on appeal or otherwise, for any irregularity "in the proceedings of the trial, unless such "irregularity have occasioned a failure of "justice."

It is contended that the words "or otherwise" shew that it is intended that the Court should have the power of reviewing its own judgment. But the Section is not an affirmative one giving jurisdiction, but a negative one directing that a judgment shall not be set right unless the grounds are such as shew that a failure of justice has been occasioned.

It appears to us, therefore, that none of the Sections which have been cited shew impliedly that it was the intention of the Legislature to give to the High Court a power of reviewing its own judgments after they have been duly recorded. We do not mean to say that if, before a judgment has been recorded, the attention of the Court be called to any matter shewing that there is an error or mistake in the judgment pronounced, the Court has not the power of correcting such error or mistake. Nor do we mean to say that the Court has not power to correct clerical errors in its judgments after they are recorded. But we are speaking of cases where the judgment has been recorded, and the Court is called upon to grant a review of its judgment for the purpose of shewing that it ought to have come to a different conclusion either upon the facts or upon the law.

The learned Counsel has pointed out that the consequences would be monstrous if this power of review were not given. But the same argument would apply to trials in the Courts in England. Suppose a jury should find a party guilty. There would be no appeal or writ of error, nor could the prisoner tender a bill of exceptions. The only mode of remedying the evil would be by appealing to the mercy of the Crown. So, in the present case, if it should be discovered that the Court has come to a wrong conclusion either upon a matter of fact or upon a matter of law, the case may be brought to the notice of the Executive Government, either for the purpose of mitigating the sentence or of pardoning the offender, as the case may require. There would be no end to cases of

this kind, if, after the Court has duly recorded its judgment, the matter is to be reopened on the ground that the Court has come to an erroneous conclusion.

In civil cases, if an erroneous judgment could not be set right upon review, there would be no one to appeal to for relief except the opposite party. But in criminal cases the Executive Government can always grant relief where an error has been committed.

It appears to us that it was the intention of the Legislature that the Court should not exercise the power of reviewing its own judgment in criminal cases. In civil cases, where such a power was intended to be given, it was conferred by express words in the Code of Civil Procedure.

We understand that, since the High Court has been in existence, there has been one case of a review by a Division Bench. But that case was never argued, and one of the Judges who granted the review (Mr. Justice Kemp), when he declared that he did not wish to prevent the case from being re-heard, expressly stated that he had doubts as to the power of granting a review. That, therefore, is no precedent; but, even if it were, it does not preclude the Court from considering the question in Full Bench.

The 4th April 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Grievous Hurt (Bone fractures)—Affirmation instead of Oaths (applicable only to Mahomedan and Hindoo witnesses).

Criminal Jurisdiction.

Referred under Section 434, Act XXV. of 1861, and Circular Order dated 15th July 1863.

Queen *versus* Ramtahal Sing and another.

Where bone fractures have been caused in addition to other injuries, the offence committed is grievous hurt triable by a Court of Session, and not hurt cognizable by a Magistrate.

A witness who is not a Mahomedan or Hindoo ought to be sworn, and not examined under the provisions of Act V. of 1840.

THE conviction in this case, by the Deputy Magistrate, of the offence of "hurt," was clearly erroneous. He had before him the evidence of the Civil Surgeon, from which it unmistakeably appeared that two persons had sustained bone fractures (in addition to other injuries), and this, under the terms of Section 320 of the Indian Penal Code, constitutes grievous hurt.

There could be no doubt, therefore, that the prisoner might have been charged with "voluntarily causing grievous hurt," an offence punishable, under Section 325 of the Code, with imprisonment which may extend to 7 years, and triable by the Court of Session.

Magistrates are not at liberty to pass over material parts of the evidence in cases before them, and so to withdraw cases from the cognizance of the proper tribunals.

And, in this case, the accused person has received a sentence manifestly inadequate in respect of the violence with which he was charged.

The conviction is, therefore, set aside, and the Deputy Magistrate is directed to proceed according to law.

We observe that the Civil Surgeon appears to have been examined under the provisions of Act V. of 1840 (printed 1841). We presume that this officer is not a Mahomedan or a Hindoo, and he ought, therefore, to have been sworn.

The 7th April 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Prisoner's witnesses—Conviction.

Criminal Jurisdiction.

Referred under Section 434, Act XVI. of 1861.

Queen *versus* Kalee Thakoor.

Conviction quashed, the prisoner's witnesses not having been summoned.

THE prisoner's witnesses ought to have been summoned, and it is impossible to say with certainty that the evidence could not have benefited the defence. The conviction is quashed. It may be doubted how far it is necessary or desirable, under the circumstances, to proceed further against the prisoner.

The 9th April 1866.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Dacoity—Receiving property stolen in Dacoity.

Queen *versus* Motee Jolaha.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of dishonestly retaining stolen property with guilty knowledge.

When a prisoner is apprehended eight days after a conviction, with part of the plunder in his possession, there is as good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he ought to be charged in the alternative form.

I HAVE read the evidence in this case, and do not think it necessary to interfere.

The cloth was fully identified, and the prisoner's defence was wholly unsupported. He speaks of two of his witnesses not having been summoned, but it does not clearly appear who they are. I observe that all those whom he examined before the Magistrate denied any knowledge of his pleas.

It is to be observed that the prisoner having been apprehended eight days after the dacoity with part of the plunder in his possession, there was as good ground for charging him with the dacoity as with having received or retained with guilty knowledge, and he might probably have been convicted in the alternative form.

The 9th April 1866.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Removal of wall—Nuisance—Right of use of land.

Miscellaneous Case.

Ram Lall Mookerjee, *Petitioner.*

When an application has been made to the Magistrate for the removal of a wall under Sections 308 and 320, Code of Criminal Procedure, as affecting the public convenience, the High Court will not compel the Magistrate to proceed under Section 320 upon a different ground, namely, to enquire whether the land on which the wall was built was open to the use of the complainant's people.

I AM of opinion that this Court ought not to interfere with the orders passed by the Joint Magistrate and the Court of Session.

The complaint (irregularly preferred by a general agent on behalf of Baboo Puddolochun Mundul) alleged an offence under several Sections of the Penal Code, and also prayed the Magistrate to deal with the case as affecting the public convenience under Sections 308 and 320 of the Code of Criminal Procedure. The Joint Magistrate declined to interfere, and recorded his opinion that the party accused was only protecting himself against a gratuitous annoyance on the part of complainant.

This Court is now asked to compel the Magistrate to proceed under Section 320, and enquire whether the land on which the wall was built was open to the use of the *complainant's people;* but the complaint was that the public were affected, and as the Magistrate deciding that the public would not suffer saw no reason to proceed, this Court will not interfere.

The 14th April 1866.

Present:

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Previous convictions—Section 75, Penal Code.

Queen *versus* Pubon.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of theft in a building of cattle.

An offender is only liable to enhanced punishment under Section 75 of the Penal Code for an offence punishable under Chapter XVII., after having been punished with imprisonment for the same offence, or for an offence punishable under the same chapter.

THE evidence clearly substantiates the theft of the two cows (in two cases) by the prisoner. It is proved that the animals were found tied up in his court-yard; that he had previously brought them to his house; and that, on being asked by his fellow-villagers as to how he had got them, he made up a false story of purchase. The prisoner makes no defence (beyond a general denial of his guilt), and calls no witnesses.

The only question that arises is the amount of punishment to be inflicted. The Sessions Judge has sentenced the prisoner to transportation for life under Section 75 of the Indian Penal Code, as the prisoner has been already several times convicted of offences coming under Chapter XVII. of this Code punishable with terms of imprisonment of three years and upwards.

It appears, however, from the record that three of these previous convictions—cattle-stealing (2) and burglary—took place before the Penal Code came into operation, and cannot therefore be taken into account in awarding the punishment in this trial. The other two cases were tried in December 1865, a few weeks only before the present one; and we are of opinion that Section 75 does not apply to such convictions. The meaning of the law appears to us to be that, when an offender, after having been punished with imprisonment for a crime under Chapter XVII., again, *after his release from prison*, commits a similar description of crime or a crime punishable under the same chapter, he is liable under Section 75 to enhanced punishment, on the ground that the sentence already borne has had no effect in preventing a repetition of his crime, and has been, therefore, insufficient as a warning. But where the prisoner's conviction has taken place a very short time before, and where no imprisonment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of shewing what the effect of the first sentence would have been upon him, and it would not be just to punish him as though he were an incorrigible offender whom no comparatively light punishment could wean from evil courses.

Taking this view of the scope and meaning of Section 75, we quash the sentence of transportation for life passed by the Sessions Judge, and pass the sentence provided by law for the offences of which the prisoner has been convicted, *viz.*, 7 years' rigorous imprisonment, and, with reference to the other cases, direct the Sessions Judge to pass such separate sentences as he may consider each offence proved at the late Sessions against the prisoner to deserve.

The 16th April 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Records of previous convictions (when to be put in).

Queen *versus* Jehan Mullick.

Committed by the Deputy Magistrate of Pooree, and tried by the Sessions Judge of Cuttack, on a charge of house-breaking by night with intent to commit theft.

Records of previous convictions should not be put in until the prisoner has been convicted in the case then under trial.

THIS appears to be a perfectly clear case. The prisoner confessed before the Magistrate that he had stolen a quantity of the prosecutor's grain, and was caught in the act of taking it away. Before the Sessions Judge he denied his former admission, and attributed the charge against him to the influence of the prosecutor.

It is proved by evidence, which is not rebutted (for the prisoner calls no witnesses), that Jehan Mullick was arrested within the enclosure of the prosecutor's house, having by him one basket of grain, and another of brass and bell-metal utensils, the property of the prosecutor, which he was in the act of carrying off. He admitted his guilt at once, and pointed out the way in which he had effected an entrance, namely, by climbing over the wall with the aid of a bamboo covered with straw; the grain and utensils were taken from within the prosecutor's house. The prisoner also made a statement regarding a companion who was said to have aided him in the commitment of the theft, and it is in evidence that, on the prisoner's house being searched, property sworn to by the prosecutor was found in it.

I see no reason, therefore, to interfere with the Sessions Judge's conviction, and, with regard to the amount of punishment, observe that the prisoner is an old offender,

having been already five times imprisoned for theft, and a severe punishment is necessary.

I remark, for the guidance of the Sessions Judge in future cases of this kind, that records of previous convictions should not be put in until the prisoner has been convicted in the case then under trial. They are of use only in determining the amount of punishment to be inflicted, and are no evidence in the case.

The 16th April 1866.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Theft—Meaning of dishonest intention.

Miscellaneous Case.

Queen *versus* Preonath Banerjee.

Meaning of *dishonest* intention in a case of theft as defined in the Penal Code.

I HAVE had the papers in this case before me, and have heard the vakeel for the petitioner.

It does not appear to me that any ground is made out which would justify the interference of this Court.

The objection for the first time taken here, *viz.*, that the facts alleged cannot constitute the offence of theft as defined in the Penal Code, is not established.

The argument urged is that there was no dishonest intention on the part of the appellant; but the meaning attached to the word "dishonest" in the Penal Code must be borne in mind.

The term is applied to a person who does any thing with the intention of causing wrongful gain or wrongful loss. Now, admitting that the husband of the prosecutrix, in this case, may have owed something in his lifetime to the prisoner, the forcible and illegal seizure of her bullocks in satisfaction of such claim would certainly amount to causing wrongful loss to her, and to refer her to a Civil Court for satisfaction of such a wrong would be a denial of justice. As to the credibility of the witnesses, that is not within the province of this Court in the present stage of the proceedings.

The 16th April 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Abetment of forgery of valuable document—Judge's charge to the Jury.

Queen *versus* Jehan Buksh.

Committed by the Deputy Magistrate, and tried by the Sessions Judge, on a charge of abetment of forgery.

How a Judge should charge the Jury in a case of abetment, while present, of the forgery of a valuable document.

WE have heard Mr. Warner, the Counsel who has appeared for the prisoner, as well as Mr. Twidale; and we are satisfied that there must be a new trial in this case.

The prisoner was arraigned, with two others, under no less than 4 Sections of the Penal Code, being Sections 465, 467, 471, and 474. The other two prisoners were acquitted without being put on their defence. The prisoner, appellant, was convicted of abetting, while present, the forgery of a valuable document, being the sale of a house, under Sections 114 and 467.

The evidence for the prosecution is as follows. The prisoner is stated to have given to one Gholam Abbas a draft of a deed of a sale, which this person, who has appeared as a witness, engrossed on a blank stamp paper in a shed in the compound of the Kutcherry. The deed is in favor of the acquitted prisoners Abdool Wahed and Bahir Ally. At the time of the execution, the prisoner pointed out a certain person as Bafatee, the owner and vendor of the property, which was a shop. Bafatee now denies that he was ever present at the execution of the deed, or that he made or consented to any such sale. This statement was corroborated by other witnesses.

The deed of sale was afterwards produced before the Magistrate in a case in which the possession of the property, conveyed by the above deed, was contested. But it does not appear that it was produced by the prisoner. The suit was brought by the two prisoners who have been acquitted against certain coolies who were alleged to have committed a trespass, and there is no evidence to shew that it was filed by Jehan Buksh. The record of the trespass case, on the contrary, would appear to shew that it was filed by the plaintiffs, *viz.*, the acquitted prisoners.

There is, however, a general statement by witness Kissen Gutty No. 17, that the appellant was looking after the case. A great deal of evidence was then taken for the defence, and the prisoner, as we have shewn above, was found guilty, and sentenced to seven years' transportation.

The above details are, however, not to be gathered from the Judge's charge, which, we regret to say, is altogether inadequate to the ends of justice in a case which presents several complications and difficulties. We have been compelled to collect the facts from the evidence, and we are quite certain that the Jury have not had that evidence analysed and presented to them in a proper shape, or in one calculated to make them feel how each detail or statement of fact bears upon the guilt or innocence of the accused. The Judge says in the commencement of his charge:—

"The case has already occupied so much "of your time (two entire days), and the evi-"dence has been so fully commented on by "the vakeels for both sides, that I shall only "trouble you with some very brief remarks."

The above charge might possibly meet the requirements of a very simple case which turned on a mere question of identity or on the evidence to one specific or distinct act, but it is wholly unsuited to the necessities of an important and difficult case, in which, moreover, it is quite clear that there has been a great deal of party feeling and local excitement. The Judge's charge, we regret to say, evinces great ignorance of what a Judge's charge should be, how facts should be analysed and arranged for the consideration of jurymen, and how the Jury ought to be told what inferences they might fairly draw from facts, if they credit the same.

In the present case there is an absolute want of any direction at all on several points affecting the prisoner. It is also not very clear to us at present how the prisoner has been found guilty of abetting an act, while Gholam Abbas, the writer, has been allowed to give evidence, and while the other persons who were to have benefited by the deed, and who actually pleaded in Court the deed now impounded, have been summarily acquitted without even being called on for their defence. We do not understand who is supposed to have committed the forgery which the prisoner is found guilty of having abetted.

The Judge will summon an entirely new Jury for this case.

We cannot accede to the request of the prisoner already preferred to the Judge, that the Jury shall consist exclusively of Europeans; but the prisoner, at the new trial, may be entitled to any privilege which he can claim under Section 325 of the Criminal Procedure Code. The Judge will then retake all the evidence that bears on the prosecution, and allow the prisoner to urge anything in his defence, and to adduce his witnesses. In presenting the Jury with a clear statement of the facts which the evidence may disclose, and in telling them that they are to exercise their own judgment in deciding on the credibility of the same, he will be careful to put before them one point which the Counsel before us has strongly urged, *viz.*, whether, supposing the Jury to believe the evidence for the execution of the deed, and for the personation of Bafatee, the prisoner may or may not have simply appeared in his professional capacity, or whether he has or has not acted without any corrupt motive, and simply for the benefit and under the direction of others. To sustain such a conviction, a corrupt motive must be shewn, or must be fairly inferrible from the evidence. The Judge will also carefully cross-examine the witnesses who speak to certain speeches said to have been made by the prisoner to other witnesses, and he will endeavour to ascertain whether they were really uttered, under what circumstances, and with what intent and meaning.

The Judge will understand that we give no opinion whatever on the value of the evidence for the prosecution; we only indicate to him its bearing and importance, as well as the paramount necessity, in a case where party feeling runs high, of giving the Jury a dispassionate statement of all the evidence, of pointing out how it bears on the guilt or innocence of the accused, and of telling them what legal inferences, if credited, it will lawfully sustain.

The Judge will do well to give our remarks a careful perusal; and, as the offence with which the prisoner is charged is not a bailable offence, the trial should be proceeded with with the least practicable delay. It is, of course, impossible to put the two prisoners acquitted summarily on their trial again, or to try the prisoner on any other charge, but one under 467 and 114. The prisoner may, however, if he thinks fit, summon these acquitted persons as witnesses for his defence.

The 16th April 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Confessions of Prisoners.

Criminal Jurisdiction.

Referred under Section 434 of Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen *versus* Chokoo Khan and another.

The whole, and not part, of a prisoner's confession must be taken in order to his conviction.

Campbell, J.—THIS is a case referred to us by the Magistrate of Pooree, with respect to Chokoo Khan only, under Section 434 of the Criminal Procedure Code. The prisoner has been convicted by the Assistant Magistrate of receiving stolen property knowing it to be stolen.

The prisoner Chokoo Khan, on being asked whether he was guilty of receiving stolen property knowing it to be stolen, replied, "No, I know nothing whether the property is stolen or not." Upon this the Assistant Magistrate records the following finding: "Both the accused confess;" and thereupon he sentences Chokoo Khan and his fellow-prisoner to rigorous imprisonment for 6 months each.

It is quite clear that Chokoo Khan did not confess to the offence with which he was charged, and there is, therefore, gross irregularity in the proceedings of the Assistant Magistrate. The trial is quashed, and a new trial of Chokoo Khan is ordered.

It is true that Chokoo Khan admits that the stolen property was brought to his house, and adds: "I told him" (that is, the thief) "put the things down." This is an admission which, *pro tanto*, might be taken against him, but the evidence implicating him in the offence of receiving stolen property knowing it to be stolen should also have been recorded. I regret that the Assistant Magistrate should have conducted the proceedings in such an irregular manner.

Norman, J.—I desire to add a few words. The prisoner Chokoo said, in answer to the question, whether he was guilty of receiving stolen property knowing it to be stolen, "No, I know nothing about whether the property is stolen or not. My son Mahobee Khan brought the rice, the ladles, the hinge, the pumpkin, the kalaree, and the two brazen plates to my house. I told him to put the things down."

Now, if it had been proved as a fact, which it was not in this case, that immediately before the property had been brought to the prisoner's house it had been stolen from the prosecutor, and if it should appear, from the nature of his son's position and circumstances, that Chokoo Khan must have known that the article so brought could not have been come by honestly, he might have been convicted on such evidence. But, as the Assistant Magistrate relies on the confession of the prisoner, he must take the whole, and cannot reject any part of it.

Probably the prisoner will have very little benefit from the remand in this particular case; but, although the consequences to the prisoner are probably of little importance, it is of the greatest possible importance that trials should be properly conducted by the Lower Courts.

The 16th April 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Forgery—Mooktearnamah—Contradictory evidence (to be noticed by Judge to Assessors).

Queen *versus* Burjo Barick and two others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of cheating.

By a person consenting to act under a Mooktearnamah, and attaching his name in token of such consent, he does not become a maker of the Mooktearnamah, or a forger if the Mooktearnamah turns out to be forged.

It is the duty of the Judge to notice to the Assessors discrepancies and contradictory statements made by witnesses.

IN this case we see no reason to interfere with this conviction or sentence.

We cannot, indeed, agree with the Sessions Judge in holding that a person who consents to act under a Mooktearnamah, and attaches his own name in token of such consent, is thereby a maker of the Mooktearnamah, and becomes a forger if the Mooktearnamah turns out to be forged.

But in this case it appears from the evidence that the prisoner No. 2, Bhujui Mabauty, was actually present, and took part in the forging of the Mookhtearnamah ; and we agree with the Judge in over-ruling the opinion of the Assessors.

The Judge remarks that they " do not seem to have noticed the gross discrepancies and impossible statements " made by the witnesses for the defence. But he ought to have brought these statements to the notice of the Assessors, if they did not notice them of themselves.

The 17th April 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

False Evidence.

Queen *versus* Fazul Meeah and another.

Committed by the Deputy Magistrate of Cachar, and tried by the Deputy Commissioner of Cachar, on a charge of giving false evidence.

A charge of giving false evidence should specify the false evidence which the prisoners are supposed to have given.

Norman, J.—THE prisoners have been convicted before Captain Stewart, the Deputy Commissioner of Cachar, of giving false evidence.

The manner in which the case has been tried is very unsatisfactory. The charge does not specify the false evidence which the prisoners are supposed to have given. From some paper sent up with the case, it appears that the prisoner Jaffer charged Debanundo with killing a buffalo calf. Their story is not a very probable one, and no doubt the charge of killing the buffalo calf was properly dismissed.

But the counter-charge, which is one of perjury against the prisoners, is not proved. There is no substantial corroboration of the story of Debanundo ; the evidence is vague as to time and place. Had the Deputy Commissioner, in trying the case, insisted on each witness giving minute details of the facts which he alleges himself to have witnessed, with time and place, we might have been able to form an opinion, from a comparison of the statements of the several witnesses, whether they were speaking the truth or not.

The prisoners must be acquitted.

Campbell, J.—I concur in thinking that the alleged false evidence is not proved, and in releasing the prisoners.

The 18th April 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble J. P. Norman and G. Campbell, *Judges.*

Absconding—Warrant to apprehend offender, not an order within meaning of Section 172, Penal Code.

Criminal Jurisdiction.

Queen *versus* Womesh Chunder Ghose.

Held by the majority of the Court (Campbell, J., dissenting) that a warrant addressed to a Police Officer to apprehend an offender and to bring him before the Magistrate is not a "summons, notice, or order" within the meaning of Section 172 of the Penal Code, and that the offence of absconding by an offender against whom a warrant has been so issued is not punishable under that Section.

Norman, J. (Peacock, C.J., concurring).—THIS is a case which comes before us under Section 404 of the Code of Criminal Procedure.

On the 26th of October last a warrant was issued by the Magistrate of Jessore against one Womesh Chunder Ghose, a Collectorate Mohafiz, on a charge of forgery committed in the office. Womesh Chunder disappeared, and could not be found till the 30th of November, when he delivered himself up to the Magistrate. The Magistrate found that he left Jessore on the 26th of October after the issue of the warrant, that he must have known of the issue of the process, and that he set the law at defiance ; and sentenced him to three months' simple imprisonment.

The Sessions Judge, Mr. Lawford, on appeal, reversed this sentence, holding that the prisoner could not be convicted under Section 172 of the Indian Penal Code.

Some correspondence having ensued between the Sessions Judge and the Magistrate as to the correctness of the Sessions Judge's decision, the papers have been sent for under Section 404.

I am of opinion that the conviction is bad, and was properly reversed by the Sessions Judge on appeal.

Section 172 provides that "whoever absconds in order to avoid being served with a

summons, notice, or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice, or order, shall be punished," &c. Now, a warrant, which directs a bailiff, constable, or Police officer to apprehend an offender, and produce him before the Magistrate, is *neither a summons, notice, nor order* to such offender. It is an order to the party to whom it is addressed to produce the offender, but not to the offender himself.

The offence of absconding by an offender against whom a warrant has been issued is dealt with in a different manner. By Section 183 of the Code of Criminal Procedure, if the person accused absconds, so that the warrant cannot be served, the Magistrate, if satisfied that he absconds, &c., for the purpose of avoiding service, may issue a written proclamation requiring him to appear to answer the complaint within a fixed period, if not less than 30 days. If he intentionally omits to attend in obedience to such proclamation, he is liable under Section 174 of the Indian Penal Code, if the proclamation is to attend in a Court of Justice, to imprisonment for six months.

Under Section 184 of the Code of Criminal Procedure the Magistrate may in the meantime attach the property of the party absconding.

In the present case, it seems that a proclamation issued, and Womesh Chunder did appear within the time limited by it.

There is no ground for interference with the Judge's order.

Campbell, J.—The law does not require that the order should be an order addressed to the person inculpated. A warrant is certainly an *order*. The only doubt might be whether an officer who goes with a warrant to apprehend a man can be said to serve him with the warrant, and that doubt is, I think, set at rest by the use of the term "If the warrant cannot be served" in Section 189 of the Code of Criminal Procedure.

I am, therefore, of opinion that a person, who absconds to avoid being served with a warrant in the above sense, may be properly convicted under Section 172 of the Penal Code.

I may add that the persons who avoid service of summons, and who are undoubtedly punishable under Section 172, are also liable to the process of attachment, &c.; so that the mere circumstance of such a procedure being provided by no means leads to the inference that specific punishment cannot also be inflicted.

The 23rd April 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

False Evidence.

Queen *versus* Bykunt Nath Banerjee.

Committed by the Assistant Magistrate of Boodbood, and tried by the Sessions Judge of East Burdwan, on a charge of "false evidence."

An enquiry by an Assistant Magistrate with a view to tracing the writer of an anonymous letter addressed to him charging certain persons with murder, and without reference to the truth or otherwise of the charge of murder, is not a stage of a judicial proceeding in which the giving of false evidence is punishable under Section 193 of the Penal Code.

THE prisoner in this case has been found guilty, under Section 193 of the Penal Code, of giving false evidence in a stage of a Judicial proceeding, and has been sentenced to rigorous imprisonment for one year.

The false evidence is alleged to have been given in this wise: The Assistant Magistrate received an anonymous communication charging certain persons with murder; but, before taking any steps to ascertain whether there were grounds for the charge, or whether indeed any murder had been committed, the Assistant Magistrate endeavoured to trace the writer of the letter, and satisfied himself (how we are not told) that the prisoner Bykunt Nath had something to do with it. Acting on this conviction he examined Bykunt Nath on oath, and elicited from him "that the letter was written by a Brahmin from a village on the banks of the Damooda, but that he did not know his name."

This statement was subsequently found to be false by the prisoner's own admission, for, when afterwards put upon his defence, he allowed that the writer was one Sham Dutt.

We do not think, however, that the conviction of the prisoner under Section 193 can stand. The Assistant Magistrate's original proceedings had no reference to the truth or otherwise of the charge of murder, as supposed by the Sessions Judge in his charge to the Jury, but was directed simply to the anonymous letter. Now, the writing of such a letter was, in itself, no offence, and the enquiry regarding it was not, in any sense of the term, a stage of a Judicial

proceeding which might have terminated in a judgment. The Sessions Judge has apparently gone on the mistaken idea that the prisoner's first statement was taken during the investigation into the charge of murder; but this is not so. The Assistant Magistrate himself distinctly states that all his proceedings, touching the anonymous petition, were taken before enquiring into the truth or falsehood of the charge of murder.

We think, therefore, that the Sessions Judge misdirected the Jury in telling them that the original statement of the prisoner was made in the stage of a judicial proceeding, and that the conviction, under Section 193 of the Penal Code, must, in consequence, be reversed.

It may possibly be that the prisoner would be liable to punishment under some other Section of the Penal Code, though we do not at all say that he would be so.

But, under the circumstances of the case, we certainly should not think it proper to direct that any further charge be framed, and we direct that the prisoner be discharged.

The 7th April 1866.

Present:

The Hon'ble L. S. Jackson, G. Campbell, and A. G. Macpherson, *Judges.*

Murder—Right of private defence.

Reference under Section 380 of the Code of Criminal Procedure.

Queen *versus* Durwan Geer.

Held by the majority of the Court (Campbell, J., dissenting) that, when a person wilfully killed another whilst endeavouring to escape after having been detected in the act of house-breaking by night for the purpose of theft, the offence committed was murder, and could not be considered to have been committed in the exercise of the right of private defence, either of person or property, nor under grave and sudden provocation.

Jackson, J.—In this case, it appears to me that the prisoner has committed murder as defined in the Penal Code.

He intentionally killed, with two blows of a kodalee, a man named Muhubir, whom he had caught in the act of committing house-breaking by night in his house.

The offence is not reduced so as to be culpable homicide not amounting to murder by reason of its coming within any of the Exceptions annexed to the 300th Section of the Code. The prisoner was not deprived of the power of self-control by grave and sudden provocation, nor was he exercising in good faith the right of private defence of property without any intention of doing more harm than was necessary for the purpose of such defence.

The thief was endeavouring to escape, but it does not appear that he was likely to escape, except that it is stated that he was a powerful man.

But the prisoner called for the kodalee with the express purpose of killing him, and, the kodalee being brought, killed him on the spot accordingly.

The right of private defence of property extends, in the case of house-breaking by night, to the voluntary causing of death to the wrong-doers, and it continues as long as the house-trespass begun by the house-breaker continues; but it is subject to the restriction contained in Section 99, that it "in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of self-defence."

If the prisoner had intended to inflict such injury on the thief as would have prevented him from escaping, and had, in so doing, accidentally killed him, the case probably would have come under the 2nd Exception to Section 300.

But the prisoner tells us that he intended to kill the thief, and it is impossible to suppose that killing was necessary for the purpose of defence.

Under the circumstances stated by the Judge, I certainly could not confirm the capital sentence which has been passed, but I cannot lawfully pass a less sentence than transportation for life.

Campbell, J.—In sentencing the prisoner Durwan Geer to death, it appears to me that the Judge has acted under a misconception of his duty, for he immediately after proceeds to state a variety of extenuating circumstances which may induce the High Court to mitigate the sentence; and it is, I think, patent in the judgment that he does not really himself think that the prisoner ought to be executed. There can be no doubt that the case is not one in which the more severe of the punishments sanctioned by law should be inflicted. But, further, with regard to the conviction for murder under which Durwan Geer must be sentenced—and Surwan Geer has been and can be sentenced—to no lesser punishment than transportation for life, I have an extreme repugnance to so construing the Penal Code that our hands are tied, and we are forced to inflict a punishment much greater than that which, on general grounds, we should deem that the offence deserves. My hon'ble

colleague who first sat with me in this case did, I believe, think it one in which a recommendation for the mercy of the Executive Government might properly be made. That is a very proper course in England, where the law designedly affixes very high punishments to certain offences, and leaves it to a Minister of State to advise Her Majesty whether the sentence should be carried out under Her Majesty's warrant or should be mitigated. But in this country I do not think that the law contemplates such a course. Under the Penal Code and Code of Criminal Procedure the very widest discretion is usually left to the Judge. Even a capital sentence is carried out without any reference to, or warrant of, the Executive Government, and the interference of the Government must be altogether extraordinary and incidental. In the case of murder, the Penal Code narrows the discretion of the Judge to the alternative punishments of death or transportation for life; but then it has always seemed to me to be the spirit and intent of the Code that the term murder should be confined to the very narrowest class of most heinous homicides for which no reasonable excuse or extenuation can be found, and that we must consider the law very fully, and construe it very liberally, before we feel ourselves bound to bring under the head of murder a homicide which our ordinary sense and feelings cannot class as an offence of so deep a dye.

In this spirit, then, I look at the offence before us and at the law on the subject.

It is patent that the prisoner killed the deceased in the very act of committing house-breaking by night for the purpose of theft. I may also premise that the circumstances were such that, if the prisoners had only remained silent or told a story more favorable to themselves, no offence could be charged against them. Beyond their own statements, there is not a tittle of evidence even to suggest that they exceeded the ordinary right of private defence which justifies the killing of a house-breaker by night. But, apparently not viewing their own conduct in a culpable light, they have volunteered statements which have placed them in their present position. It appears that the first prisoner was alarmed by the boy (the second prisoner), and coming up caught the deceased burglar in the act of coming through the hole in the wall and entangled in the hole. The deceased was, as the Judge says, "a very powerful man." The prisoner, it is shewn, shouted lustily for assistance, and (as remarked by the Judge), if the chowkeedar had done his duty instead of going off half a mile to call the gorait, the deceased would not have been killed. But, as the Judge goes on to narrate in his judgment, the prisoner could get no assistance, the deceased would not tell who he was, and "fearing escape" the first prisoner called to the boy to bring the kodalee. The boy fetched the kodalee from a few yards' distance, and then and there the first prisoner struck the deceased two blows which killed him. Insufficient as is the protection afforded to the people of this country against burglars and dacoits, and constant as is our complaint that they generally shew too little energy in protecting themselves, I confess that I feel much sympathy for a man who has only shewn a little too much energy in dealing with a house-breaker. But I must look to the law of the case. To begin with, it seems to me to be entirely a misapplication of terms to speak of this act as done *deliberately*. It may seem deliberate now in the narration, but I think it evident that the whole transaction took much less time than it takes to tell. The prisoner was struggling with a very powerful burglar, and calling for assistance which did not come. I take the refusal to tell his name to be a refusal to surrender, and the Judge is, I think, justified in saying that the prisoner, "fearing escape," knocked him on the head. As the fetching the kodalee probably did not take many seconds, I think that the thing was done, not deliberately, but in the very heat and excitement of the struggle. It was a dark night, some property of the prisoner had actually been taken, and the prisoner might well suppose that, if the burglar escaped, he would or might take property with him; there was neither time nor light to see whether he was going empty-handed. I cannot find any very distinct provisions of the law regarding the degree of violence that may be used to prevent the escape of a thief or robber, but I cannot doubt that, as observed by my brother Jackson, the prisoner would have been justified if he had only inflicted such injury as was necessary to prevent escape. As respects private defence of property, the Penal Code seems at first sight very distinctly framed to meet such cases as that before us. It is lawful, by way of defence, to kill a house-breaker by night (Section 103) and such right continues so long as the house-trespass continues (Section 103, Clause 5), and also (Clause 2) till the offender has effected

his retreat with the property or assistance is obtained. Again, if the right of private defence, being in good faith exercised, is carried to excess, that is, beyond lawful limits, then (Section 300, Exception 2) culpable homicide is not murder, but a homicide of the lesser degree.

Further, when a man kills another under the influence of grave and sudden provocation depriving him of self-control, then also the offence is not murder, but culpable homicide.

There are, however, exceptions within exceptions, and these provisions are qualified by final reservations: "provided that no more harm than is necessary is inflicted," "without any intention of doing more harm than is necessary for the purpose," and so on. Now, I admit that, if we are to construe these provisions very strictly against a prisoner—if we must consider that a man struggling with a powerful burglar must moderate his blows, and calculate them so as, if possible, not to kill, but only to stun him—if we are to measure by seconds the time required for deliberation—and if we are to refuse the benefit of the provision in favor of those acting under the excitement of provocation to such extent as deprives them of self-control to the point of, as it were, temporary insanity—then, no doubt, reasons may be found (and, in my view, too frequently are found) for throwing by far the greater proportion of these cases into the category of murder, contrary, as I think, to the general purview and spirit of the Code. I would, then, construe these provisions in a liberal spirit in favor of the prisoners. I would hold that, if a man in good faith acts for the protection of his person and property and to stop a robber, he is not to be deprived of all benefit of the law because he hits somewhat too hard, provided always that a blow of some kind was really necessary to effect the object in view.

Further, if a man really acted under the excitement of provocation, I would give him the benefit of the mitigated Clause without requiring proof that he was literally transported beyond every possibility of control over his acts.

In this case the prisoners may have carried the right of private defence and the duty of securing the thief a little too far; but, on the double ground that they acted against the burglar under the excitement of provocation, and that they in good faith acted in defence of their property and to secure the burglar, I hold the offence to be not murder, but culpable homicide. I would reduce the sentence on Durwan Geer to twelve months', and on Surwan Geer to six months' rigorous imprisonment. As my colleagues hold that the law binds them to convict for murder, and to pass the severe sentence prescribed, I hope that they will join me in recommending mitigation to his Honor the Lieutenant-Governor.*

Macpherson, J.—I think it is quite clear that the prisoner has committed the offence of murder. He did, and intended to do, far more harm to the deceased than was necessary for any purpose of defence, either of person or property. Therefore his case does not fall within Exception 2, Section 300 of the Penal Code, and what he did cannot (with reference to Exception 4, Section 99) be considered to have been done in the exercise of the right of private defence at all. The right of private defence is for protection, and not for punishment, and it is impossible to say that, in acting as he did, the prisoner acted merely for his own protection.

The case does not fall within Exception 1, Section 300, because there is nothing whatever to shew that the prisoner caused the deceased's death whilst deprived of the power of self-control. On the contrary, it appears on the evidence that the prisoner knew perfectly well what he was about, and acted with deliberation. The kodalee with which the murder was committed was not a weapon lying immediately at hand, seized by the prisoner, and used in the heat of sudden passion. It was brought to him by his brother from another house or room by the prisoner's order and for the express purpose of killing the deceased, whom the prisoner had on the ground, and was holding there.

In my opinion, the prisoner ought to be sentenced to transportation for life.

The 28th April 1866.

Present:

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Abetment of Grievous Hurt—Murder.

Queen *versus* Goluck Chung and others.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of

* NOTE.—The Lieutenant-Governor subsequently commuted the sentence passed on Durwan Geer to one year's rigorous imprisonment, and that of Surwan Geer to six months' rigorous imprisonment.—EDR.

Sylhet, on a charge of culpable homicide amounting to murder.

The prisoners having abetted an assault, and murder having been committed—HELD, under the peculiar circumstance of the case, that they were guilty of abetment of grievous hurt, and not abetment of murder.

Campbell, J.—UPON the whole, I do not think that the appellants abetted Sheikh Khawuz with the knowledge that he was likely to commit murder, but only with the intention of assaulting the deceased, and with the knowledge that deceased might suffer grievous hurt. I would, therefore, alter the sentence passed on the appellants to that which I should deem proper on a conviction for abetting grievous hurt, under the circumstances, *viz.*, 3 years' rigorous imprisonment.

Macpherson, J.—I also think that these prisoners ought not to be convicted of murder, or to be sentenced for that offence. I am not satisfied that any of them struck the deceased as alleged in the evidence. The case against the prisoners seems to me to go no farther than that they went out to assist in beating the deceased. Intending to hurt him, they are, no doubt, liable for any hurt or even grievous hurt done him. But the killing the deceased in the manner in which he was killed by Khawuz went so far beyond the purpose for which these prisoners seem to have gone out, that I do not look upon the murder which he committed as an act done in furtherance of the common object. The act abetted was different from the act done, and the act done was not the probable consequence of the abetment. I do not think that the prisoners knew that the hurt abetted was likely to cause death, or that they intended it to cause death. As the prisoners were abettors, and were present, I think they should be punished as for grievous hurt. I concur in the proposed sentence of three years' rigorous imprisonment.

The 30th April 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Compensation (under Section 44, Code of Criminal Procedure)—Damages.

Queen *versus* Barjoo Koormee and another.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Gya, on a charge of grievous hurt.

The compensation awarded under Section 44 of the Code of Criminal Procedure to the person injured in consideration of the loss which he has suffered, corresponds to *damages* awarded in civil proceedings.

WE think the Judge's order is quite legal. The compensation awarded under Section 44 of the Code of Criminal Procedure to the person injured in consideration of the loss which he has suffered corresponds to "damages" awarded in civil proceedings.

The discretion allowed to the Judge is very wide.

The 7th May 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Imprisonment (in default of fine)—Contempt (Refusal to answer public servant).

Criminal Jurisdiction.

Referred under Section 434 of the Code of Criminal Procedure and Circular Order No. 18, dated 15th July.

Queen *versus* Jogeshur Roy.

Simple, and not rigorous, imprisonment can be inflicted in default of payment of a fine imposed on an offender convicted under Section 179 of the Penal Code for refusal to answer a question demanded of him by a public servant on a subject on which he was legally bound to state the truth.

WE are of opinion that the offence committed by the accused comes under the provisions of Section 179 of the Penal Code, the accused having refused to answer a question demanded of him by a public servant on a subject on which he was legally bound to state the truth.

The Deputy Magistrate is clearly wrong in stating that he disposed of the case under Section 21, Act XXIII. of 1861, as we find that he made over the accused for trial before himself in his capacity of Deputy Magistrate, and punished him under Section 228 of the Penal Code.

The infliction of rigorous imprisonment in default of payment of the fine was clearly illegal, and we accordingly order that simple be substituted for rigorous imprisonment.

As the accused has been guilty of an offence under Section 179 of the Penal Code and as the amount of fine is not excessive and has been paid, we see no reason to take further action in the matter. The Judge will be instructed accordingly.

The 7th May 1866.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

False evidence—Corroboration.

Queen *versus* Mohina Chunder Chuckerbutty.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Jessore, on a charge of false evidence.

In a case of giving false evidence, the strictest and most accurate proof is necessary, and the testimony of a single witness unsupported by corroborative evidence is insufficient for a conviction.

We think that on this record the conviction for giving false evidence is bad. The false evidence with which the prisoner is charged is his having deposed, in the course of a suit in the Small Cause Court at Jessore, that he had paid a certain sum of six rupees and nine annas to one Rutheeram Nath, the prosecutor. On such a charge, we should have expected to find that the prosecutor was asked expressly whether the prisoner did or did not pay him the rupees 6-9 referred to; yet no such question seems to have been asked, and there is no express denial by the prosecutor that he received that sum. It is true prosecutor swore that the receipt for rupees 6-9, purporting to be signed by him, which the prisoner produced, is a forgery; but its being a forgery is not inconsistent with the possibility of the truth of the statement that the money was in fact paid. It is also true that, from the whole of the prosecutor's evidence, an inference may be drawn that he meant to depose that he never did receive the rupees 6-9; still, in a case of giving false evidence, the strictest and most accurate proof is essential, and when the question is as to an alleged payment as in the present instance, the Court ought to have put the question directly to the prosecutor in the express terms made use of by the prisoner in the Small Cause Court.

Further, the testimony of a single witness, unsupported by corroborative evidence, is insufficient to convict a person charged with giving false evidence (*see* Reg. *vs.* Lall Chand Kowrah, 5 W. R. C. R. 23). In the present case, the evidence of the prosecutor is, in our opinion, wholly uncorroborated. The evidence of the two witnesses who say that the prisoner applied to them to give false evidence in his behalf, to prove the receipt or the payment of the money, in the Small Cause Court, seems to us wholly worthless and unreliable. Then the question being whether the prisoner did or did not pay rupees 6-9 to the prosecutor, we are at a loss to see how any corroboration of the prosecutor's statement is to be found in evidence as to the mode in which the prosecutor usually keeps his books or transacts his business. Finally, we see no corroboration, to which we attach any weight, in the fact that, when taken before the Sessions Judge in order to be committed for trial for giving false evidence, the prisoner in general terms said he had committed a fault, and prayed to be let off. We do not think that such expressions, made use of under such circumstances by a person of the prisoner's class, can in any degree be relied upon as proof of his being guilty of the offence with which he is charged.

On the whole, we consider the conviction on the charge of giving false evidence is bad. Nevertheless, under Section 426 of the Code of Criminal Procedure, we shall not reverse or alter the finding or sentence of the Lower Court, because it appears to us that the prisoner might on the evidence—the testimony of one witness being in law sufficient, and the Lower Court having accepted the evidence of the prosecutor as true—have been properly convicted of the offence of dishonestly using as a genuine document the receipt which he knew, or had reason to believe, to be a forged document (Section 471 of the Penal Code). For this offence he might have received a more severe sentence than that which has been passed upon him. And, as the accused has not been prejudiced by the defect in the proceedings, we dismiss the appeal.

The prisoner ought to have been charged with giving false evidence, and also under Section 471.

The 9th May 1866.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Murder—Culpable Homicide not amounting to Murder.

Queen *versus* Teprah Fukeer and others.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of grievous hurt.

A person who beats another brutally and continuously so that the back of the victim is reduced to a state of pulp, and yet studiously avoids breaking a bone (the very fact of his taking such a precaution evincing deliberation), is guilty of murder or culpable homicide not amounting to murder, according as there may or may not have been grave provocation.

THESE three prisoners have been convicted, by the Sessions Judge of Rungpore, of voluntarily causing "grievous hurt," Section 325, Indian Penal Code. The sentence is five years' rigorous imprisonment. We may observe that the Assessors acquitted the prisoners Churkotoo and Pelkoo. These prisoners were also discharged by the Joint Magistrate, but were subsequently committed under the orders of the Sessions Judge. The prisoner Teprah Fukeer was committed on a charge of culpable homicide not amounting to murder, to which the Sessions Judge added the charge of voluntarily causing grievous hurt.

We have considered the whole of the evidence. It appears clear that there was an intrigue between the deceased and the wife of the prisoner Teprah Fukeer. It is stated that this connection had been broken off, but we are doubtful of the truth of this statement. This much is established by the evidence, that, on the night of the murder, the deceased went to the house of Teprah Fukeer (he at the time being absent); but whether he went there by assignation or with a view, as stated by the wife of the prisoner, to have forcible connection with her, is not so clear. That the deceased was cruelly beaten is clear from the evidence of the medical officer, who deposes "that the cause of death was compression of the brain and injury to the spinal chord, the result of a severe beating on the back, most probably inflicted with a bamboo." The Civil Assistant Surgeon further stated that "the muscles of the back were reduced to a state of pulp, and were infiltrated with blood to below the knee. There was no rupture of the spleen or any other organ."

The Sessions Judge observes "that it is true that the deceased was beaten in a 'brutal' manner, but there were no bones broken or any beating about the head; nor was any dangerous weapon used, and from the marks being all over the back, it would seem that the accused did not intend to inflict any injuries on any known vital portion of the body; and therefore I think that the intention to cause such bodily injury as was likely to cause death, or that a guilty knowledge that death was likely to ensue, cannot be imputed to the prisoner."

From this it would appear that, in the Judge's opinion, a party who beats another brutally and continuously, so that the back of the victim is reduced to a state of pulp to below the knee, so long as he studiously avoids breaking a bone (and the very fact of his taking the precaution evinces deliberation), is not guilty of murder. We give the prisoner the benefit of the grave provocation he received; but, taking his own admission as disclosed in his statement before the Joint Magistrate, we find that he was satisfied of the innocence of his wife on the night in question, and that no sexual intercourse had taken place on that occasion between her and the deceased. He also admits that he returned to the attack upon the deceased, and we find that he took undue advantage, and acted in a cruel and brutal manner. We therefore convict the prisoner Teprah Fukeer of culpable homicide not amounting to murder. The sentence may stand.

There is no evidence against the other prisoners beyond that of the wife of the prisoner Teprah Fukeer; and, as her statements before the Joint Magistrate and the Sessions Judge differ widely, we do not think it would be safe to convict these prisoners. We therefore acquit them in concurrence with the opinions of the Assessors and Joint Magistrate.

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The 14th May 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Disputed possession—Oral evidence.

Miscellaneous case.

Maharajah Gobind Nauth Rai

versus

Rajah Anund Nauth Rai.

Oral evidence is the principal matter upon which Magistrates can proceed in determining a question of possession under the Code of Criminal Procedure.

WE are decidedly of opinion that the order of the Joint Magistrate in this case must be set aside. Being directed by this Court to hold an enquiry into the subject-matter under Section 318 of the Code of Criminal Procedure, the Joint Magistrate has confined himself to examining the documents produced, and has refused to hear the witnesses whom the parties had in attendance. He justifies this refusal by the remark that "to commence to take oral evi-"dence would be to entitle each party to "bring hundreds and perhaps thousands of "witnesses on both sides." Whether the parties would or would not have brought hundreds or thousands of witnesses, they were entitled to have them heard; and we cannot refrain from expressing our surprise that the Sessions Judge, in reviewing this decision, should observe that "the law does "not prescribe any particular form in which "the Magistrate, in cases of this kind, is to "prosecute his enquiries. It simply says "the Magistrate shall call on all parties to "state their claims, and shall proceed to en-"quire; but that enquiry, not being in any "way defined or limited, may be an enquiry "based upon parol evidence or documentary "evidence, as the case may be."

Now, it is quite manifest that documentary evidence would at the best be a most unsafe guide in determining a question of possession. Both in cases under Act IV. of 1840, and under the Sections of the Code of Criminal Procedure which with certain modifications continue a portion of that law, oral evidence always has been, and must be, the principal matter upon which Magistrates can go.

The Joint Magistrate's order is therefore set aside. We express no opinion upon the necessity for making this enquiry under Section 318. The enquiry has been ordered by competent authority, and must be carried out in a lawful manner.

The 17th May 1866.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Plea of Intoxication.

Queen *versus* Bodhee Khan.

Committed by the Assistant Magistrate of Aurungabad, and tried by the Sessions Judge of Gya, on a charge of grievous hurt.

Voluntary intoxication is not a valid plea for an offence.

THIS is a very clear case. The prisoner wounded his uncle and another person with a sword most severely. The two men were for a long time in the hospital, and were for more than twenty days in severe bodily pain, unable to follow their ordinary pursuits.

The prisoner pleads intoxication, but there is no proof of this plea; and, if drunk at all, he was voluntarily drunk (Section 85 of the Indian Penal Code). Taking the aggravated circumstances of this case into consideration, the sentence is not too severe.

I reject the appeal, and confirm the conviction.

The 29th May 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, W. S. Seton-Karr, L. S. Jackson, and J. B. Phear, *Judges*.

Evidence (of accomplices)—Corroboration—Power of High Court (to set aside conviction and order new trial for error or defect in summing up).

Criminal Appeal No. 75 of 1866.

Elahee Buksh, *Appellant*.

Messrs. T. Barrow, R. T. Allan, R. E. Twidale, and *C. Gregory, Baboo Romanath Bose, Moulvie Murhumut Hossein*, and *Moonshee Ameer Ali* for Appellant.

A conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law.

The evidence of accomplices should not be left to a Jury without such directions and observations from the Judge as the circumstances of the case may require.

Improper advice given by the Judge to the Jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the Jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty.

The power of setting aside convictions, and ordering new trials for any error or defect in the summing up, will be exercised by the High Court only when the Court is satisfied that the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby.

This case was referred to a Full Bench by Justices L. S. Jackson and Glover with the following order:—

Referring Order.—We are of opinion that this conviction is bad in law, and should be reversed.

The evidence against the prisoner was that of three approver witnesses, two of whom were professional dacoits under the surveillance of the Police, and over whose heads a former conviction for dacoity was pending. The evidence of these persons was in no way corroborated, for the Telee, who deposes that he sold the 2¼ seers of oil to Pauchcowree, Elahee Buksh's servant, could not fix the date of the sale in any satisfactory manner, and, moreover, admitted that Pauchcowree used always to buy oil at his shop in various quantities, at intervals of three and four days. To this may be added that these approver witnesses never mentioned Elahee Buksh's name until they had been two days in the hands of the Police, and that it was from information received through Elahee Buksh that the first clue to the dacoity was obtained.

The Judge ought to have directed the Jury that the evidence of approvers, and especially of such approvers, ought to be received with great caution, and that under no circumstances would it be legally sufficient evidence unless it were in some way or other corroborated; and he ought further to have told them that it was not corroborated in any way. Instead of thus directing the Jury, the Judge simply left it to them to decide whether the approvers were speaking the truth or not.

This misdirection we consider to have been an error of law, the result of which has been to convict Elahee Buksh on what is not legal evidence.

We think, therefore, that the finding and sentence should be reversed, and the prisoner released.

But it has been brought to our notice that there are conflicting decisions on the point, and that a Divisional Bench of this Court have ruled in the case of the Queen *versus* Godai Raout (V. Weekly Reporter, page 11) that a Jury may convict upon the evidence of an accomplice, though not corroborated so as to show the prisoner's participation in the offence.

They also ruled that Section 28 of Act II. of 1855 did not apply to Mofussil Courts.

And another Divisional Bench, consisting of three Judges, ruled, Queen *versus* Dwarka (V. Weekly Reporter, page 18), that the uncorroborated testimony of an accomplice was not sufficient for conviction.

It has, moreover, it appears, since been laid down by a Full Bench of this Court (7th February 1866, Reg. *versus* Lalchand Kaora, V. Weekly Reporter, page 20) that Section 28, Act II. of 1855, refers to all Courts, Mofussil included.

Under these circumstances, we are not, we conceive, at liberty to pass final orders in this case until the point in question, *viz.*, whether or no the uncorroborated evidence of an accomplice is legally sufficient for conviction, be settled authoritatively, and we accordingly direct that this case be laid before a Full Bench of this Court for the purpose. As the prisoner Elahee Buksh is under sentence of transportation, the Sessions Judge will be directed to suspend the execution of his sentence until the result of this reference be known.

The opinion of the Full Bench will be asked on these points: *first*, whether a conviction can be had on the uncorroborated evidence of one or more accomplices?

Second.—If not, what is the nature of the corroboration required?

Peacock, C. J. (Kemp and Phear, JJ., concurring).—I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle.

The point was decided in England as far back as the 10th December 1662, after conference with all the Judges.

Several cases to that effect are cited by Sir Matthew Hale in his "Pleas of the Crown," Vol. I., pp. 303-304. He, however, remarks: "Yet, though such a party is admissible as "a witness in law, the credibility of his tes- "timony is to be left to the Jury; and truly "it would be hard to take away the life of "any person upon such a witness that "swears to save his own, and yet confesseth "himself guilty of so great a crime, unless "there be very considerable circumstances "which may give the greater credit to what "he swears."

In the King *vs.* Attwood, 1 Leach's Crown Cases, p. 464, which is a leading case upon the subject, two prisoners were convicted of highway robbery upon the uncorroborated evidence of an accomplice as to their identity. The question was referred for the opinion of the twelve Judges, who were unanimously of opinion that an accomplice alone is a competent witness; and if the Jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.

In sentencing the prisoners, Mr. Justice Buller made the following remarks:—

"Prisoners, you were convicted of a "highway robbery at the last summer As- "sizes at Bridgewater. The material cir- "cumstances of the trial were these. The "prosecutor gave in evidence that he was "robbed by three men on the day laid in "the indictment, mentioning the conver- "sation that passed during the robbery, and "proving all the facts that are necessary in "law to constitute that offence; but as it "was dark, he could not swear to the person "by whom it was committed. The accom- "plice was then called, who swore that he "and you had, in company of each other, "committed this robbery, *and he mentioned "all the circumstances that passed, which "exactly corresponded with those which the "prosecutor had before related.* On the "testimony of these two witnesses, the Jury "found you guilty; but on a doubt arising "in my mind respecting the propriety of "this conviction, I thought it proper to refer "your case to the consideration of the twelve "Judges. My doubt was whether the evi- "dence of an accomplice, unconfirmed by any "other evidence that could materially affect "the case, was sufficient to warrant a convic- "tion; and the Judges are unanimously of "opinion that an accomplice alone is a com- "petent witness, and that, if a Jury, weigh- "ing the probability of his testimony, think "him worthy of belief, a conviction supported "by such testimony alone is perfectly legal. "The distinction between the *competency* "and the *credit* of a witness has been "long settled. If a question be made "respecting his *competency*, the decision "of that question is the exclusive pro- "vince of the Judge; but if the ground "of the objection go to his *credit* only, "his testimony must be received and left "with the Jury, *under such directions "and observations from the Court as "the circumstances of the case may require,* "to say whether they think it sufficiently "credible to guide their decision on the "case. An accomplice, therefore, being a "competent witness, and the Jury in the "present case having thought him worthy "of credit, the verdict of guilty which has "been found is strictly legal, though found "on the testimony of the accomplice only." His Lordship then passed sentence of death upon the prisoners, but intimated that it was his intention to recommend them to mercy.

In the case of the King *vs.* Jones, 2 Campbell's Reports 131, Lord Ellenborough says: "No one can seriously doubt that a "conviction is legal, though it proceed upon "the evidence of an accomplice only. Judges, "in their discretion, will advise a Jury "not to believe an accomplice, unless he "is confirmed, or only in so far as "he is confirmed; but, if he is believed, "his testimony is unquestionably sufficient "to establish the facts which he deposes: "it is allowed that he is a competent witness, "and the consequence is inevitable that, if "credit is given to his evidence, it requires "no confirmation from another witness. "Within a few years, a case was referred to "the twelve Judges where four men were con- "victed of a burglary upon the evidence of "an accomplice who received no confirma- "tion concerning any of the facts which "proved the criminality of one of the

"prisoners; but the Judges were unanimously of opinion that the conviction as to all the four was legal, and upon that opinion they all suffered the penalty of the law. Strange notions upon this subject have lately got abroad, and I have thought it necessary to say so much for the purpose of correcting them."

See the King *versus* Durham and another, Leach's Crown Cases 478.

At the Old Bailey Sessions, 1784. Smith and Davies were tried for robbing Hunter. During the night the prosecutor was attacked by four ruffians whose persons he was unable to identify, but during the scuffle he had torn a piece of the coat which one of them had on, who, on being discovered by these means, turned King's evidence, and implicated the two prisoners. But the Court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony, and the prisoners were acquitted.

The law, as above laid down, that a conviction is legal, though supported by the uncorroborated evidence of an accomplice, has been admitted by Lord Denman in Rex *versus* Hastings and another, Carrington and Payne's Reports 152; by Baron Alderson in Rex *versus* Wilkes, 7 Carrington and Payne's Reports 272; and by many other learned and eminent Judges; and it was so ruled by the Court of Criminal Appeal in Rex *versus* Stubbs, 25 Law Journal Reports, Magistrates' Cases, page 16. The law of England, therefore, upon this subject is beyond doubt.

The Law of America is the same, and in that country, where in most of the States new trials are granted in criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice. The cases upon the subject are collected in Wharton's Criminal Law of the United States of America, page 366. It does not appear that, in the cases in which new trials were refused, the Judge who tried the case had omitted to make such observations to the Jury, with reference to the evidence of the accomplices, as the circumstances required. But in civil cases it is clear that both in that country and in England a new trial will be granted where, from the absence of proper instructions from the Judge, the Jury fall into an error. Formerly, the rule was that the mere commission of a crime did not render a witness incompetent, but persons convicted of treason, felony, or certain other crimes, were rendered incompetent by conviction. The incompetency created by conviction was removed in England by Act of Parliament, and was subsequently removed here by Act XIX. of 1837, by which it was enacted that no person shall, by reason of a conviction for any offence whatever, be incompetent to be a witness in any stage of a cause, civil or criminal, or before any Court in the territories of the East India Company.

It was contended, in the course of argument in the present case, that in India the rule of evidence in the Mofussil is different from the law of England with respect to the legality of convicting upon the uncorroborated evidence of an accomplice.

If there had been a long uniform course of decisions in the late Sudder Court that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of a prisoner, we should have been disposed to bow to those decisions, and to act upon the rule "*stare decisis.*"

One case only was cited in which a Judge of the Sudder Court stated that he did not think it legal to convict upon such evidence. There may be other cases to the same effect. But there is no uniform current of decisions which would justify us in holding that the law in this respect in the Mofussil was different from the established law of England, and from that which was administered in the late Supreme Court, and is now administered by this Court in the exercise of Original Criminal Jurisdiction. It would require a uniform train of decisions to justify us in holding that the Law of Evidence to be administered by the Court upon such a point as this is different in the exercise of the Appellate Criminal Jurisdiction from that which is acted upon in the exercise of Original Jurisdiction.

7 Nizamut Reports, page 57.

When called upon to give effect to particular expressions which have been made use of by the Judges of the late Sudder Court with regard to the rules of evidence, we must bear in mind that, up to a very recent period, when trial by Jury was established in certain districts, it was the province of the Sessions Judges, and of the Judges of the late Sudder Court, to determine questions of fact as well as questions of law in criminal cases; and that, in dealing with such cases, it was not very frequently necessary to determine whether the evidence of a particular witness was insufficient in law to justify a

conviction, or merely insufficient to induce them, as judges of fact, to declare that a prisoner was guilty. There is a wide distinction, however, between disbelieving evidence and determining that it is not legally sufficient if believed; but this distinction is not always sufficiently adverted to by Courts which are judges of fact as well as of law.

Act II. of 1855, Section 28, was referred to by the appellant's pleader, by whom the case was very well argued, and it was contended that that Act rendered corroboration necessary. Upon that point, it is sufficient to say that it was not the intention of the Act to render inadmissible any evidence, which, but for the Act, would have been admissible (*see* Section 58); nor was it intended to lessen the legal effect of any such evidence.

We have, therefore, no hesitation in answering the first question in the affirmative, and declaring that a conviction may be legally had on the uncorroborated evidence of one or more accomplices.

It is unnecessary, as regards this part of the case, to answer the second question.

Holding that the Judge was not bound to direct the Jury that the evidence was not legally sufficient for a conviction, we shall probably mislead if we do not go on to consider whether there was any error or defect in the summing up which constitutes a valid ground of appeal. The question of misdirection is raised by the Judges who referred the case, and is, I think, substantially before us, and ought to be considered, although there is no specific question as to whether there was a misdirection or not. I proceed, therefore, to consider whether there is any ground for setting aside the conviction upon the ground of error in the summing up.

In the case of Regina *vs.* Farler, 8 Carrington and Payne's Reports, page 108, a very learned and eminent Judge, than whom no one was better able to deal with evidence, and to determine the degree of credibility to which particular witnesses were entitled—I mean the late Lord Abinger—in summing up the case to the Jury, made the following remarks: "I am strongly inclined "to think that you will not consider the "corroboration in this case sufficient. No one "can hear the case without entertaining a "suspicion of the prisoners' guilt; but the "rules of law must be applied to all men "alike. This a practice, which deserves all "the reverence of law, for Judges uniformly to tell Juries that they ought not to "pay any respect to the testimony of an "accomplice unless he is corroborated in "some material circumstance. In my opinion, that corroboration ought to consist "of some circumstance that affects the identity of the party accused.

"A man who has been guilty of a crime "himself will always be able to relate the "facts of the case, and if the confirmation "be only on the truth of that history without identifying the persons, that is really "no corroboration at all. If a man were to "break open a house and put a knife to "your throat, and steal your property, it "would be no corroboration of an accomplice that he had stated all the facts correctly—that he had described how the "person did put a knife to your throat, and "did steal the property. It would not at all "tend to show that the party accused participated in it. Here you find that the prisoner and his accomplice are seen together "at the house of the landlord. Now, look at "his evidence. If they were seen together "under circumstances that were extraordinary, and where the prisoner was not likely "to be unless there were concert, it might "be something. But he lives within one "hundred and fifty yards, and there is nothing "extraordinary in his being there; and he "left when they were shutting up the "house. Therefore it is perfectly natural "that he should have been there, and left "when he did. The single circumstance is, "that the prisoner was seen in a house "which he frequents, where he may be seen "once or twice a week; and there the case "ends against him. All the rest depends upon "the evidence of the accomplice. The danger is that, when a man is fixed, and knows "that his own guilt is detected, he may "purchase impunity by falsely accusing "others. I would suggest to you that the "circumstances are too slight to justify you "in acting on this evidence." The prisoner was accordingly acquitted.

In Rex *versus* Wilkes and Edwards, 7 Carrington and Payne's Reports, page 272, a similar rule was laid down by Baron Alderson in a case of sheep-stealing. He said: "There is a great difference between confirmations to the circumstances of the "felony and those which apply to the individuals charged: the former only prove "that the accomplice was present at the "commission of the offence; the latter show "that the prisoner was connected with it. "This distinction ought always to be attended to." In summing up, the learned Judge said: "The confirmation of the ac-

"complice as to the commission of the "felony is really no confirmation at all, because it would be a confirmation as much "if the accusation were against you and me, "as it would be as to those prisoners who "are now upon their trial. The confirmation "which I always advise Juries to require is "the confirmation of the accomplice in some "fact which goes to fix the guilt on the "particular person charged. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony; but I advise Juries never to act "on the evidence of an accomplice, unless "he is confirmed as to the particular person "who is charged with the offence. With "respect to the prisoner Edwards, it is "proved that meat of a similar kind was "found in his house. The meat cannot "be identified, but it is similar; that is, "therefore, some confirmation of the accomplice as to Edwards more than any one "else. It is also proved that the skin was "found in a whirley hole: that is no confirmation, because it does not affect the "prisoners more than it affects any other "person. With respect to the prisoner "Wilkes, it is proved by the witness Meek "that the prisoner Wilkes told him nearly "the same story as the accomplice has told "you to-day. If you believe that witness, "there is confirmation of the accomplice "as to the prisoner Wilkes: you will say "whether, with these confirmations, you "believe the accomplice or not. If you "think that his evidence is not sufficiently confirmed as to one of the prisoners, "you will acquit that one; if you think "he is confirmed as to neither, you will "acquit both; if you think he is confirmed "as to both, you will find both guilty."

The Jury found both prisoners guilty.

In the case of Rex *vs.* Stubbs, in the Court of Criminal Appeal above referred to, Mr. Baron Parke said: "My practice has "always been to tell the Jury not to convict the prisoner unless the evidence of "the accomplice is confirmed, not only as "to the circumstances of the crime, but "also as to the person of the prisoner;" and Creswell, J., added: "You may take it for "granted that the accomplice was at the "committal of the offence, and may be "corroborated as to the facts; but that has "no tendency to shew that the parties accused were there." Chief Justice Jervis in the same case remarked: "There is "another point to be noticed. When an "accomplice speaks as to the guilt of three "prisoners, and his testimony is confirmed "as to two of them only, *it is proper, I "think*, for the Judge to advise the Jury that "it is not safe to act on his testimony as to "the third person in respect of whom he is "not confirmed, for the accomplice may "speak truly as to all the facts of the case, "and at the same time in his evidence substitute the third person for himself in his "narrative of the case." In Rex *vs.* Merries and another, 7 Carrington and Payne's Reports, 270, on an indictment against *A* as principal and *B* as receiver, where the evidence of an accomplice was corroborated as to *A*, but not as to *B*, Baron Alderson thought it was not sufficient as to *B*.

Conflicting opinions have been expressed as to whether, in a case in which an accomplice accuses two persons, and is corroborated as to one, but not as to the other, a Jury ought to be advised to acquit the one as to whom there is no corroboration. The opinion expressed by Chief Justice Jervis in Rex *vs.* Stubbs, as above mentioned, appears to be the correct one; for nothing is more easy than for an accomplice to accuse an innocent person in order to get off his real companion in guilt, and to attribute to the person falsely accused acts which were really committed by the guilty companion.

In the present case, two accomplices gave evidence against Elahee Buksh; but that does not seem to carry the case much farther.

In Rex *vs.* Noakes, in which two accomplices spoke distinctly as to the prisoner, Littledale, J., told the Jury that, if their statements were the only evidence, he could not advise them to convict the prisoner; that it was not usual to convict on the evidence of one accomplice without confirmation; and that, in his opinion, it made no difference whether the evidence was that of one accomplice only, or of more than one. This, as a general rule, is correct, for otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons. But if two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II. of 1855, Section 31. The evidence of the several accomplices so corroborated might be sufficient to satisfy a Jury, although the

evidence of one of them alone could not have been safely acted upon. These are matters to which the attention of a Jury ought, under all circumstances, to be specially directed, with proper remarks from the presiding Judge, according to the rule laid down by Mr. Justice Buller in the case already cited.

The danger of acting upon the evidence of an accomplice, who is admitted to give evidence for the Crown, arises, not merely from the fact of his having committed a crime—for that would go to the credit of every witness who had recently committed or been convicted of a crime—but from the fact of his giving his evidence under the hope or expectation of pardon, and of his obtaining immunity from punishment if his evidence be believed.

Suppose two gentlemen of previously undoubted honor and good character should, in a moment of irritation, not amounting in law to provocation, get out of a dâk carriage, and thrash the coachman or syce for not giving them a good horse—suppose the man should die, and that both should be convicted of culpable homicide. Would any one say that either of them would be so wholly unworthy of credit as witnesses in any other case, that a Jury ought to be advised not to act upon his testimony except so far as it was corroborated?

If he would not, after conviction, be unworthy of credit if called upon to give evidence against a stranger for another offence, why should he be unworthy of credit before conviction against his own companion and friend if compelled to give evidence against his will? Suppose that, immediately after the commission of the offence, one should be apprehended and the other should escape without being identified with sufficient certainty for conviction—suppose that the one who escaped should be apprehended and brought to trial, and that the one who had been apprehended in the first instance should be called as a witness against his will, and, being compelled to give evidence (as he might be under Act II. of 1855, Section 32), should identify his companion—would any Judge, in the exercise of a sound judicial discretion, feel himself bound to tell a Jury that, because the witness was an accomplice, it would be dangerous to act upon his evidence alone uncorroborated?

When the Judges speak of the danger of acting upon the uncorroborated evidence of accomplices, they refer to the evidence of accomplices who are admitted as evidence for the Crown, in the hope or expectation of a pardon.

If, in such a case, the accomplices admitted to give evidence act fairly and openly, and discover the whole truth, though, according to the law of England, they are not, except in certain cases for which special provision is made by Statute, entitled as of right to pardon, yet the usage, the lenity, and the practice of the Court is to stop the prosecution against them, and they have an equitable title to a recommendation to the mercy of the Crown (Cowper's Reports 334).

The origin of the practice of admitting accomplices to give evidence for the Crown without approvement is explained by Lord Mansfield in Rex *vs.* Rudd (Cowper's Reports 334, 335). He there says:—

"A person desiring to be an approver "must be one *indicted* for the offence, and "*in custody* on that indictment. He must "confess himself guilty of the offence, and "*desire* to accuse his accomplices. He must "likewise, upon oath, discover, not only the "particular offence for which he is indicted, "but all *treasons* and *felonies* which *he* "*knows of;* and after all this, it is in the "discretion of the Court whether they will "assign him a Coroner, and admit him to be "an approver or not; for, if on his confession "it appears that he is a *principal*, and tempted the others, the Court may refuse and "reject him as an approver. When he is "admitted as such, it must appear that what "he has discovered is true, and that he has "discovered the *whole truth.* For this purpose, the Coroner puts his appeal into form; "and when the prisoner returns into Court, "he must repeat his appeal without any help "from the Court or from any bystander. "And the law is so nice that, if he vary in "a *single circumstance*, the whole falls to "the ground, and he is condemned to be "hanged. If he fail in the color of a horse, "or in circumstances of time, so rigorous is "the law that he is condemned to be hanged; "much more if he fails in essentials. The "same consequences follow if he does not "discover the *whole truth;* and in all these "cases the approver is convicted on his own "confession. (*See* this doctrine more at large "in Hale's Pleas of the Crown, Vol. II., pages "226 to 236; Stauns. Pleas of the Crown, "lib. 2, c. 52 to c. 58, 3 Insti. 129). A further "rigorous circumstance is, that it is necessary to the approver's own safety that the "Jury should believe him, for if the partners "in his crime are not convicted, the approver himself is executed.

"Great inconvenience arose out of this "practice of approvement. No doubt, if it "was not absolutely necessary for the exe- "cution of the law against notorious offend- "ers that accomplices would be received "as witnesses, the *practice* is liable to many "objections. And, though under this prac- "tice they are clearly competent witnesses. "their single testimony alone is seldom of "sufficient weight with a Jury to convict "the offender, it being so strong a tempta- "tion to a man to commit perjury if by ac- "cusing another he can escape himself.

"Let us see what has come in the room "of this practice of approvement—a kind of "*hope* that accomplices who behave fairly, "and disclose the whole truth, and bring "others to justice, should themselves escape "punishment, and be pardoned. This is in "the nature of a recommendation to mercy. "But no authority is given to a Justice "of the Peace to pardon an offender, and "to tell him he shall be a witness against "others. The accomplice is not assured "of his pardon, but he gives his evidence "*in vinculis*, in custody; and it depends on "the title he has from his behaviour whether "he shall be pardoned or executed."

Sir Matthew Hale, speaking of approvement, says: "This course of admitting ap- "provers has long been disused, and the truth "is that more mischief hath come to good "men by this kind of approvements by false "accusations of desperate villains than "benefit to the public by the discovery and "convicting of the real offenders; jailors, "for their own profits, often constraining pri- "soners to affect honest men, and therefore "provision has been made against it." (*See* 2 Hale's Pleas of the Crown 226.)

The modern practice of admitting accomplices to give evidence under a hope of pardon, though not so dangerous as the old practice of approvement, would still be attended with the greatest danger, but for the safeguard which has to some extent been provided by the practice of the Judges in recommending Juries not to act upon such evidence without requiring corroboration as to the identity of the person accused.

The danger of acting upon the uncorroborated evidence of accomplices is at least as great here as it would be in England, for here, as in England, the accomplices are not actually pardoned before they give evidence.

In England, by confessing and giving evidence, they acquire an enquitable right to a recommendation for the mercy of the Crown. Here the Magistrate is merely authorized to tender a pardon; and, if it appear to the Court of Session at the time of trial or to the High Court as a Court of Reference, that the person who has accepted the offer of pardon has not conformed to the conditions under which the pardon was tendered, either by concealing anything essential, or by giving false evidence or information, it is competent to the Court to direct the commitment of such person for trial for the offence in respect of which the pardon was tendered.

Code of Criminal Procedure, Sections 209, 211.

The witness, therefore, does not give his evidence under an absolute certainty of immunity.

In Scotland the law is different. There, as remarked by Mr. Alison, "it is established that "by the mere fact of "calling the Socius as "a witness, the prose- "cutor debars himself from "all right to molest him "for the future with relation to the same "offence. This is always explained by the "presiding Judge to the witness as soon as "he appears, and consequently he gives his "testimony under a feeling of absolute "security as to the effect which it may have "upon himself. This privilege is absolutely "and altogether independent of the preva- "rication or unwillingness with which the "witness may give his testimony. Justice "may indeed be often defeated by a wit- "ness retracting his previous disclosures "or refusing to make any confession after "he is put into the witness-box; but it "would be much more put in hazard if the "witness were sensible that his future "safety depended on the extent to which "he spoke against his associate at the bar."

Alison's Practice of the Criminal Law of Scotland 453, cited by Mr. Roscoe, Digest of Evidence in Criminal Cases, 6th Edition, page 126.

It is quite as necessary here as it is in England, if not more so, that the evidence of accomplices should not be left to a Jury without such directions and observations from the Judge as the circumstances of the case may require.

The question is, whether the omission of the presiding Judge, on a trial in the Mofussil, to make such observations, is not such an error in his summing up as to justify the Court, on appeal or revision, in setting aside a verdict of guilty.

It has been said by a learned author, speaking of the administration of Civil Justice in England, that "it is

Starkie on Evidence, page 472.

"the practice for the Judge at Nisi Prius, "not only to state to the Jury all the evi-"dence that has been given, but to com-"ment on its bearing and weight, and to "state the legal rules upon the subject and "their application to the particular case, "and even to advise them as to the verdict "they should give, so that it may accord "with his view of the law and with "justice."

He proceeds: "Indeed, without this as-"sistance from the Judge, few Juries would, "in a contested case, be able to come to an "unanimous opinion, being frequently left "in a state of great perplexity by the "influence of the speeches of the contending "leaders.

"The accuracy of the summing up of the "Judge is therefore of the very utmost "importance, because if the Jury, after "hearing the evidence and the powerful "arguments which probably have been urged "in favor of quite opposite views of the "question, were entirely left to decide for "themselves, without an impartial direction "as to what just and legal weight ought to "be attached to this or to that view of the "case, it would be difficult, if not impracti-"cable, for them to come to a just conclu-"sion; and hence, in the administration of "civil justice, it is incumbent on the Judge "correctly to state the law upon the case, "as well as the evidence and the bearings "of the latter."

If the above remarks as to the impracticability of Juries coming to a just conclusion are correct as regards the administration of civil justice in England, they are still more so as regards the administration of criminal justice in the Mofussil, where trial by Jury is in its infancy, and where the persons of whom Juries are generally composed are necessarily more dependent upon the Judge than they are in England for sound and proper advice and assistance as regards the degree of weight which may be fairly and safely attached to the testimony of particular witnesses. The Jury, it is true, are not legally bound to act upon the advice or recommendation of the Judge, as there is no appeal from a verdict of acquittal or from a verdict of guilty upon a mere matter of fact.

By Section 379 of the Code of Criminal Procedure, it is enacted that, in a trial by Jury, the Judge will sum up the evidence on both sides, and the Jury shall then deliver their finding upon the charge, and "a statement of the Judge's direction to the Jury shall form part of the record." There can be no doubt that that Section requires the Judge to sum up properly, and there would be very great danger in holding that there is no remedy by appeal against a verdict of guilty, if it appears clearly to the High Court that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses.

It appears to me that it amounts to an error in law in the summing up, which, on appeal, is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in Sections 439 and 426, *viz.*, that the Appellate Court is satisfied that the accused person has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby.

It was said by Chief Justice Tindal, in Davidson *vs.* Stanley, 2 Manning and Granger's Reports, p. 728, that "it is no objection that "a Judge lets the Jury know the impres-"sion which the evidence has made upon "his own mind, and that, at all events, the "party objecting to such a course should "show that the impression entertained "by the Judge was not justified by the "evidence;" and it has been already shown that it is the practice of Judges in England to advise Juries not to convict merely upon the uncorroborated evidence of an accomplice.

If a Judge in a criminal trial in the Mofussil were to tell the Jury that in his opinion the evidence was sufficient to justify them in finding the prisoner guilty, in a case in which, if the Judge had been trying the case with the aid of Assessors, the High Court would, on appeal, have reversed his judgment if upon the same evidence he had convicted the prisoner, I have no doubt that the Court ought on appeal to set aside a verdict of guilty found by the Jury, notwithstanding the advice was merely as to the weight of evidence.

So, if a Judge, instead of advising a Jury not to convict upon the mere uncorroborated evidence of an accomplice, were to advise them to convict upon such evidence, or were to tell them that the uncorroborated evidence of an accomplice given under a tender of pardon was admissible, and that it was for them alone to form their opinion upon it, that a conviction founded upon such evi-

dence would be legal, and that such evidence without corroboration might be acted upon with as much safety as that of any other witness, I think the error in the direction would form a good ground of appeal.

Now, there are errors of omission as well as errors of commission, and I have no doubt that it would form a good ground of appeal against a verdict of guilty if a Judge were to call the attention of a Jury to all the evidence against the prisoner, and to omit altogether to allude or call attention to the evidence in his favor. By such a summing up, the Judge would not comply with the requirement of the Code of Procedure, and a verdict founded upon such a summing up ought, I think, to be set aside if the Court should be of opinion that the evidence was not sufficient to justify a conviction. I put the case merely to try the principle. It appears to me that such an omission, or an omission to follow a practice which is universally adopted by the Judges in England, and is described by Lord Abinger to be "a "practice which deserves all the reverence "of law," would be a ground of appeal against a conviction upon a verdict of guilty based upon such evidence alone, and founded by a Jury upon such a summing up. So also I think it would be error in a summing up if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the Jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all. When Lord Ellenborough said, "Judges in their discretion will advise a "Jury not to believe the evidence of an ac-"complice unless he is confirmed, or only so "far as he is confirmed," he must have intended that it was their duty to do so. "Discretion," says Lord Mansfield, "when "applied to a Court of Justice, means sound "discretion guided by law. It must be "governed by rule, not by humour. It "must not be arbitrary, vague, and fanciful, "but legal and regular."

But, although I am of opinion that the Legislature intended that the Sudder Court should have the power of setting aside a verdict of guilty pronounced by a Jury upon an erroneous or defective summing up of the evidence by the presiding Judge, yet I think that it was not their intention that a verdict of guilty should be set aside in every case in which there is a defective or erroneous summing up. It was their intention to provide protection for the innocent, but not chances of escape for the guilty. The power, therefore, of reversing a finding or of setting aside a trial was carefully guarded by Sections 426 and 439 of the Code of Criminal Procedure, by which it was enacted that "no "finding or sentence passed by a Court of "competent jurisdiction shall be reversed or "altered, on appeal or revision, on account of "any error or defect either in the charge or "in the proceedings on the trial, unless in the "judgment of the Appellate Court the ac-"cused person *shall have been preju-"diced* by such error or defect;" and that 'no trial held in any Criminal Court "shall be set aside, and no judgment "passed by any Criminal Court shall be "reversed, either on appeal or otherwise, for "any irregularity in the proceedings of the "trial, unless such irregularity have occa-"sioned a failure of justice."

The Code of Criminal Procedure provides that, if a person be convicted on a trial by Jury, the appeal shall be admissible only upon a matter of law. But it certainly is not against the principle, or even the letter of the Code, that the Court should have power to set aside a verdict of guilty for an insufficient or defective summing up of the evidence in a case in which, in their judgment, the verdict is not warranted by the evidence.

If a verdict and conviction could not under such circumstances be set aside, trial by Jury in the Courts of Session in this country would be fraught with the most dangerous consequences. On the other hand, if every convict, against whom a verdict of guilty is pronounced by a Jury, has a right to have that verdict set aside upon appeal, and to obtain his discharge whenever it can be shown that the presiding Judge has not properly directed the Jury as to the degree of weight which ought to be given to particular evidence, a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country would be placed in the greatest jeopardy in those districts to which trial by Jury has been extended. A verdict of acquittal by a Jury cannot be reversed, and ample protection is afforded to prisoners by allowing the High Court to reverse a verdict of guilty for any error or defect in the summing up, whenever the Court is of opinion that a failure of justice has been thereby occasioned.

It has been suggested that the word "reverse" means to change to the contrary,

and that to reverse a verdict of guilty is to change it into a verdict of not guilty; and that, although the Court, as a Court of Revision, may grant a new trial, as a Court of Appeal it has not power to do so.

But I am of opinion that the word "reverse" is not used in so restricted a sense. The word "reverse" in Sections 419 and 426 is applicable not merely to findings or verdicts, but also to sentences; and in Section 439 the same word is used with reference to judgments only. But if the word "reverse," when applied to a verdict, means to "change or turn into the contrary," it must also mean the same when applied to judgments or sentences. Thus, a judgment of conviction must be turned into a judgment of acquittal. Section 420 shows that such was not the meaning of the word when applied to sentences, even if without that Section it would have been possible to put such a construction upon it.

Section 405.

The Court, upon revision, may grant a new trial. But the person convicted cannot obtain a revision as a matter of right.

I think that the Court has as great a power in this respect on appeal as it has on revision, and that it may set aside a verdict of guilty and a conviction founded upon it for any error in law, such as a misdirection of the Judge in point of law, or an error or defect in the summing up of the evidence, or the improper rejection or admission of evidence, provided the Court is of opinion that the person convicted has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby. I am of opinion that the word "reverse" is used in its legal sense, and means to make void, to set aside, or annul.

The Legislature, when giving a power to a Court of Revision to order a new trial, may have thought it necessary to do so by express words, as a Court of Revision may act of its own motion and without any application or consent of the person convicted. But an appeal must be preferred by the person convicted, and it seems to follow that, if he asks to have a finding and conviction set aside for error in law, he cannot set up that conviction in bar of a second trial.

That was the principle acted upon by the Judges in America, who held that a new trial might be granted in cases of felony notwithstanding the words in the constitution, "Nor shall any person be subject for "the same offence to be twice put in jeo-"pardy of life or limb;" which words were interpreted by Mr. Justice Story to mean that "no person shall be tried a second time "for the same offence where a verdict has "been given by a Jury." "I am aware," said Mr. Justice Kane, "that one of the most "eminent of our Jurists, Mr. Justice Story, "has found an inhibition in the constitution "against the grant of new trials in cases in-"volving jeopardy of life. But I cannot "realize the correctness of the interpretation "which, anxious to secure a citizen against "the injustice of a second conviction, re-"quires him to suffer under the injustice of "the first. Certainly I would not subject "the prisoner to a second trial without his "consent. If, being capitally convicted, he "elects to undergo the sentence, it may be "his right. When, however, he asks a "second trial, it is to release himself from "the jeopardy in which he is already, and "it is no new jeopardy that he encounters "when his prayer is granted, but the same "divested of the imminent certainty of its "fatal issue."

The same distinction was noticed by other Judges between jeopardy incurred with the consent of a prisoner, and jeopardy incurred without that consent.

If a new trial may be granted for error in law by a Court of Revision, even without the prisoner's consent, can it be doubted that the same Court, as a Court of Appeal, may grant a new trial when an appeal is preferred by a prisoner against a verdict and conviction?

It appears to me that, in all cases in which a finding of guilty is set aside upon appeal, the Court, if it considers it necessary, may order a new trial.

In some cases it may be necessary: for example, where evidence is improperly rejected, or where, for other reasons, the Appellate Court is unable to form a correct opinion as to the guilt or innocence of the appellants. But when the finding and conviction are objected to upon the ground that the Judge did not properly direct the Jury as to the degree of weight which ought to be given to the evidence, it appears to me that this Court, sitting as an Appellate Court, is not necessarily bound to send the case back for a new trial. If the Court are of opinion that the evidence could not, in any proper view of the case, support a conviction, it would be worse than useless to send the case back for a new trial in order that a Jury might have the opportunity of convicting upon such evidence under a proper summing up.

Section 419 of the Code of Criminal Procedure allows the Appellate Court to alter or reverse the finding. It does not compel them to send the case back for a new trial in cases in which they see that it is useless, and may be injurious to do so. Regard for the prosecutor and witnesses forbids it; the prisoner is amply protected by the Section which prohibits an appeal from a judgment of acquittal, and a failure of justice is sufficiently guarded against by allowing the Court to order a new trial whenever, upon appeal, they are satisfied that there has been a failure of justice. It would tend to defeat, and not to promote, justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon the evidence given on the trial, have affirmed a conviction, if, instead of a trial by Jury, the trial had been before a Judge and Assessors. In determining whether the verdict ought to be set aside, and a new trial granted for a defective summing up of the evidence, it appears to me that the question to be considered is not whether, upon a proper summing up of the whole evidence, a Jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and Assessors, I think that they ought not to set aside a verdict of guilty found by a Jury merely because the Judge has not, in summing up, given proper caution or advice to the Jury as to the weight which they might properly give to the evidence. If the verdict is set aside for such a cause upon the ground that the error of the Judge has caused a failure of justice, and that the prisoner has been prejudiced thereby, it may be necessary in some cases to grant a new trial. But if the Court is satisfied that a failure of justice has been caused, and that the evidence is wholly insufficient to support any conviction against the prisoner, and would, upon the same evidence, have reversed a conviction, if the case had been tried without the intervention of a Jury, there is no necessity, and I think it would be improper, to grant a new trial. In such a case, the Court, having set aside the verdict, may order the prisoner to be discharged.

In the case under consideration, the appellant was convicted and sentenced for the crime of dacoity. The Judge told the Jury that the prisoners might be divided into four classes: *1st*, Elahee Buksh (the appellant), Pauchcowree, and Baratee, charged with abetment, and against the first and last of whom *the tendency of the evidence is to show that the dacoity originated with them*; *2nd*, the Ghazeepore men, who came down to commit the dacoity. As to these, he says: "The second set, the Gazeepore men, are "charged with actually committing the da-"coity, and the evidence goes to shew that "Chukowree Goindah, Bahadoor Goindah, "and Elahee Buksh (the appellant), also "went with the gang."

The statements "that the tendency of the "evidence was to show that the dacoity "originated with" Elahee Buksh, the appellant, and others, and that the evidence "went to show that Elahee Buksh went "with the gang who were charged with the "actual commission of the dacoity," would fairly lead to the inference that the evidence was such upon which Elahee Buksh might be safely convicted of dacoity and also of abetment of dacoity, and the Jury found him guilty of those offences. So far from cautioning the Jury against convicting the appellant upon the mere evidence of accomplices, unless they should find it corroborated as it related to him, he substantially told them that the evidence went to show that the appellant was guilty.

Having made the remarks to which I have before alluded, the Sessions Judge concluded by saying: "Elahee Buksh's statement "has been already recapitulated: his de-"fence is that the charge was made against "him out of spite, because he was the person "through whom the dacoity was traced out. "This is undoubtedly true. It is for you "to say whether the confessing Goindahs" (*i. e.*, the accomplices) "are really speaking "the truth in implicating Elahee Buksh, or "whether this was done out of revenge."

The Judge did not even tell the Jury that the accomplices were giving their evidence under a tender of pardon, or explain to them the position in which the witnesses were placed, and the danger of acting upon their evidence, unless they should find that it was corroborated. The witnesses were men whose evidence was of a dangerous character. They were not merely accomplices giving evidence under a tender of pardon; they were men who had been previously convicted of dacoity, and had been pardoned for the purpose of giving evidence against other dacoits, and were kept in the pay of Government under the surveillance of the police.

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Even then, according to their own evidence, they were planning and concocting fresh dacoities, and, having evaded the surveillance under which they were kept, abetted the dacoity in question; and then again, for the sake of saving themselves, turned round and accused others of being their associates in the new crime. Yet the attention of the Jury was not prominently directed to the fact, as it ought to have been, by the Judge in his summing up, nor did he point out to them the danger of acting upon the uncorroborated evidence of accomplices in general, or of such desperate and abandoned characters as Shunker and Soondur in particular.

I have read the evidence in the present case, and I agree with the Judges of the Division Bench by whom this case was referred, that the evidence of the accomplices was not corroborated by the Telee, who deposed that he sold 2¼ seers of oil to Pauchcowree, the servant of Elahee Buksh, the prisoner. The circumstance was not an unusual one, nor was it more unnatural than the fact commented upon by Lord Abinger in Regina *vs.* Farler, above cited, that the accomplice and the prisoner were drinking together at a public house commonly frequented by the prisoner, and that they left together on the night in question when the house was shut up.

But there was in this case, as it appears to me, a strong piece of corroborative circumstantial evidence against the prisoner Elahee Buksh. Isree Singh, Inspector of Police, Bankipore, stated that he got information on the 18th September at 11 P. M. from Elahee Buksh, the prisoner, that a dacoity at Alumgunge had been committed by the approvers and *some Shahabad and Ghazeepore dacoits, and that some of the property was with the approvers*, and some had been sold to Ramsahaye Sonar, who was about to melt it down, and he suggested the propriety of an instant search.

The witness was not cross-examined by Elahee Buksh, nor does the fact of his having stated to the witness that some Shahabad and Ghazeepore *dacoits* were parties to the dacoity at a time when, if his story is correct, his knowledge of the fact is not accounted for or explained, seem to have been pressed or used as evidence against him. The evidence of the Inspector is, therefore, the more worthy of credit.

If Elahee Buksh's story is true, and he was not a party to, or an abettor of, the dacoity, how did he know that some Ghazeepore dacoits were parties to it, or that some of the property remained with the Goindahs? The offence was committed on Saturday night, and Elahee Buksh's statement, if the evidence of the Inspector is accurate and to be believed, was made on Monday night at 11 P. M., before any search had been made, or the police had had any communication with the Goindahs.

Elahee Buksh in his defence stated that he made secret enquiries which led to the belief that the property had been sold to Bamsahaye Sonar, but no evidence was given on his behalf to show from whom he made the enquiries, or how, at the time when he gave information to the police, he knew that part of the property was with the Goindahs, or that some Ghazeepore dacoits had been concerned in the robbery.

The witness Nuseebun, who was admitted to give evidence under a tender of pardon, was not an accomplice in the dacoity. She appears to have received a portion of the property knowing it to have been obtained by dacoity. But she lived with Soondur Goindah as his wife, and was probably as untrustworthy as if she had actually been his wife, or as an actual accomplice in the dacoity. She says that Elahee Buksh came on the Sunday to divide the stolen property, and that he brought the scales. In this respect, if true, she corroborates Soondur and Sunker. It appears that the Goindahs were arrested and taken to the Quarter-guard before any of the accomplices confessed, and that the women were taken to the Thannah. If, after the arrest, and before the confession, Nuseebun had no means of communicating with Sunker or Soondur, or of hearing their confession before she was examined and gave her evidence, the fact of her corroborating the evidence of the other accomplices without knowing what they stated, and without communication with them, is a strong fact to be taken into consideration. I do not think that there is much weight in the fact that the accomplices did not mention Elahee Buksh's name at first. They did not confess when they were first arrested: as soon as they confessed, they implicated Elahee Buksh.

The case should be returned to the Division Bench with an expression of the opinion of the Full Bench—

1. That a conviction founded upon the uncorroborated evidence of one or more accomplice or accomplices alone is valid in law.

2. That, for the reasons above stated, there was error in law in the summing up of the evidence, which would warrant the Court in setting aside the verdict of guilty if the Court is satisfied that the prisoner was prejudiced by the error, and that there has been a failure of justice.

3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of Assessors, instead of by Jury.

I should observe that, in his evidence before the Magistrate, the Inspector of Police, Isree Singh, did not say that Elahee Buksh, the appellant, informed him that some Ghazeepore men were concerned in the dacoity. Nor did the woman Nuseebun mention the fact of Elahee Buksh's bringing the scales. It may be that the Judges, who referred this case, if they set aside the conviction, may consider a new trial necessary to test, by further examination, the accuracy of that portion of the evidence to which I have referred, and which, if accurate, tends to corroborate the evidence of the accomplices against the appellant.

Whatever may be the result of this case, it appears to me that a copy of the depositions ought to be sent to the Lieutenant-Governor of Bengal. The accomplices who gave evidence are convicted dacoits in the pay of Government. These men and the other Goindahs who were convicted, though supposed to be under proper surveillance, were, according to the evidence of the accomplices, engaged in abetting and planning fresh dacoities. To keep a number of such men together in the pay of Government appears to me to be most dangerous, even when they are under the strictest surveillance; but to leave them under such a lax inspection as that which appears to have been exercised in the present case seems to be little short of keeping up, at the public expense, a nest of dacoits, a harbour for men of the most abandoned, depraved, and dangerous character, and a place for the reception of stolen property.

It appears to me that the attention of his Honor the Lieutenant-Governor should be called to the lax and insufficient manner in which the surveillance appears to have been performed by those who were entrusted with the duty.

Seton-Karr, J.—I have previously read the exposition of the law by the learned Chief Justice with that attention which its full and exhaustive nature merits.

There appears, from this and from other cases, to have existed some slight doubt amongst us as to how the evidence of an accomplice or of two accomplices should be treated, and as to whether a conviction is legal and ought to be affirmed, if founded on such evidence alone and uncorroborated. I have now, after full consideration, arrived, substantially, at most of the same conclusions as the Chief Justice. I may observe, however, that, on such questions, we do quite right to search for information, guidance, and aid in the decisions of the highest judicial authorities in England, as well as in American law-books. But, as was remarked by Mr. Justice Campbell in a late case, I may take the liberty of doubting whether the *dicta* of English Law, or even the most elaborate English decisions, are imperatively to rule us on *all* points in the discharge of the Appellate Criminal Jurisdiction of this High Court. It is almost superfluous to observe that we deal here with a state of society very different from any European society, and we must apply the law either of particular Statutes, or that which is best suited to the people. We are not necessarily to be guided by English Law on all points. The substantive criminal law of the Penal Code is unquestionably different from English criminal law. On the other hand, I would observe that the utmost that the old Sudder decisions establish, is, to my thinking, that it was a rule of practice rather than an established rule of law with Sudder Judges not to convict on the uncorroborated testimony of accomplices. In this country such a rule may, practically, in many cases, be a sound rule, though it is easy to conceive some cases in which there could be no reason why a conviction should not ensue on the uncorroborated evidence of an accomplice. I think it unnecessary, after the citation of so many high authorities by the Chief Justice, after his full statement of the particular case before us, and after his general remarks, with many of which I entirely agree, to do more than state my own conclusions. I trust that the law on this important subject may henceforth be, in a great measure, settled. Some of the cases quoted, especially that in which Lord Abinger delivered judgment, were referred to by me on a very recent occasion.

The consideration, then, which I have

given to this subject, has enabled me to arrive at the following conclusions :—

1. A conviction upon the uncorroborated evidence of an accomplice is legal ; and failure in corroboration of the same is not a ground for refusing to convict or for reversal of conviction

2. Judges, for all that, ought to be most careful in this country to direct Juries that the evidence of accomplices should be received with caution, and that, if possible, corroboration should be required. The extent of such corroboration should be matter for the Jury. In cases tried by Assessors and open to appeal on the facts, the Judge should himself, I think, act on the same principle.

3. A new trial can be granted, if necessary, by a Bench of the High Court sitting as well in appeal as on revision. In a late case, Mr. Justice Kemp and myself, in this view, ordered a new trial on an appeal from a conviction by a Jury.

4. In the case now referred to us, the failure of the Judge to direct the particular attention of the Jury to the nature of the evidence of the accomplices, did amount to an error in law ; and the Divisional Bench may deal with the case accordingly.

5. Convictions ought not to be reversed, nor should new trials be granted, unless the accused has been really prejudiced within the meaning and scope of Section 426 of the Code of Criminal Procedure.

Jackson, J.—Upon the pure legal point before us, I agree in the conclusions at which the Chief Justice has arrived, and generally in the reasons which he has stated.

I think it must be admitted that a conviction by a Jury upon the uncorroborated testimony of an accomplice is good in law—

1st. Because the accomplice is a competent witness even though he may have been previously convicted of an offence (Act XIX. of 1837) ; and because (Act II. of 1855, Section 28) a single witness (if entitled to full credit) is sufficient (except in cases of treason) to prove any fact, unless there be a rule or practice in our Courts that requires corroborative evidence in support of his testimony.

2nd. Because cases are conceivable in which the accomplice would be thoroughly credible.

3rd. Because there is no such established rule or practice as is referred to in the latter part of the Section just cited.

There can be no doubt that the Chief Justice has indicated how it is that we have no such rule. This came about, *first*, because for many years exclusively, and until quite recent times in a large proportion of cases, the procedure in criminal trials was governed by Mahomedan Law, and the rules taken from that law and applied to particular cases were never accurately defined and laid down for general adoption. *Second*, because the finality of the verdict of a Jury has only arisen under the Code of Criminal Procedure ; and the Judges of the late Sudder Court or Nizamut Adawlut, being supreme Judges of fact as well as of law in criminal trials, were not under the necessity of discriminating between what was legally insufficient and what their judgment refused to accept.

This being so, in the vacancy, as it were, of any rule upon the subject, we ought probably to adopt, on the Appellate Side of this Court, the same principles of evidence which are recognized in the exercise of Original Jurisdiction. At any rate, we are not at liberty to adopt any principle of exclusion which is not admitted there, and has not the sanction of ancient practice in the late Nizamut Adawlut. And thus, although I should fully adhere, as a Judge of fact, to the principle which I stated in the case of Dwarka (who was tried by a Judge with Assessors), and which in that case had the concurrence of my learned brothers Kemp and Seton-Karr (5 Weekly Reporter, page 18), yet, as matter of law, I am bound to say that a conviction by a Jury founded upon the evidence of an accomplice without corroboration is not invalid.

But, before the Jury can deliver any finding upon a charge, they must have the evidence on both sides summed up to them by the Judge, and this function, also called his "direction to the Jury" (Section 379, Code of Criminal Procedure), must be fully, discreetly, and conscientiously performed. A statement of the direction is to form part of the record, and a report of it forms part of the matter for this Court's consideration when it acts as a Court of Revision.

There can be no doubt but that an erroneous direction to the Jury (where such direction has caused a failure of justice) is a ground for setting aside the verdict, and for either discharging the prisoner or ordering a new trial as the circumstances of the case may require. And I am not acquainted with any kind of error which is more important in criminal trials than a direction which misleads or omits to guide the Jury as to the nature or the weight of evidence.

I think it immaterial, for the purposes of the present decision, whether the word "reverse" in the 419th and 420th Sections of the Criminal Procedure Code means simply to "turn to the contrary" as in the natural tense, or to "make void," which is no doubt a legal interpretation, as convictions before a Jury can only come up in appeal to this Court, as this Court under its powers of revision can order a new trial, and can exert those powers upon hearing an appeal as well as on other occasions.

Upon the duty of a Judge in summing up, I need not add anything to what has been said by the Chief Justice.

But upon the necessity for that duty being carefully performed, and upon the special danger of relying on approvers' testimony in this country, I think it right to say that which my official experience has suggested.

It is not too much to say that Native Juries in the Mofussil are generally quite incapable of appreciating evidence, unaided, when the question before them is at all critical. On the one hand, they readily, and even greedily, listen to positive assertions regarding the guilt or innocence of the prisoner, frequently without discriminating between that which the witness declares of his own knowledge, and that which is pure hearsay. On the other hand, they commonly disregard circumstantial evidence, though it be of the strongest and most trustworthy character. And though it may come out in cross-examination that the statement is hearsay, though it may even be apparent at once, and the words might be taken down, yet they have been heard by the Jury, and the impression is made. And though the facts which constitute circumstantial evidence be well put together, and their effect be obvious to the trained judicial mind, they will seem of little importance to the ignorant Juror.

With these proclivities, the Native Juror plainly stands in need of intelligent guidance, and, without that guidance, will, in difficult cases, often go entirely wrong. It is remarkable, too, as it is notorious, that the Jurors are, as a rule, decidedly less intelligent, as well as less instructed, than the persons employed as Assessors in criminal trials; and yet, by a strange anomaly of modern law, the verdict of the ignorant, inexperienced, unsworn Jury is final upon facts; while, upon facts, not only are the Assessors over-ruled by the Judge, but the opinion of Judge and Assessors together may be set aside by the Appellate Court.

And then as to testimony, I feel bound to say, after many years of conversance with Courts of Justice in India, that veracity is not regarded in this country as it is in the countries of Western Europe. Whether this be due to wilful falsehood, to imperfect memory, to inexact conditions of mind, to fear, or to all these causes combined, I am not called upon at present to enquire. I need only say that the care with which witnesses must be watched, and the deductions which have to be made from their credit, are much greater than in England.

It must in fairness be remembered that, as witnesses, we have to do, almost universally, with the meaner classes: that the respectable Native avoids being made a witness as we should shun the small-pox; and that witnesses, therefore, are scarcely a fair sample of the population.

But the fact remains; and when the witness is, moreover, a person stained, by his own confession, with the commission of atrocious crimes—most of all, when, to the desperate ruffianism of the dacoit, he adds the depravity of the retained approver—can the unsupported word of such a person be a safe ground on which to convict any prisoner?

I need not say that this (and not the unlucky gentleman who in a moment of irritation has committed an act of violence) is the kind of approver or accomplice whom we have in view when we speak of approver's testimony. The other case is of extremely rare occurrence—this of every day.

Now, when, in the course of a long trial, in which many persons are on their defence, there is against particular prisoners only the kind of evidence we are speaking of, and the Judge, in his direction, instead of pointing out the defect, and warning the Jury against the danger, actually throws a veil over that nakedness, and disguises the danger by the use of general words to the effect that "the tendency of the evidence is to establish the prisoner's guilt"—in such a case, can it be doubted that the Judge has greatly miscarried, that the Jury have been wrongly directed, and that the prisoner has been seriously prejudiced? I think not, and I am sure that the nature of both witness and Juror, the finality of and absence of sanction to the verdict, make it even more incumbent on the Judge in this country than it is in England, to perform with care and fidelity the office of direction.

I have heard it said that, if the Jury go wrong, it does not very greatly matter—the prisoner can be pardoned. No doubt he can, and there may be persons so constituted as to find this a satisfactory assurance. It is not so to me. No doubt, after an improper conviction has taken place—when the matter can be properly represented through the proper channel—when the head of the Government can be communicated with at Darjeeling or at Simla—the convict may, after weeks or months of unmerited suffering, receive a free pardon for an offence of which he ought never to have been found guilty. For my part, I should prefer to be delivered by a careful and regular administration of justice.

My Lord has pointed out that the prisoner is not in every case of misdirection entitled to a new trial, and there has been some apprehension expressed that the admission of the principle we are laying down may open a door to the escape of criminals merely by reason of some shortcoming of the Judge in point of form. But it seems to me that the simple test, "has there been a failure of justice?" may be applied in most cases with perfect ease and perfect safety.

In regard to the proposed rule that we should not interfere in case of misdirection where the facts are such that, if the trial had been held before a Judge and Assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe—I might say it is rarely safe—for an Appellate Court, with papers before it, to put itself in the place of the Court below which has heard the witnesses; and it might be that, in affirming the conviction on the faith of some unnoticed circumstance of corroboration found in the evidence, we might be using that which the Judge and Jury would not have relied upon. But this perhaps only suggests caution in the application of the rule, rather than an objection to the rule itself.

With these observations, therefore, I concur both in the judgment on the general point, and in the course which it is proposed to take with the particular case before us.

The 28th May 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Robbery.

Queen *versus* Teekai Bheer.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of robbery.

Held that the offence was robbery where, in committing theft, there was indubitably an intention, seconded by an attempt, to cause hurt.

We think that the prisoner has been rightly convicted. That the woman's nose was not torn, was an accident; the clasp of the *nuth* came loose, and so the cartilage escaped, though pain was caused, and blood flowed. But there was indubitably an intention, seconded by an attempt on the part of the prisoner, to cause hurt; and the offence was, therefore, robbery.

But the punishment awarded by the Sessions Judge appears to us too severe.

The prisoner is not shewn to be a bad character, or to have been previously convicted, and a sentence of seven years' transportation is altogether disproportionate to the offence committed.

We are extremely unwilling, as a general rule, to interfere with the exercise of the Judge's discretion in the matter of punishment within the limits prescribed by the law, but, in this case, the punishment awarded appears to us so far beyond what is required, that we feel called upon to interfere; and, accordingly, we alter the sentence to one of two years' rigorous imprisonment.

The Sessions Judge ought to have forwarded the appeal with less delay.

The 28th May 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

False Evidence.

Queen *versus* Rewah Goallah.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of false evidence.

A false statement by a witness, as to his position or character, ought not to be punished so severely as a false charge on a false claim.

In this case, the prisoner has been convicted, by Mr. Ainslie, the Judge of Patna, sitting with a Jury, of the offence of

giving false evidence, and sentenced to rigorous imprisonment for a period of five years.

The facts, stated briefly, appear to be as follows :—

Bhuttun Goallah and Wullee Goallah charged the servants of Toondun Sing, their zemindar, with carrying off some buffaloes belonging to them, the alleged object being to compel them to supply *ghee* to the zemindar at a low price. Rewah Goallah appeared as a witness in support of the charge, and, for the purpose apparently of causing additional weight to be attached to his evidence, stated that he was *not* the brother of Bhuttun Goallah. This statement was proved to be false, and admitted to be so by prisoner himself.

We think that a false statement by a witness as to his position or character ought not to be punished so severely as a false charge on a false claim.

There is no proof of the falsehood of the main story of the prisoner, *viz.*, that he saw Toondun's servants driving off the buffaloes.

We cannot assume that it is false. The offence actually established—*viz.*, the giving of false evidence which simply affects the witness's credibility—being of a comparatively venial character, we think it would be sufficiently punished by 12 months' imprisonment; and we therefore mitigate the sentence of the Sessions Judge accordingly.

The 28th May 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Using forged document.

Queen *versus* Prosunno Bose and two others.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of fraudulently using as genuine a forged document, &c.

A conviction may be had for using as genuine a forged document purporting to be made by a public servant in his official capacity, notwithstanding the illegibility of the seal and signature thereon.

In this case the prisoner, Prosunno Bose, has been found guilty of using a forged document purporting to be made by a public servant in his official capacity.

It appears that certain cattle, belonging to the prosecutor, had been sold under a decree obtained against him by the prisoner Koylas Bose. The cattle was bought by prisoner Moothoornath Bose. It was subsequently arranged that they should remain in the charge of one Soottan Biswas, and that the money due under the decree should be paid, and, if the money was paid within one month, the cattle should be returned.

The prosecutor, Mudaree Mundul, alleges that he did repay the money. After the expiration of one month, the prisoner Prosunno Bose went to Soottan Biswas, and produced to him a document purporting to be an order to Futeh Ali, constable, informing him that, according to the order of the Huzoor, he was to go to the spot, and see that the cows were returned to Moothoornath Bose. This order was sealed with a seal of which the Sessions Judge observes that it does not correspond with any known official seal, and on it was a scrawl, by way of signature, apparently an attempt to imitate the appearance of English writing, but perfectly illegible.

The Sessions Judge left the question to the Jury, and the Jury found that the prisoner Prosunno Bose used that document *purporting* to be a forged document made by a public servant in his official capacity.

We think it clear that there was evidence to go to the Jury upon that point, and that they were warranted in finding that this document, notwithstanding the illegibility of the seal and signature, purported, or, in other words, appeared on the face of it, to have come from a superior officer to a public servant, such superior officer being necessarily a public servant, and, therefore, that a conviction under Sections 466-471 of the Penal Code was proper.

The other two prisoners appear also to have been properly convicted of abetting the offence, and we therefore reject this appeal.

The 28th May 1866.

Present :

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Hurt—Culpable Homicide not amounting to Murder.

Queen *versus* Punchanun Tantee.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Midnapore, on a charge of culpable homicide not amounting to murder.

The prisoner, having received great provocation from his wife, pushed her with both arms so as to throw her with violence to the ground, and, after she was down, slapped her with his open hand. The woman died, and on examination it appeared that there were no external marks of violence on the body, but that there was a certain degree of disease of the spleen, and that death was caused by the rupture of the spleen. HELD, under the circumstances, that the prisoner was guilty of causing hurt, and not of culpable homicide not amounting to murder.

Campbell, J.—IT appears from the finding of the Sessions Judge that the prisoner in this case, having been subject to extreme provocation by his wife, pushed her with both his arms so as to throw her with violence to the ground, and, after she was down, slapped her with his open hand.

The woman died, and, on examination, it was proved that there was a certain degree of disease of the spleen, and that death was caused by the rupture of the spleen. It appears from the medical evidence that there were no external marks of violence whatever. The deceased, it appears, was, for the most part, a healthy woman, and the disease of the spleen had not proceeded far; it was, in fact, an early stage of disease. Under these circumstances, the question on which the case turns is simply this: Did, or did not, the prisoner act with the knowledge that, by his act, he was likely to cause the death of the deceased? And that would, it seems to me, depend on this, whether the prisoner did, or did not, know that the deceased was labouring under such a disease that a blow, or such violence as is used in throwing a person violently upon the ground, would be likely to cause death? If the prisoner did not know that there existed disease of such a nature that moderate violence was likely to cause death, and the violence inflicted was not such as would cause death to a person in an ordinary sound state of health, the offence is not culpable homicide. The illustration (*b*) attached to Section 300 of the Penal Code seems to be, in this instance, exactly in point. For, although the illustration is used to show what is murder and what is not murder, it may very well stand for the purposes of this case, without going into minor details, that a case such as (not coming under the exception) is set forth in this illustration (*b*) for the purpose of showing what is murder and what is not murder, would equally, in a case of culpable homicide (qualified by an exception taking it out of the category of murder), shew what is culpable homicide and what is not culpable homicide. In this case the Sessions Judge says: "Where a man in ungoverned rage throws "a woman with all the force of both his "arms upon the hard ground, it cannot but "be presumed, this Court is of opinion that "the man has acted with the knowledge "that he was likely by his act to cause "death." This, I think, is puting the matter far too broadly. It cannot be said that in every case the mere throwing upon the ground a strong healthy woman would be likely to cause death. Some excessive violence must be shewn to have been used, and in this case the medical evidence proving the absence of all external marks of violence shews that, in truth, no extreme violence, beyond the violent push, was used. On the other hand, the evidence does not shew whether the prisoner did know of the diseased state of his wife's spleen; on the contrary, the evidence of the Civil Surgeon, proving that the disease was in an inchoate state, and the woman, generally speaking, strong and healthy, would go to shew that the prisoner probably had no such knowledge. I think, therefore, that there are reasonable doubts as respects the charge of culpable homicide, of which the prisoner must have the benefit, and that he is, in fact, guilty of hurt only. I do not think it necessary to order a new trial, and the justice of the case will be met by a sentence of one year's rigorous imprisonment. I would mitigate the sentence of the Sessions Judge accordingly.

Norman, J.—I concur in the result arrived at by my learned colleague in this case. Without going minutely into questions of law, I desire to say a few words as to the grounds of my opinion.

The prisoner, who had received provocation of a most gross character from his wife, threw her down, sat upon her, and slapped her. He was found by a neighbour sitting

upon the woman. Immediately after he was drawn away from her, he gave her water, supported her head, and tried to relieve her. The wife died from rupture of the spleen. The disease was not of long standing, and had not apparently affected her general health, and was, in all probability, not known to the prisoner. There were no marks of violence on the body found on examination by the Civil Surgeon. The Civil Surgeon says "that, looking to the weight of the deceased, if, in falling from a mere standing position on to the floor, there was anything prominent against which her stomach might have struck, it might have caused a rupture of the spleen, and death would ensue." Under these circumstances, I think it clear, upon the evidence, that the injury intended to be caused by the prisoner was not such as would be likely, or that he could have known to be likely, to cause death; and I think that, under these circumstances, the prisoner should not have been convicted of culpable homicide, but of causing hurt. Accordingly, I would commute the sentence of the Sessions Judge below to one year's rigorous imprisonment.

The 28th May 1866.

Present:

The Hon'ble F. A. Glover, *Judge.*

Cheating.

Queen *versus* Puddomonie Boistobee.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of cheating.

Case of cheating a person who was induced to part with his money and to contract marriage under the false impression that the girl he was marrying was a Brahminee.

I see no reason to interfere in this case.

The Sessions Judge placed all the facts of the case fully before the Jury, and laid special stress on the weakness of the evidence; but if the Jury believed that evidence, they were bound to convict the prisoner, as, by it, it was proved that she induced the prosecutor to part with his money and to contract marriage under the false impression that the girl he was marrying was a Brahminee.

There was evidence on the record on both these points, and the Jury chose to believe it. It was immaterial whether there was any clear proof on the record of the girl being a Boistobee: the point was, that she was not a Brahminee, as she was falsely alleged by the prisoner to be.

As to the severity of the punishment awarded (three years' imprisonment), it was not, I observe, for the Sessions Judge to nullify the verdict of the Jury by passing a sentence inadequate to the offence which they considered proved against the prisoner; and the same reasons prevent my interference on appeal.

The prisoner can, if she be so advised, apply to the Executive Government, with which the opinion so strongly expressed by the Sessions Judge will doubtless have due weight.

The 5th June 1866.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

False Evidence—Evidence—(of single witness)—Corroboration.

Queen *versus* Bakhoree Chowbey.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of giving false evidence.

Comparison of signatures is one kind of corroboration which would justify a conviction on the testimony of a single witness in a case of false evidence.

THERE can be no doubt, to my mind, that the evidence of the vakeel Mohesh Dutt is true, and that the evidence of the prisoner Bakhoree, to the effect that he never verified or presented the written statement, is false.

If the case consisted merely of one oath against another, there would be no doubt that, under the late ruling of the Full Bench in cases of perjury, reported at page 23, Criminal Rulings of the Weekly Reporter, Vol. V., No. 6, the prisoner could not be convicted. But, in this case, the Sessions Judge and the Assessors had the advantage of comparing the signatures of the prisoner—that is, of the signature on the document which he denied, with the signature on that which he admitted; and they were guided by this comparison in coming to a decision.

It appears to me that this is the kind of corroboration contemplated in the ruling alluded to; and in this view I would not interfere with what is a sufficient, legal, and a proper conviction.

Appeal rejected.

Form of Charge in cases of Grievous Hurt.

Extract (para. 2) of Letter No. 147, from the Officiating Registrar of the High Court, dated Calcutta, the 16th February 1866.

2. THE first head of the charge against Beerajdee Paik and others (Case 5 of Statement No. 5) is not altogether perfect. The correct form would have been as follows: *viz.*—"That they, on or about at "were members of an unlawful assembly "in prosecution of the common object of "which, *viz.*, in one of the members, "*viz.*, caused grievous hurt to not "on grave or sudden provocation, and they "are thereby, under Section 149 of the "Indian Penal Code, guilty of the said "grievous hurt, an offence punishable under "Section 325 of the Indian Penal Code, "and within the cognizance of the Court "of Session."

Form of charge in cases of Abetment of Grievous Hurt, and of Kidnapping from lawful guardianship.

Extract (paras. 5 and 6) of Letter No. 149, from the Officiating Registrar of the High Court, dated Calcutta, the 16th February 1866.

5. THE Court desire me to point out, with reference to the charge against Latoor Ali and others (Case 41 of Statement No. 4), that the mere abetment of grievous hurt does not make the offence punishable under Sections 109 and 325 of the Indian Penal Code. It is necessary that the act abetted should have been committed in consequence of the abetment of the accused, and that there should be no express provision of the law for the punishment of that offence. As the prisoners, Alimoodeen and Moshruff Ali, were *present* abetting the grievous hurt, they should, by the application of Section 114 of the Penal Code, have been charged with that offence rather than with abetment.

6. The charge against Nityanund and others (Case 42 of Statement No. 5), the Court observe, is incomplete, inasmuch as it has omitted to specify the name of the lawful guardian from whose guardianship Brijoshuree was taken. The charge is further incomplete, as the existence of the exception in Section 361 of the Penal Code should, in accordance with Section 237 of the Code of Criminal Procedure, have been specifically denied.

Charge to state the offence for which a prisoner was lawfully detained when he escaped from custody.

Extract (para. 3) of Letter No. 154, from the Officiating Registrar of the High Court, dated Calcutta, the 20th February 1866.

3. THE Court further observe that, in the charge against Khijoo Dosadh (Case 9 of Statement No. 4), the offence for which the prisoner was lawfully detained when he escaped from custody should have been stated.

Opinion of Assessors unnecessary when Prisoner pleads guilty—Form of charge for Forgery of a valuable Security.

Extract (paras. 2 and 8) of Letter No. 157, from the Officiating Registrar of the High Court, dated Calcutta, the 20th February 1866.

2. THE Court observe that, as the prisoner, Kellai Jenah (Case 1 of Statement No. 4), pleaded guilty, the opinion of the Assessors was unnecessary (*vide* Section 362 of the Code of Criminal Procedure).

8. With reference to the 1st head of the charge against Ram Chunder Swyne and others (Case 4 of Statement No. 5), the Court observe that the mere fraudulent preparation of a deed of sale, with intent to cause injury to certain persons, does not amount to forgery of a valuable security, unless that document be a false document (*see* Section 464 of the Penal Code). The charge, in its present form, which omits to specify this important point, is imperfect.

Punishment for Murder—Procedure for mitigation of sentence.

Extract (para. 2) of Letter No. 160, from the Officiating Registrar of the High Court, dated Calcutta, the 20th February 1866.

2. As the sentence of ten years' transportation passed by you on the prisoner Troylokhyanath Mookerjee (Case 1 of Statement No. 4) is an illegal sentence, the Court quash it. I am to point out that the law prescribes only two punishments for murder, *viz.*, death or transportation for life. The Court direct, therefore, that you pass the latter sentence; and, if you consider that there are grounds for a remission of the sentence, in accordance with the recommendation to mercy made by the Jury, you should, under Section 55 of the Penal Code, address the Lieutenant-Governor for a mitigation of sentence.

Imprisonment for default of payment of fine—Framing of charge for False Evidence—Nature of common object of Unlawful Assembly to be described in the charge.

No. 166.

From the Officiating Registrar of the High Court, &c., dated Calcutta, the 21st February 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and H. V. Bayley, *Judges.*

SIR,—I AM directed to communicate to you the following observations made by the Court on a review of your Sessions Statements for November last.

2. In the case of Luchun Misser (Case 7 of Statement No. 4), the Court find that the alternative sentence of imprisonment, in default of payment of fine, exceeds the legal limit, inasmuch as Section 65 of the Indian Penal Code limits imprisonment for default to one-fourth of the *maximum* period fixed for the substantive offence (Section 323 of the Penal Code), which in this case would be one-fourth of one year, or three months. Under these circumstances, the Court cancel the sentence as illegal, and direct that you will pass a fresh sentence in accordance with the law now explained to you.

3. The Court remark that the substance of the deposition upon which the charge for false evidence (Section 193 of the Penal Code) proceeded should have been stated in the charge against Suntakhee Aheer (Case 8 of Statement No. 4).

4. The Court further observe that, in the 2nd head of the charge against Paspot Rai (Case 11 of Statement No. 4), the nature of the common object of the unlawful assembly should have been described. This remark, *mutatis mutandis*, applies to the 1st head of the amended charge in the case of Bundhun Roy and others (Case 14 of Statement No. 4).

Framing of charge for Kidnapping from lawful guardianship.

Extract (para. 3) of Letter No. 186, from the Officiating Registrar of the High Court, &c., dated the 5th March 1866.

3. THE Court remark that the charge against Doaloo Bewa (Case 3 of Statement No. 4) is incomplete, inasmuch as it has omitted to specify the name of the lawful guardian from whose guardianship Copur Cholloa was kidnapped. The existence of the exception in Section 361 of the Penal Code should also, in accordance with Section 237 of the Code of Criminal Procedure, have been specifically denied.

Verdict of Jury concurred in by Judge, considered the same as verdict of Judge in concurrence with Assessors, in a District to which trial by Jury not extended.

Extract (para. 3) of Letter No. 187, from the Officiating Registrar of the High Court, &c., dated the 5th March 1866.

3. WITH reference to the trial in the abovementioned case, I am to point out that trial by Jury has not been extended to the trial of offences punishable under Clause 9 of the Penal Code. It is only for offences under Chapters* VIII., XI., XVI., and XVII., and Chapter XVIII.† of the Indian Penal Code, and for attempts or abetments thereof, that this mode of trial has been sanctioned. Your proceedings were, therefore, not altogether regular; but, as you have stated your concurrence with the verdict of the Jury, there is no necessity for further action. That verdict must be considered as one of your own in concurrence with Assessors.

* Govt. Notification of 7th Jany. 1862.
† 27th May 1862. 13th Oct. 1862.

Collectors not competent to manage estates attached by Magistrates under Section 319, Code of Criminal Procedure.

No. 200.

From the Registrar of the High Court, &c., dated the 7th March 1866.

(Criminal Side.)

Present:
The Hon'ble C. B. Trevor, *Judge.*

SIR,—YOUR letter No. 316, dated 23rd December last, and its enclosure, have been laid before the Court, who direct me to inform you, and the Magistrate at whose instance you referred this matter, that they see no reason for doubting the correctness of the orders issued by the Board of Revenue prohibiting Collectors from managing estates attached by Magistrates under Section 319 of the Code of Criminal Procedure. Regulation V. of 1827 ordinarily applies only to orders issued by Zillah and City Judges, and was, by Section 3 of Act IV. of 1840, specially extended to cases of the description specified in that law, and now provided for by Section 319 of the Code of Criminal Procedure. These provisions of Section 3 of Act IV. of 1840 have, however, been repealed, and have not been enacted in Section 319 of the Code of Criminal Procedure or in any other law. It follows, therefore, that the Collector has no authority to act in attachments of this nature.

Ruling of a Divisional Bench of two Judges of the High Court, not affected by a subsequent conflicting decision of a single Judge.

No. 201.

From the Registrar of the High Court, &c., dated Calcutta, the 8th March 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—IN reply to your letter No. 22, dated the 15th ultimo and enclosures, I am directed to state that the Court consider that there was no ground for the reference now made at the instance of the Officiating Joint Magistrate. The High Court, consisting of two Judges, judicially, and not extra-judicially as supposed by yourself and the Officiating Joint Magistrate, during 1863, placed a construction upon certain Sections of the Penal Code, and it appears that one Judge of the Court has, without allusion to the ruling of the Divisional Bench of two Judges, subsequently decided in contradiction to that ruling. This decision, however, in no material way interferes with the previous ruling which should be followed by the Lower Courts, until another decision by a Full Bench in opposition to it is delivered.

Charge of Kidnapping from lawful guardianship need not state that the Kidnapping was forcible.

Extract (para. 2) of Letter No. 211, from the Registrar of the Appellate High Court, dated Calcutta, the 10th March 1866.

2. WITH reference to the first head of the charge against Gobind Ram Doss (Case 39 of Statement No. 4), the Court observe that, in a charge of kidnapping from lawful guardianship (Section 363 of the Penal Code), it is not necessary that it should be stated that the kidnapping was forcible.

Hurt caused to each of three persons to be separately charged and punished—Charge to state common object of Unlawful Assembly in prosecution of which Grievous Hurt was caused.

Extract (paras. 2 and 3) of Letter No. 215, from the Registrar of the Appellate High Court, dated Calcutta, the 10th March 1866.

2. THE Court observe, with reference to the second head of the charge against Madon (Case 2 of Statement No. 4), that the hurt caused to each of the three persons noted therein being a separate offence, should have been separately charged and punished.

3. The first head of the charge against Rezioollah (Case 6 of Statement No. 4) should have stated the common object of the unlawful assembly in prosecution of which grievous hurt was caused to Taukeer Mahomed by means of an instrument for stabbing or cutting, &c.

Charge to state offence how punishable with which Prisoners threatened another in order to extort property from him.

Extract (para. 3) of Letter No. 225, from the Registrar of the Appellate High Court, dated Calcutta, the 12th March 1866.

3. THE third head of the charge in this case is also incomplete, inasmuch as it has omitted to specify the offence punishable with death, transportation, &c., with which the prisoners threatened one Keenoo Mahtoon in order to extort property from him.

Procedure when Prisoner pleads not guilty to graver offence charged, and guilty only to minor offence charged.

No. 229.

From the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 12th March 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—WITH reference to your Jail Delivery Statements for January last, I am directed to inform you that, as the prisoner Bissonath Baworee (Case 1 of Statement No. 4) pleaded not guilty to the graver offence charged, and guilty only to the minor offence charged, you should have proceeded to take the evidence, and should have tried him on the higher offence of dacoity. The Court remark that it was not competent to the Government vakeel, after the prisoner had been arraigned and pleaded *not guilty*, to withdraw that charge. The prisoner was entitled to a trial, and a clear verdict of acquittal if there was no sufficient evidence produced against him.

Sessions case to remain on file until re-apprehension and trial of escaped Prisoners.

No. 238.

From the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 13th March 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—WITH reference to your letter No. 45, dated the 7th instant, I am directed to inform you that the Sessions case No. 10 of 1866, alluded to by you, cannot be struck off, but should remain on the file until the prisoners who have escaped are re-apprehended and put on their trial.

Grievous Hurt and causing disappearance of Evidence—Conversion of Theft into Dacoity—Receiving stolen property—Different degrees of abetment to be charged separately.

Extract (paras. 2, 4, and 6) of Letter No. 242, from the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 14th March 1866.

2. WITH reference to the case of Jangeea Tantee and others (Case 2 of Statement No. 4), the Court observe that the prisoner Jangeea Tantee has been convicted of grievous hurt under Section 325 of the Indian Penal Code, and causing the evidence to disappear to screen himself from legal punishment (Section 201 of the Penal Code), and has received separate sentence for each offence. This does not seem to the Court proper, as Section 201 applies to the causing the disappearance of evidence of an offence committed by *another*, not by one-self. At any rate, in the present case, the commission of grievous hurt, and the offence under Section 201, were not distinct acts, but were part of one continuous transaction, and, as such, should not have received separate punishments, though the acts of the prisoner, subsequent to the causing of grievous hurt (*vide* illustration), may be matters which may properly be taken into consideration in awarding punishment. As the sentence is not excessive, the Court will not interfere, unless on appeal it may be found necessary to do so.

4. The Court observe in the case of Sheodial Dosadh and another (Case 8 of Statement No. 4) that, from the facts stated by you, the prisoners were clearly guilty of dacoity. Although there was no actual violence, the number of persons engaged, and the fact of their being armed, would convert the theft into dacoity. I am also to point out that you should have convicted the accused of theft (Section 379 of the Indian Penal Code), and also of receiving stolen property (Section 411 of the Penal Code), as the property found in their possession seems to have been acquired by that particular theft, and the offence cannot, therefore, be considered as separate criminal acts.

6. In the 3rd head of the charge against Nawazish Hossein and others (Case 13 of Statement No. 4), the Court desire me to point out that different degrees of abetment should not have been charged together in one head but separately, and that the peculiar nature of the abetment should have been specified. Thus, for a charge of abetment under Section 109 of the Indian Penal Code, it should have been stated that the act abetted was committed in consequence of the abetment charged; and, under Section 114 of the Penal Code, the former should have been charged constructively with the offence abetted by reason of his having been present while abetting its commission.

Bigamy and Abetment of Bigamy to be charged separately.

Extract (para. 2) of Letter No. 243, from the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 14th March 1866.

2. IN the charge against Sahebjan and others (Case 2 of Statement No. 5), the Court observe that the woman and the two men should have been charged in separate heads

of the charge, since the former was charged actually with bigamy, and the latter as principals of the second degree by reason of their having been present, abetting the commission of that offence (Section 114 of the Penal Code).

Intentional omission to apprehend on the part of a public servant bound to apprehend, how to be charged.

Extract (para. 2) of Letter No. 246, from the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 14th March 1866.

2. In the case of Hurronath Singh and another (Case 4 of Statement No. 4), the Court observe that the first head of the charge, *viz.*, that under Section 221 Penal Code, is incomplete, inasmuch as the nature of the office held by prisoner No. 2, so as to make him a public servant, should have been stated, as well as the names of the men whom he (prisoner) suffered and aided to escape apprehension. Further, in the second head of the charge, the names of the persons to whom prisoner caused hurt should have been stated.

False Evidence, False personation for the purpose of any act or proceeding in a suit, and Culpable Homicide not amounting to Murder, how to be charged—Charges to Jury what to state.

Extract (paras. 3, 4, and 6) of Letter No. 250, from the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 16th March 1866.

3. In count 1st of the charge under Section 205 against Jumimah Bysumbee (Case 2 of Statement No. 4), the nature of the admission or statement made by her in her assumed character should have been fully stated. And in the 2nd count of the same charge laid under Section 193, the false statement upon which criminal proceedings were instituted should have been fully entered as required by Circular Order No. 3, dated 9th February last. In count 1, against Bhorut Chunder Ghose, the offence which the prisoner instigated Jumimah Bysumbee to commit should have been specified. It was not sufficient to allude to it as an "offence punishable under Section 205, Penal Code", for it cannot be presumed that such a minute acquaintance with the Code exists generally as will render allusions like this intelligible to the accused. The above remarks apply to count 2nd of the same charge, to counts 1 and 2 of the charge against Mirtonjoy Dutt, and to the charge against Sheeb Chunder Dutt. I am to add, with reference to the charge against Kheroo (Case 3), that the murder of two persons (Wassirudee and Bholai) should not have been charged in the same head of the charge, as they were distinct acts and separate offences.

4. In count 2 of the charge against the same individual, which is laid under Section 304, the offence specified should have been not culpable homicide merely, but culpable homicide not amounting to murder.

6. I am to remark in conclusion that the Court do not feel satisfied with your charges to the Jury. Your charges should clearly and distinctly point out to the Jury what part of the evidence of any witness, if credited by them, bears on the guilt of the accused, thus enabling the Jury to view as a connected whole, what, in the absence of a good summing up, may seem to them only an unconnected series of statements. The Court request your careful attention to these instructions.

Framing of charge of Delivery of Counterfeit Coin and of Wrongful Confinement.

Extract (paras. 3 and 5) of Letter No. 256, from the Registrar of the High Court, dated Calcutta, 19th March 1866, &c.

3. THE coin delivered, and the Queen's coin of which it was a counterfeit, should have been described in the charge against Nefee Koch (Case 75 of Statement No. 4), and the name of the person to whom it was delivered should have been stated as required by the model form Clause 1, Section 243 of the Code of Criminal Procedure. It was also essential that the element of *fraud* should be recognized either by the use of the word "fraudulently" in the charge, or of the terms "as genuine" in the manner indicated in the sample form.

5. In the 2nd head of the charge under Section 342 of the Penal Code, against Santos Sing (Case 4 of Statement No. 5), the name of the person wrongfully confined at Kakomaree should have been given.

Procedure by Lower Courts in cases of conflicting rulings of the High Court.

Extract (para. 2) of Letter No. 281, dated 27th March 1866, from the Registrar of the High Court, &c.

2. I AM to inform you in reply that the circular under which your present reference purports to have been made does not apply to cases in which there are conflicting and inconsistent rulings of the High Court, and that in those instances the only legitimate means of settling authoritatively the law on the point is a judicial ruling of a full Court. You should therefore take an opportunity of referring to the Court any proceedings of a subordinate Court in which you may observe irregularity on the particular point.

Practice in trials regarding offences, some of which should be tried by Jury and others with the aid of Assessors.

No. 303.

From the Registrar of the High Court, &c., dated Calcutta, the 5th April 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—In reply to your letter 193, dated 22nd December last, I am directed to inform you that, in trials regarding offences, some of which should be tried by Jury and others with the aid of Assessors, it has been the practice that the Sessions Judge should deliver his directions to the Jury, and take their verdict on the heads of the charge relating to the former classes of offences, and should then proceed, with respect to the remaining heads of the charge, to obtain the opinion of Assessors, regarding the Jurors as such, and deliver his judgment accordingly.

In two cases* in which this course was followed, the High Court, on the appeal of the convicts, did not think it necessary to notice or condemn the proceedings of the Sessions Judge held in the manner above described.

* Azmut Ghazee, Appellant, decided 9th June 1865.
G. R. Smith, Appellant, decided 5th December 1865.

Charge to name the offender whom the accused intended to screen from legal punishment—Framing of Charge to enable Penal Code to apply.

Extract (paras. 4 and 5) of Letter No. 311, from the Registrar of the High Court, &c., dated 9th April 1866.

4. THE two heads of the charge against Mukim Hajra (Case 6, Statement 4), which have otherwise been very carefully drawn up, omit the name of the offender whom it was the intention of the accused to screen from legal punishment.

5. The Court observe that some date subsequent to 1st January 1862, and some place within British India, should have been entered in the 1st and 2nd heads of the charge against Newazish Kurreem, *alias* Nuthno (Case 8, Statement 4), otherwise the Penal Code would not apply; and, in order to give you jurisdiction, it should have been stated in the charge that the acts alleged to have been committed by the accused were committed within your district.

Knowing or negligent omission—Charge to state nature of office held by prisoners, so as to make them public servants.

Extract (paras. 3 and 4) of Letter No. 313, from the Registrar of the High Court, &c., dated the 9th April 1866.

3. THE Court observe, with reference to the second head of the charge against Peassie Bodyar (Case 7, Statement 4), that the offence charged under Section 289 of the Indian Penal Code consists principally in a "knowing or negligent omission," and not merely in an omission, which is no offence under the Penal Code.

4. In the case of Hur Nath Tallopattre and others (Case 1, Statement 5), the Court observe that the charge is incomplete, inasmuch as the nature of the office held by the prisoners, so as to make them public servants, should have been stated.

Judge to record regular finding.

Extract (para. 2) of Letter No. 315, from the Registrar of the High Court, &c., dated 9th April 1866.

2. REFERRING to the mode in which your finding and sentence in the case of Jamoo Khan (Case 1, Statement 4) have been recorded, I am to request that you will in future record a regular finding in accordance with Sections 381 and 382 of the Code of Criminal Procedure.

About furnishing a copy of the judgment, as well as of the final sentence and order, to applicants under Section 418, Code of Criminal Procedure.

No. 320.

From the Registrar of the High Court, &c., dated Calcutta, the 10th April 1866.

Present:

The Hon'ble C. B. Trevor, H. V. Bayley. J. P. Norman, and L. S. Jackson,

Judges.

SIR,—I am directed to acknowledge the receipt of your letter No. 34, dated the 5th February last, in which you solicit instructions as to the necessity of furnishing a copy of the *judgment*, as well as of the final sentence and order, to applicants under Section 418 of the Code of Criminal Procedure.

2. In reply I am to observe that Section 429 of the Code distinguishes between the sentences or final order and the reasons for passing the same. Section 416 enacts that every petition of appeal shall be accompanied by a copy of the sentence or order appealed against, and Section 381 enacts that "the Court, in passing judgment, shall specify the offence of which, and the sentence of the Penal Code under which, the accused is convicted," &c. It seems, therefore, to the Court that the words *judgment, sentence, or final order* in the Code of Criminal Procedure refer to the same thing, and are distinct from the reasons on which such judgment, sentence, or order may be based. The former is therefore all that the law requires to be given to a party wishing to appeal.

3. As, however, it is obviously convenient, as facilitating the immediate disposal of the case, that the Court should have before it, with the final sentence, also a copy of the reasons on which that sentence was founded, the Court are of opinion that a copy of such reasons should continue to be supplied under the conditions specified in Section 440 for furnishing parties with a copy of the final sentence or order.

Order as to fine illegal in a case of bodily injury —Abetment of Grievous Hurt—Report of Deputy Magistrate is not legal evidence—Intention to take life not indispensable to constitute murder—Report of Chemical Examiner to Government is evidence.

Extracts (paras. 2, 6, 7, and 8) of Letter No. 329 from the Registrar of the High Court, &c., dated the 11th April 1866.

2. WITH reference to the case of Pachoo and others (Case 4, Statement 4), the Court observe that, if bodily injury was alone sustained, the order as to fine appears to be illegal; but the Court presume that the compensation was awarded for loss or damage suffered or expense incurred in prosecution (Section 44 of the Code of Criminal Procedure). As the prisoner No. 2, Kadir, apparently was present abetting the commission of grievous hurt, he should, under Section 114 of the Penal Code, have been convicted of grievous hurt.

6. In the case of Sobo Gazee and others (Case 15, Statement 4), the Court remark that the report of the Deputy Magistrate of Dukhin Shabazpore, regarding his visit to the spot where the body of the deceased was found suspended from the branch of a tree, was not legal evidence, and should not have been received as such. If information on the point was necessary, he should have been examined.

7. With advertence to the remark made by the Judge in his judgment in the last-mentioned case, that the prisoner "Sobah "Gazee was guilty of culpable homicide not "amounting to murder, as the act committed "by him was so committed when provoked, "and not with *any intention of taking life*," the Court observe that the provocation was not one admissible by law, and that intention to take life is not indispensable to constitute murder, as may be seen from a perusal of Section 300 of the Indian Penal Code.

8. With reference to the Judge's remarks in the case of Meeah Gazee and another (Case 2, Statement 5), I am in conclusion to point out that he was mistaken in supposing that the report of the Chemical Examiner to Government, duly signed, is not evidence, as will be found on reference to Section 370 of the Code of Criminal Procedure.

Escape of prisoner arrested for bad livelihood.

No. 345.

From the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 14th April 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, H. V. Bayley, J P. Norman, and L. S. Jackson, *Judges.*

SIR,—I am directed to acknowledge the receipt of your letter No. 44, dated the 27th ultimo (with annexures), submitting in tabular form the question whether escape from the custody of the police of a prisoner arrested under Section 101, Code of Criminal Procedure, for being "of notoriously bad livelihood," can be held to constitute an offence punishable under Section 224 of the Indian Penal Code.

C. O. No. 17, dated 17th June 1863.

2. I am to state in reply that, as the escape contemplated by Section 224 of the Indian Penal Code is escape from lawful detention for an *offence* charged, and as "bad livelihood" is not an "offence" accord-

ing to the definition of that term in Section 40 of the Code, the Court is of opinion that a person absconding under the circumstances described is not liable to punishment under Section 224 of the said Code.

Framing of charge for Theft in a building—Previous conviction not to be charged, but to be brought forward after conviction.

Extract (para. 2) of Letter No. 349 from the Registrar of the High Court, dated the 16th April 1866.

2. In the second head of the charge against Puttut (Case 1, Statement 4), it should have been stated that the theft was committed in a building used for a human dwelling or for the custody of property. The Court observe that the previous conviction of the prisoner should not have been charged against him. It should have been brought forward by the prosecution after his conviction, and should have been taken into consideration by you when passing sentence. To enter such a circumstance in a charge would be apt very improperly to prejudice the Jury trying the case.

Absence of principal witnesses for the prosecution, no ground for discharging the prisoner —Additional sentence.

No. 366.

Resolution on the Criminal Statements of Dacca for the month of February 1866, dated Calcutta, 20th April 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and F. A. Glover,

Judges.

The Court observe that the Sessions Judge of Dacca has held no trial of Puban on the charge of having on the 10th March 1865 Hassuderah committed theft of a cow in a building used for the custody of property, an offence punishable under Section 280 of the Indian Penal Code, but has released him without taking any evidence, *first*, because the principal witnesses for the prosecution were not in attendance, and, *next*, because in another case the prisoner had been sentenced to transportation for life, and therefore no further sentence could be passed on him, if he were convicted in this case.

The Court have to point out to the Judge that his proceedings are erroneous. Even if the prisoner had been sentenced to transportation for life, the Judge was bound not to discharge him until the result of his appeal had been known. As it is, the Court on the prisoner's appeal have been compelled to reduce the illegal sentence passed by the Judge to one of transportation for seven years, the maximum permitted by law, and the effect of the order of the Sessions Judge in the present case would be that the prisoner would be discharged without trial for an offence on conviction of which he might receive an additional sentence. The absence of the principal witnesses for the prosecution was in itself no sufficient ground for discharging the prisoner. The Judge should rather under Section 377, Criminal Procedure, have adjourned the case, and required the Magistrate to take measures to obtain the attendance of the absent witnesses.

The Court accordingly direct that the Judge proceed with the trial of Puban. If the prisoner be convicted, sentence should be passed on him with due regard to Section 46, Criminal Procedure, as he has already been sentenced to several terms of imprisonment, and must not be sentenced beyond the period provided by law for such cases.

CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

Holidays for 1866.

CIRCULAR No. 1.

Dated 11th January 1866.

[*N.B.*—This Circular was printed by mistake in Vol. IV. as Circular No. 31, dated 19th December 1865. The date was subsequently altered.]

Preparation of the Registration Memoranda.

CIRCULAR No. 2.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, 2nd February 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

WITH a view to prevent misconception and unnecessary labor, and for their future guidance in the preparation of the Registration Memorandum enjoined in Section 45, Act XVI. of 1864, the Court desire to point out to all Civil Judges that an order or decree passed in any Civil Court of first instance dismissing a claim to any immoveable property, neither creates, declares, transfers, limits, nor extinguishes any right, title, or interest in such property. It simply negatives the plaintiff's claim to any right, title, or interest in the property sued for. In such case, therefore, the preparation of a Registration Memorandum to meet the requirements of Section 45, Act XVI. of 1864 is needless, and should not be undertaken.

2. Should, however, the Appellate Court reverse a judgment of a Court of first instance decreeing to the plaintiff, either in whole or part, that for which he sues, a Memorandum of the decree of the Appellate Court, which in effect dismisses the plaintiff's claim, should be forwarded to the proper Office for the Registration of Assurances, in order to correct the effect of the judgment of the Lower Court, which has already been forwarded to that Office.

Three Chiefs of Mahomedan Religious Institutions exempted from personal attendance in the Civil Courts.

CIRCULAR No. 3.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated. Calcutta, the 15th February 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court circulate for general information and guidance the accompanying copy of a letter No. 873 of the 3rd instant, from the Secretary to the Government of Bengal, exempting the three Chiefs of Mahomedan Religious Institutions, whose names are noted on the margin, from personal attendance in the Civil Courts.

1. Shah Ameerooddeen of Behar.
2. Shah Golam Nujuf, of the Durgah of Shah Arzan, in the City of Patna.
3. Shah Mahomed Ali Hubeeb, of Phoolwaree.

No. 873.

From the Secretary to the Government of Bengal, to the Officiating Registrar of the High Court, dated Fort William, the 3rd February 1866.

SIR,—I AM directed to request that, with the permission of the Hon'ble Judges of the High Court, you will be so good as to include the three Chiefs of Mahomedan Religious Institutions, whose names are noted on the margin, in the list of persons who have been exempted from personal attendance in the Civil Courts, under the provisions of Section 22, Act VIII. of 1859.

1. Shah Ameerooddeen of Behar.
2. Shah Golam Nujuf, of the Durgah of Shah Arzan, in the City of Patna.
3. Shah Mahomed Ali Hubeeb, of Phoolwaree.

Drawing attention to Circular No. 2 of 1865, calling for Annual Statements regarding Stamp Fees and the expense to Government for each description of Court.

CIRCULAR No. 4.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Judicial Commissioners and the Deputy Commissioners in the Non-Regulation Provinces, dated Calcutta, the 20th February 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

I AM directed to forward herewith copy of a Circular No. 2, dated the 13th February 1865, and to request that you will be so good as to submit without delay the information required therein in the form annexed thereto.

Salaries of Nazirs of Civil and Revenue Courts how to be exhibited in the Quarterly Returns.

CIRCULAR No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 28th February 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

IN continuation of the Circulars as per margin, and with reference to Government Order No. 1584, dated 14th March 1865, which requires that the salaries of the Nazirs of all the Civil and Revenue Courts in the Lower Provinces should be charged to the Peons' Fee Fund constituted under Act V. (Bengal Council) of 1863, the Court direct that the salaries of such Nazirs be exhibited in the 2nd column of the Quarterly Returns submitted to them in the Form B appended to Circular Order No. 10A, dated 26th April 1864.

C. O. No. 10A, dated 26th April 1864.
C. O. No. 4, dated 31st March 1865.

2. The words "Nazirs and" should be inserted before the word "Peons" in the heading of the said Form B, which would change the present heading to that exhibited in the margin.

"Disbursement on account of the salaries of Nazirs and Peons of each Court during past Quarter."

Destruction of old Records of Small Cause Courts after final execution of Decrees.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judges of Small Cause Courts, dated Calcutta, the 5th March 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

I AM directed to forward to you the accompanying copy of a letter No. 3, dated 16th ultimo, from the Judge of the Small Cause Court, Dacca, and, with reference thereto, to enquire whether you are aware of any objection to the destruction of old records immediately after the final execution of the decrees.

No. 3.

From Baboo Obhoya Coomar Dutt, Judge, Small Cause Court, Dacca, to the Registrar of the High Court, Calcutta, dated Dacca, the 16th February 1866.

I HAVE the honor to submit the following report for the consideration and orders of the Hon'ble Court.

There is no special rule for the destruction of useless records of the Small Cause Courts. The nuthees, though containing only a few papers each, *viz.*, Plaint, Vakalutnama, Summons, &c., may in time form a mass, so as to occupy shelves without adequate advantage.

On my taking charge of this Court, I issued instructions to the Clerk to destroy papers coming under the List B of the late Sudder Court's Circular No. 167, dated 3rd March 1852, which, I regret, have not yet been carried out. The matter, however, is such as would suggest the advisability of a rule for general observance.

In my humble opinion, the papers of a Small Cause Court case are not of any importance to render their retention at all necessary, after expiration of the time allowed for a review, or at latest after the decree is *finally executed*. The khattahs and accounts filed are taken back by the suitors. Bonds, notes, and other deeds, which form the basis of most of the Small Cause Court cases, are of a nature and character as to be of no further use to the parties. Small Cause Court cases can seldom form the subject of reference in future litigation between the parties to the suit or between others, and most of the papers come under B Class, which, even in the ordinary Courts, are not required to be kept after the expiration of a year, not to mention the cases, generally a large number, adjusted amicably or dismissed on default, the papers of which are of no use whatever.

The only records worth preservation in a Small Cause Court are the Register and Summons Book,* containing, as they do, the names of parties, particulars of demand, date, decree, &c., &c. The latter also contains the evidence and the judgment, and serves the purpose of execution, as well as other matters of reference, if any. Should it happen that an important document, worth future use, is filed in any Small Cause Court case, the party filing it may give notice of the same to the Clerk, or take it back within a fixed time after the disposal of the case. If, however, the preservation of any paper for a particular period be deemed necessary, it rests with the Court to decide whether that period should exceed three years, the time allowed for execution. But I beg to state that even execution is issued in reference to the Summons Book alone; the papers of the nuthee are never consulted.

* Prescribed by the Printed Rules of Practice, dated 1st June 18 1.

Permit me to add that, during the last year, 2,698 Small Cause Court cases were disposed of by this Court, a rate in which the number of disposals would in five years come to 13,490, and in ten to 26,980, and these exclusive of execution-cases. Now, whatever papers, if any, be kept of a case, the same must need a list, that is to say, a list for each and every case, and a general Register from year to year, and the cases ought to be arranged and placed by years and months. The Court may well imagine the amount of labor and attention this would entail, and to what advantage. The papers of cases decided by Small Cause Courts in certain districts are sent for deposit to the Judge's Record Office, which, I fear, not only would augment inconvenience, but may very likely cause confusion.

Explanation of Circular No. 34 of 1865, calling for Return of original suits disposed of, and of Stamp Duty levied on their institution during March 1865.

CIRCULAR No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges, dated Calcutta, 7th March 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge*.

DOUBTS having arisen as to the precise nature of the information required for columns 5 and 6 of the Form appended to Circular Order No. 34, dated the 23rd December last, the following instructions are issued in explanation:—

2. By the "stamp-duty levied on institution of suits" is meant the value of the stamp-paper on which the *plaint* is presented, calculated, as it ought to be, in the manner prescribed in Article 11, Schedule B of Act X. of 1862; the graduated scale furnished there being the model according to which the scale in the above form has been constructed. Column 5 should therefore show, opposite each step of the scale, the total amount of the stamp-duty levied on the plaints included therein.

3. By the "total cost" of a suit are signified *all the legitimate expenses* which a suit entails, namely, such expenses as a Judge would sanction under the head of costs, including the costs of both parties. Accordingly, column 6 would contain as well the value of the institution-stamp (already entered in column 5) as the stamp-values of the other documents filed, and also Civil Ameen's fees, Peon's fees, Witnesses' expenses, and all other charges included in the recognised costs.

4. As regards those Judges who have already submitted their Returns to Circular Order No. 34 of 1865, if the columns in question have been filled up in the way now

explained, no further Return will be necessary. But, if these columns have been dealt with in a different manner, fresh Returns should be submitted with the particulars now required. As this Return is urgently required by Government, the Court request that it may receive immediate attention.

CIRCULAR No. 8.

(Civil Side.)

[*N. B.*—This Circular has been cancelled.]

Rates of Printing executed at Private Presses—Indents for Stationery.

CIRCULAR No. 9.

(Civil and Criminal Side.)

The 13th March 1866.

Copy of the following letter forwarded to the Civil and Criminal Authorities in the Lower Provinces for their information and guidance :—

No. 1490.

From the Secretary to the Government of Bengal, to the Registrar of the High Court, dated Fort William, the 27th February 1866.

SIR,—I AM directed by the Lieutenant-Governor to request that the Court will be good enough to inform the officers subordinate to them that no charge for printing executed at private Presses should be admitted at rates higher than those of the Alipore Jail Press The rates of charge for Book Printing have never undergone revision, and are susceptible of reduction in every case.

2. I am to add that no relaxation of the rule requiring public officers to forward their indents for printed forms to the Superintendent of Stationery has been authorized.

Calling for information regarding amount of Stamp Duty levied on institution of suits and total costs of suits.

CIRCULAR No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of districts, dated Calcutta, the 23rd March 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court are pleased to circulate the accompanying forms, and to request that the requisite information be supplied *as soon as possible* by all the Civil Courts subordinate to them.

2. The information required relates to *original* suits only which were *decided* during the year 1865, and should be exhibited in the manner laid down by Circular Order No. 34, dated 23rd December last (para. 2). The explanations given regarding stamp-duty and costs of suit in Circular Order No. 7, dated 7th instant, apply respectively to the columns 4 and 5 of the forms now sent.

3. As the information is urgently required by Government, the Court expect that it will be promptly furnished. The Court will not fail to notice any unnecessary delay.

Original suits relating to land, the valuation of which is calculated at the amount of the Annual Jumma.

1	2	3	4	5
	No. of Suits.	Aggregate value.	Amount of Stamp Duty levied on institution of Suits.	Total costs of Suits.
Not exceeding Rupees ... 300				
Exceeding Rs. 300 and not exceeding 500				
,, 500 ,, 800				
,, 800 ,, 1,000				
,, 1,000 ,, 1,200				
,, 1,200 ,, 1,600				
,, 1,600 ,, 2,000				
,, 2,000 ,, 2,500				
,, 2,500 ,, 3,000				
,, 3,000 ,, 3,500				
,, 3,500 ,, 4,000				
,, 4,000 ,, 5,000				
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,, 35,000 ,, 40,000				
,, 40,000 ,, 50,000				
,, 50,000 ,, 75,000				
,, 75,000 ,, 1,00,000				
,, 1,00,000 ,, 2,00,000				
,, 2,00,000 ,, 3,00,000				
,, 3,00,000 ,, 4,00,000				
,, 4,00,000 ,, 5,00,000				
,, 5,00,000 ,, 10,00,000				
Above 10,00,000				

Original suits relating to land, the valuation of which is calculated at three times the Sudder Jumma.

(Same form as above.)

Original Suits relating to land, the valuation of which is according to Note (d), Schedule B, Act X. of 1862.

(Same form as above.)

All original suits the valuation of which is estimated under the rule laid down in Note (e), Schedule B, Act X. of 1862.

1	2	3	4	5
	No. of suits.	Aggregate value.	Amount of Stamp-duty levied on institution of Suits.	Total costs of Suits.
Not exceeding Rupees ... 4				
Exceeding Rs. 4 and not exceeding 8				
" 8 " 12				
" 12 " 16				
" 16 " 20				
" 20 " 25				
" 25 " 30				
" 30 " 40				
" 40 " 50				
" 50 " 75				
" 75 " 100				
" 100 " 150				
" 150 " 200				
" 200 " 300				
" 300 " 500				
" 500 " 800				
" 800 " 1,000				
" 1,000 " 1,200				
" 1,200 " 1,600				
" 1,600 " 2,000				
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" 30,000 " 35,000				
" 35,000 " 40,000				
" 40,000 " 50,000				
" 50,000 " 75,000				
" 75,000 " 1,00,000				
" 1,00,000 " 2,00,000				
" 2,00,000 " 3,00,000				
" 3,00,000 " 4,00,000				
" 4,00,000 " 5,00,000				
" 5,00,000 " 10,00,000				
Above 10,00,000				

Grant of half-pay to Peons while sick in Hospital or receiving Medical aid as out-door patients of the Hospital.

CIRCULAR No. 11.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 23rd March 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

RESOLUTION.—The Governor-General in Council is now pleased to confirm as a permanent arrangement the rule which was experimentally passed in the year 1864, authorizing the grant of half-pay to Peons while sick in Hospital or receiving medical aid as Out-door patients of the Hospital of the Station at which the Peons are serving.

THE extract given in the margin from the proceedings of the Government of India in the Financial Department, under date the 26th January last, is hereby circulated for the information and guidance of all Zillah Judges and their subordinates, as well as of Judges of Small Cause Courts.

2. It is further notified that the Government of Bengal has, under date the 3rd instant, authorized the general extension of the same rule to Peons employed under Act V. (B. C.) of 1863.

Vide Government to Court, dated 12th March 1866.

Amount of Stamp-duty refunded under Note (F) Article 12, Schedule B, Act X. of 1862.

CIRCULAR No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower Provinces, dated Calcutta, the 23rd March 1866.

CIVIL SIDE.

Present:

The Hon'ble C. B. Trevor, *Judge.*

As the Court find that the Form A, Appendix to their Circular No. 2, dated the 13th February 1865, does not provide for a return of the amount of Stamp-duty refunded under Note (F), Article 12, Schedule B, Act X. of 1862, they request that a fresh column may be inserted after column 3,

supplying the requisite information, and another column shewing the total amount refunded.

The amended Form of Statement A will be the following :—

1.	2.	3.	4.	5.	6.	7.	8.
NAME of COURT.	Value of Stamps filed.	Amount refunded under Act X. of 1862, Section 26.	Amount of Stamp-duty refunded under Note (F), Article 12, Schedule B, Act X. of 1862.	Total amount refunded.	Net amount value of Stamps.	Receipts on account of Ameens' Fees.	Total Receipts, being aggregate of Columns 6 and 7.

2. It will be seen that the new column refers to information which can be supplied only from Courts of appeal, as it relates to the refund of Stamp-duty realised on the petition of appeal. The fresh returns for the past year (1865), which the Court require with as little delay as possible, will not embrace the Courts of Sudder Ameen, or Moonsiffs.

Enrolment of Pleaders in the Civil Courts.

CIRCULAR No. 13.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Districts, dated Calcutta, 1st April 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—THE High Court request the immediate attention of all Judges of Districts to Section 43, Act XX. of 1865, and are pleased to direct that notifications explaining its terms be issued by all Civil Courts at once, in order that all persons who may now be practising as pleaders in any Civil Court, and who may wish to be enrolled under that Act, may lose no time in applying to be so enrolled, so as to be duly qualified to appear, plead, and act on and after the 1st July next, when Act XX. of 1865 comes into operation; for from that date none but pleaders duly enrolled are entitled by law to appear, plead, and act in the Courts in the Mofussil.

* Vide Act XXIX. of 1865.

2. It should be explained that, in accordance with Section 43, each application should be made in writing on a stamp-paper of the value prescribed for petitions before the Court in which the pleader so applying may be practising, and that none but those who on the 1st January last may have been practising as pleaders are entitled to the privileges set forth in Section 43.

3. In addition to his own name, every application should contain that of the applicant's father, his age, his place of residence, and the particular class of Court in which he wishes to practise.

4. Junior pleaders should apply to the Sudder Ameen or Moonsiff before whom they may be practising, and the Sudder Ameen or Moonsiff should, without delay, forward such application to the Judge of the District for transmission to the High Court. Senior pleaders should apply to the Judge of the District, or to the Principal Sudder Ameen in any place in which the Judge of the District may not reside. Such Principal Sudder Ameen should forward to the Judge of the District all applications that may be made to him. In every case the local Court should satisfy itself that the person so applying is a pleader holding a

d

roper diploma, and that on the 1st of January last he was in actual practice.

5. As the law requires that, after the 1st uly next, before any person can be duly ualified to plead before any Civil Court, e shall have been enrolled by the High ourt, and shall have received a certificate n the manner provided by Sections 8, 9, and o of the Act, the High Court request that ll Judges will warn pleaders of the necesity for making applications for enrolment vithout delay. Such applications should be orwarded to the High Court as soon as ossible.

6. As soon as an application has been eceived, the applicant's name will be enrolled by the High Court, who will then uthorise the granting of a certificate in the manner provided by Act XX. of 1865.

Exemption of Zemindar of Soosung from personal attendance in Civil Courts.

CIRCULAR No. 14.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated Calcutta, 18th April 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

The Court circulate for general information and guidance the accompanying copy of Government letter No. 2442, dated the 11th instant, exempting Rajah Raj Krishna Sing Bahadoor, Zemindar of Soosung in Mymensingh, from personal attendance in the Civil Courts of Lower Bengal.

Copy No. 2442.

From the Officiating Junior Secretary to the Government of Bengal, to the Registrar of the High Court, dated Fort William 11th April 1866.

Judicial.

SIR,—I am directed to state for the information of the High Court that the Lieutenant-Governor has, under the provisions of Section 22, Act VIII. of 1859, been pleased to exempt Rajah Raj Krishna Sing Bahadoor, Zemindar of Soosung in Mymensingh, from personal attendance in the Civil Courts.

2. I am to request that you will, with the High Court's permission, cause this to be notified in the District.

Enrolment of Mookhtears under Act XX. of 1865.

CIRCULAR No. 15.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Districts, dated Calcutta, the 20th April 1866.

Present:

The Hon'ble C. B. Trevor, *Judge.*

IN continuation of their Circular No. 13, dated 14th instant, the Court are pleased to

issue the following orders regarding the enrolment of mookhtears under Act XX. of 1865.

2. In order to provide for the present requirements of the Local Courts, the High Court have determined that any person who, on the 1st January last, had been practising as mookhtear in any Criminal Court for the term of at least one year immediately preceding that date, shall be entitled to apply for enrolment under Act XX. of 1865.

3. Judges and Magistrates of Districts should lose no time, therefore, in notifying to all mookhtears that, unless they are duly enrolled, and have received certificates under Act XX. of 1865, they will not be entitled to appear, plead, or act in any Civil or Criminal Court after 1st July next, and they should call upon all persons now practising as mookhtears who may wish to continue to be such to submit without delay applications for enrolment.

4. Every application must be made in writing on stamp-paper of the value prescribed for petitions to the Judge of the District, or, where there is no resident Judge, as at Mooteeharee, Monghyr, Bograh, Maldah, Pubnah, Fureedpore, Balasore, Pooree, Noacolly, and Howrah, to the Magistrate of the District, and must contain, besides the name of the applicant, the name of his father, his place of residence, his age, the grounds upon which he applies for enrolment, and the class of Courts in which he wishes to practise.

5. The Court desire to point out that every applicant is not of necessity eligible for admission as mookhtear even though he may have served the period prescribed in para. 2, for the Court require that every applicant shall satisfy the Judge, or, in the special cases aforementioned, the Magistrate, that he is a person of good moral character and is qualified by his knowledge of law and procedure to continue practising as mookhtear. The Court request that these officers will satisfy themselves thoroughly on these points, and the Court suggest that Judges place themselves in communication with the Magistrates of Districts with the view of obtaining the requisite information.

6. If the Judge or Magistrate in the special cases aforementioned considers that the applicant is a proper person to be admitted as a mookhtear, he should forward his application to the High Court for enrolment, together with a certificate to that effect endorsed thereon.

7. The High Court, on receipt of an application, will either order the enrolment of the applicant (in which case a certificate shall be granted by the Judge in the manner prescribed by Sections 8, 9, 10, Act XX. of 1865), or will reject the application.

8. The Court, in conclusion, desire to impress upon all officers the absolute necessity for prompt action on their part, as, unless a certificate has actually been granted to a person before the 1st July next, he cannot practise as a mookhtear in any Criminal Court. But at the same time the Court think it necessary to add that these instructions are not intended to interfere with the provisions of Section 40, Act XX. of 1865, by which an accused person, with the permission of the presiding Judge or Magistrate, may be defended by any person not a pleader or mookhtear. The Court rely with confidence on the care and intelligence of Judges and Magistrates for a proper performance of the important duties which, under Act XX. of 1865, now devolve upon them.

Transmission to Courts of first instance of judgments of Appellate Courts in cases of reversals, &c.

CIRCULAR No. 16.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judges of Districts, dated Calcutta, the 25th April 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE High Court are pleased to order that, for the future, whenever the order of a Court of first instance be modified or reversed on appeal, or whenever any irregularity in the proceedings of such Court be made the subject of argument by the pleaders, and of comment by the Court of Appeal, a copy, or a translation of the judgment if it has been recorded in a language not intelligible to the Subordinate Judge, be forwarded for the information and future guidance of such officer.

2. The High Court trust that by this means the judgments of the Lower Courts may be improved, and the work of the Appellate Courts may in consequence be diminished.

3. Judges of Districts are requested to communicate these orders to their subordinate Principal Sudder Ameens.

CIRCULAR No. 17.

[*Under re-consideration.*]

Employment and remuneration of extra peons by Civil Judges for the service and execution of processes on special occasions.

CIRCULAR No. 18.

From the Deputy Registrar in charge of the Office of Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Districts and Judges of Small Cause Courts, dated Calcutta, the 11th May 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court desire to remind all Civil Judges that they are empowered by Section 4, Act V. (B. C.) of 1863, to employ, for the service and execution of processes on special occasions, other than registered peons. That power, however, should be exercised *only* when there is absolute necessity for the employment of extra peons, and on the occurrence of such necessity, the Judge (*i. e*, the presiding officer of the Court by whatever title designated, Section X.) should hold a proceeding, and record his reasons for employing such peons. When this is done by any Judge subordinate to a Zillah Judge, the latter should be furnished at once with a copy of the proceeding, and the Court will expect to receive from Zillah Judges, at the close of the month in which extra peons are employed in any Civil Court in their districts, a Return showing the number of men employed, and the costs of their employment. Judges of Small Cause Courts will submit to the High Court a similar Return under like circumstances.

2. The following rule, which has been approved by Government,* is circulated for general observance in cases of the above nature where extra peons are employed for any period less than a month; they shall receive the full amount realized from suitors for their services according to the rate laid down in paragraph 3, Circular Order No. 10A, dated 26th April 1864; but when their services are retained for one month or longer, they shall be remunerated by fixed salaries according to the usual scale, the entire fees being credited to Government.

* *Vide* G. O., 6th April 1865, No. 2235.

Duty of Administrators under Act XL. of 1858, other than public Curators and others appointed under Section 10, to keep accounts.

CIRCULAR No. 19.

From the Deputy Registrar in charge of the Office of Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Districts, dated Calcutta, the 16th May 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

In continuation of Circular Order No. 25, dated 15th September last, the Court are pleased to point out that, when a certificate of administration is granted under Act XL. of 1858 to any person *entitled* to have charge of the property of a minor by virtue of a will or deed, or to any relative (Section 7). such relative or other person is not required to file annual accounts under Section 16, inasmuch as that Section only applies to the public curator and other administrators to whom a certificate may have been granted under Section 10.

2. But under Section 21 the Civil Court *for any sufficient cause* may re-call *any certificate granted under the Act*, and may *then* compel the person whose certificate has been re-called to make over the property in his hands to his successor (to whom the Court has the power of granting a fresh certificate), and to account to such successor for all monies received and disbursed by him; and on the neglect or refusal of such person to deliver his accounts and property in his hands, the Court, under Section 22, may impose on him a fine not exceeding Rs. 500, realizable by attachment and sale of property, and may commit the recusant to close custody until he shall consent to deliver such account or property. Thus the Court has power, though not identical in both cases, over administrators under Section 7 as well as over those under Section 10.

3. The Court desire to add that, although administrators under Act XL. of 1858 other than public curators and others appointed under Section 10 cannot be required to furnish accounts annually, yet they are bound to keep regular accounts (for they may be sued* and compelled to produce them); and the Court draw attention to the duty rightly enjoined upon them in the certificates for which Form A of Circular Order No. 26, dated 31st August 1859, has been provided. Zillah Judges should omit no opportunity of reminding such persons of the duty of keeping accounts and of exercising a proper economy in carrying out their trusts.

* Section 19.

Explanation of Circular No. 10, regarding amount of Stamp Duty levied in institution of suits and total costs of suits, and further call for the statements therein required.

CIRCULAR No. 20.

From the Deputy Registrar in charge of the Office of Registrar of the High Court of Judicature at Fort William in Bengal, to the Zillah Judges, dated Calcutta, the 16th May 1866.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

In continuation of Circular No. 10, dated the 23rd March last, the Court find it necessary to explain that suits concerning claims which fall within more than one of the descriptions therein provided for should be entered in the statement which refers to the more valuable portion of the claim.

2. Thus, if a suit be for recovery of a house and some lakheraj land, the statement in which it will be entered will depend upon whether the house or the lakheraj land is assessed at the highest value.

3. The Court take this opportunity of calling upon all Judges to submit, without delay, the statements required by Circular No. 10 above referred to, as ample time has been allowed for their preparation, and they are urgently required by Government.

Deduction of probable payments of April 1867 from the Budget Grant for 1866-67—Explanation of the head "Allotment" at foot of Monthly Contingent Bill.

CIRCULAR No. 21.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Courts of Small Causes, dated Calcutta, the 28th May 1866.

(Civil side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE attention of Judges of Mofussil Small Cause Courts is drawn to Financial Resolution No. 270, dated 1st instant,* by which the ensuing financial year (1867-68) has been ante-dated, so that it will commence on the *1st April* 1867. The effect of this Resolution will be to reduce the current official year to 11 months by limiting it to the 31st March next, and by throwing the month of April into the following financial year. It will accordingly be necessary to deduct the contemplated payments of the month last named (April 1867) from the Budget Grant for 1866-67. This can be easily effected as regards *fixed* salaries by deducting from the Grant *one-twelfth* of the amount sanctioned for the year; but with respect to *fluctuating* charges, it will be necessary to form a probable estimate of what will need to be paid in April next, and to retrench such estimate from the Budget Grant. The Court request accordingly that each Judge will report for their approval the total amount (fixed as well as fluctuating) which he proposes to deduct from the Grant for 1866-67.

* *Vide* page 690 of the *India Gazette*, dated 5th May 1866.

2. The Court are also pleased to state, for the information and guidance of Judges of Small Cause Courts, that the head "Allotment," which is provided at foot of the prescribed form of Bill for Monthly Contingent Charges, is intended to include none but the following Heads of Charge:—

"Travelling Allowances.
"House-rent.
"Stationery.
"Office Contingencies.
"Petty Construction and Repairs."

The cost of punkah-pullers should be shown under the head of Contingencies, and the total of the foregoing five heads, as ascertained from the Budget Grant, should be exhibited in the Contingent Bill as the *allotment* for the year.

CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

Mode of Commitment in cases of European British Subjects and Native Subjects together charged with an offence.

CIRCULAR No. 1.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Criminal Authorities of the Lower and Extra-Regulation Provinces, dated Calcutta, the 16th January 1866.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court is desirous of pointing out to the Criminal Authorities that, when a European British subject and a Native subject are together charged with an offence requiring the commitment of the former to the High Court for trial, the latter should not be committed to the High Court also, but should, in the ordinary manner, be committed to the Sessions Court competent to try the offence.

Convictions under Act V. of 1861 appealable.

The 7th February 1866.

CIRCULAR No. 2.

COPY of the following decision forwarded for the information and guidance of the Criminal Authorities in the Lower and Extra-Regulation Provinces:—

(Criminal Side.)

High Court of Judicature at Fort William in Bengal, dated the 31st January 1866.

Referred under Section 434, Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863, in re Thakoordash and Godai Shek.

Present:

The Hon'ble C. B. Trevor, L. S. Jackson, and F. A. Glover, *Judges.*

WE think it clear that convictions under Act V. of 1861 are appealable in the same way as other convictions.

Section 21, Code of Criminal Procedure, provides that "the Criminal Courts of the several grades, according to the powers vested in them respectively by this Act, shall have jurisdiction in respect of offences punishable under the Indian Penal Code, or under *any special or local law*, and in the investigation shall be guided by the provisions of this Act."

Act V. of 1861 is a special law on the subject of Police, and persons charged with offences punishable under that law must be tried under the provisions of the Code of Criminal Procedure.

Section 409 of the same Code provides that any person convicted on a trial held by the Magistrate of the district or other officer exercising the powers of a Magistrate, may appeal to the Court of Session to which such Magistrate is subordinate (subject to the limit prescribed in Section 411).

The appellants in this case are persons convicted on a trial held by an officer exercising the powers of a Magistrate and sentenced to imprisonment exceeding the limit fixed by Section 411. They were, therefore, we think, entitled to an appeal to the Sessions Court. We therefore direct the Sessions Judge to hear the present appeal and to pass such orders as the circumstances may require, and we further direct that a copy of this decision be laid before the Judge in the English Department.

SMALL CAUSE COURT REFERENCES.

The 23rd February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Limitation—Pleaders' Fees.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Kooshtea.

Dwarkanath Moitro

versus

T. J. Kenny.

The period of limitation applicable to suits for the recovery of pleaders' fees.

Case.—THE plaintiff instituted a suit against the defendant on the 26th October 1865, for the recovery of Rupees 14-5-3, being the amount of his fees for work done for him as a pleader. He, the plaintiff, was employed by the defendant as a pleader in the Moonsiff's Court, and, as such, he duly appeared and conducted a certain case which was decided on the 15th August 1862. He states that, no specific provision for the limitation of such actions having been made, a period of six years should be allowed for them under Clause 16, Section 1, Act XIV. of 1859.

The defendant contends that, when a party engages a pleader to act on his behalf, he enters into a contract with him, and an action on such contract should have three years' limitation; and the plaintiff is barred, inasmuch as the period of three years, computed from the date of the decision of the case he conducted, to the date of institution of the present suit, has expired.

The point, therefore, submitted for the decision of the Court is, what period of limitation should apply to an action for the recovery of the pleader's fees?

I am of opinion that an action for the recovery of fees for work done as a pleader comes under the head of contract entered into by a party under a power which is equivalent to a document in proof of the said action, and, as such, a period of three years, as provided in Clauses 9 and 10 of Section 1 of Act XIV. of 1859, should apply. Clause 16 of the said Section is meant for suits for which no express provision has been made, and it cannot, therefore, govern the present action.

Judgment of the High Court.—We are of opinion that a suit for pleader's fees is founded upon a contract either express or implied. If the contract is not in writing, the limitation under Clause 9, Section 1, Act XIV. of 1859, is three years from the time when the cause of action accrues.

If there is no express contract making provision for the time at which payment is to be made, we think that the cause of action in respect of conducting or defending a suit accrues when the decision is passed in the suit, as the general rule is that the fee includes everything to be done by the pleader to the date of decision. That was the time at which, under Regulation XXVII. of 1814, Section 29, whilst that Section was in force, the fee was to be paid, and such fee was to include everything done relative to the suit until judgment was enforced.

When no express agreement is made, we think that the implied agreement is to pay one fee, and to pay it when the decision is given.

The 23rd February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction—Damages—Costs—Section 15, Act XIV. of 1859.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Kooshtea.

Mr. T. J. Kenny

versus

Kolum Mundle and another.

A suit will not lie for damages sustained in consequence of the destruction of indigo-plants in execution of an award under Section 15, Act XIV. of 1859; nor

for damages in the shape of the value of *kolai* crop recovered by the decree of a competent Court; nor for costs awarded by a competent Court in a possessory suit under the same Section.

Case.—In this case, Mr. T. J. Kenny, the plaintiff, states that the defendants, Kolum Mundle and another, having, by virtue of an award under Section 15 of Act XIV. of 1859, obtained possession of a plot of land appertaining to plaintiff's *ijara* Mehal Kisteenuggur, destroyed the indigo-plants grown by him, and recovered from him the costs of the case amounting to Rupees 3-5-3; that the defendants also recovered from the plaintiff, by a suit in the Small Cause Court, Rupees 7-9 in the shape of damages alleged to have been sustained by them in consequence of the destruction of *kolai* crop previously grown by them on the said land; that the plaintiff subsequently established his right to the said land, and obtained possession of the same; and that he, therefore, by this action seeks to recover from the defendants damages for the destruction of his indigo-plants as well as the sums realized from him on account of costs under Section 15 of Act XIV. of 1859, and price of *kolai* crop with interest; the whole claim being laid at Rupees 23-13-7.

The defendants plead, *first*, that, as they obtained possession of the land in question under a process of a Court of Justice, they are not liable for any damages caused to the plaintiff in execution of such process; that, at the time they obtained possession of the land by virtue of an award under Section 15 of Act XIV. of 1859, there were only a few scattered indigo-plants on it; and that the plaintiff's claim to damages in the shape of the value of the same is excessive: *secondly*, that plaintiff is not entitled to recover back from the defendants the costs of the possessory suit which were awarded by a Court of Justice: and, *thirdly*, that the plaintiff cannot also get back from the defendants the damages sustained in consequence of the unlawful destruction of their *kolai* crop, and awarded to them by a competent Court.

The only points, therefore, which arise from the records, and which are submitted for the opinion of the Court, are—

First. Whether damages sustained in consequence of the destruction of the Indigo plants in execution of an award under Section 15 of Act XIV. of 1859 by the plaintiff can be recovered by him from defendants.

Secondly. Whether costs awarded and recovered in a possessory suit under Section 15 of Act XIV. of 1859 can, in the event of the party cast subsequently establishing his right, be realized with interest by a fresh action of the present kind.

Thirdly. Whether damages in the shape of value of *kolai* crop, recovered by the defendants from the plaintiff after they had obtained possession by virtue of an award of a Court, can be made the subject of, and realized with interest in, a fresh action by tha latter against the former.

With reference to the *first* point, I am of opinion that the damages sustained in execution of an award under Section 15 of Act XIV. of 1859 by the plaintiff, cannot be recovered by him in a fresh suit of the present kind. I have arrived at this conclusion for the following reasons: *First.*—The award under Section 15 of Act XIV. of 1859, and the decree for damages on account of the *kolai* crop, passed by the Small Cause Court after a careful local enquiry, go to show that the defendant were in peaceful possession of the land before they were ousted therefrom by the plaintiff, and that, while in such peaceful possession, they grew the *kolai* crop. The plaintiff, therefore, in disturbing that possession by the destroying of the crop and growing indigo on its site, took the law into his own hand without having recourse to a Court of law for remedy. When the defendants were in undisturbed possession of the land with or without any title, it behoved the plaintiff to establish his right to it in the first instance; but he, instead of doing so, resorted to force and wrongful act to obtain possession. If, therefore, he be allowed to recover back from the defendants the damages which they sustained in consequence of such force and illegal act, and which the Court awarded to them, it would be offering, as it were, a sort of premium for such illegal proceedings in violation of the policy of law, which is that a party in peaceful possession might be maintained in the same until ousted by the rightful owner by the establishment of his title in a Court of competent jurisdiction. *Secondly.*—Should the plaintiff be permitted to recover back the damages awarded against him in the Small Cause Court, the defendants who were in actual possession of the land, and who grew the crop under the reasonable belief that they would enjoy the fruits of it, would thus be made to suffer a double loss. *Thirdly.*—It has been already

remarked that the plaintiff, instead of resorting to law, had recourse to force for ousting the defendants. He, therefore, cannot take advantage of his own wrongful act. He had no right to disturb the possession of another, much less to grow a crop of his own by the destruction of the defendants' crop. If, then, the plaintiff sustained any loss, it is the result of his own unlawful act, and the Court cannot help him in the matter.

On the *second* issue, I am of opinion that costs awarded by a competent Court under Section 15 of Act XIV. of 1859 cannot be made the subject-matter of a fresh action, inasmuch as such an award cannot be interfered with by any other Court than the one awarding the costs. Should such actions be allowed to proceed, whether under the denomination of costs or damages, it would be encouraging forcible entry of possession under color of a title. There is besides nothing in Section 15 of Act XIV. of 1859 from which it could be inferred that costs awarded in a case under that Section could be recovered from the party winning after the establishment of the right of the opposite party.

With reference to the *third* point, I am of opinion that, for reasons stated above, an action of the kind alluded to in the issue cannot be allowed to proceed. I may only add that the defendants cannot be justly made to pay back the sums which they have recovered by the decree of a competent Court in the shape of damages sustained by them in consequence of the plaintiff's wrongful and forcible entry of possession; but whether or not he is entitled to recover anything in the shape of mesne-profits after the establishment of his right, is a question which is not necessary to enter into for the purpose of this suit.

Judgment of the High Court.—We are of opinion that the Judge of the Small Cause Court is quite correct in the opinion which he has expressed in each of the questions which he has submitted to the High Court. The Judge has so clearly expressed his reasons, that it is unnecessary for us to do more than say that we entirely concur with him.

The 23rd February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Limitation—Servants' Wages—Admission.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Kooshtea.

Nobin Chunder Mozoomdar

versus

Mr. T. J. Kenny.

A suit for servants' wages is governed by the limitation prescribed by Clause 2, Section 1, Act XIV. of 1859. Servants' wages are a debt which may be revived, within the meaning of Section 4, by an admission in writing, the new period of limitation being computed according to the nature of the original liability from the date of such admission. An admission which does not specify a particular amount to be due does not extend the period of limitation.

Case—THE plaintiff states that he was employed as a Factory Gomastah, under the defendant, on a salary of 10 rupees per mensem, and left his service on the 27th October 1864; that on the same day he applied to the defendant for the payment of his wages, and got a letter of acknowledgment from him, in which he promised to pay the same; and that, as by that letter the plaintiff's case has been saved from limitation, he brings this action to recover wages for 11 months and 27 days extending from November 1863.

Mr. Kenny in his defence admits the plaintiff's service and salary, as also the letter, dated 27th October 1864, filed by the plaintiff; but urges the plea of limitation in bar of the hearing of this suit, on the ground that more than a year, has elapsed from the date in which the salary became due.

It is argued on behalf of the paintiff that, as the defendant's letter above alluded to virtually put the plaintiff back from suing him in the Court, the wages due to him must be regarded in the light of money lent; hence the rule of three years' limitation or six years' limitation as provided in Clause 16, Section 1, Act XIV. of 1859, must apply to this case.

On the other hand, it is contended on behalf of the defendant that, as Clause 2, Section 1 of the Limitation Act, allows one year for bringing a suit for wages, the plaintiff is out of Court; that a letter of admission can create fresh cause of action only in the cases contemplated by Section 4, and Clauses 9 and 10, Section 1 of the Act, and not in a case of the present kind; that, to constitute a letter of acknowledgment, the amount should be specified; whereas the letter relied on by the plaintiff, not specifying the amount, cannot be considered as an admission.

The defendant's letter was thus—

To

Nobin Chunder Mozoomdar.

You are requested to come and take the salary due to you.

(Sd.) T. J. Kenny.

Dated 27th October 1864.

In my opinion, the *first* point to be enquired into in this case is, which Section of Act XIV. of 1859 applies to this case. The plaintiff seeks to recover wages due to him, and this suit is governed by Clause 2, and not Clause 9 or 10, Section 1, Act XIV. of 1859. The different Clauses and Sections of the Act have been made for different classes of cases, and Clause 2, Section 1, and not any other Clause or Section specifically provides for the limitation of suits for wages of servants. It now remains to be seen whether or not the letter relied on by the plaintiff can be regarded in the light of defendant's admission. On looking to the letter, I find that it makes no mention of the sum sued for, and, as such, it cannot be regarded as an admission of the claim. The wording of the letter being too general, it cannot save the plaintiff's claim from limitation, nor can it create a fresh cause of action from its date. But even if the letter in question be considered in the light of defendant's admission, still it cannot save the plaintiff's suit from limitation, for the admission contemplated by Section 4, Act XIV. of 1859 applies to cases of legacy and debt only, and not to cases for wages of servants. Had it been the intention of the legislature to apply this Section to cases for wages of servants, they would have inserted the word "wages" in it. The words "wages" and "debt" are distinct. Consequently, Section 4 does not govern this case. Besides, the Limitation Act distinctly provides for the cases in which an admission takes effect (*vide* Section 4, Clause 15, Section 1, and Section 19, Clause 16, Section 1, Act XIV. of 1859), provides for those cases for which no specific limitation is given. For these reasons I am of opinion that the plaintiff's claim is barred by limitation, excepting that portion of it which, according to the defendant's admission, is within time.

The case is submitted at the request of both the parties to the suit.

Judgment of the High Court.—We are of opinion that the rule of limitation applicable to this case is that laid down in Clause 2, Section 1, Act XIV. of 1859.

If the defendant had admitted a particular amount to be due to the plaintiff for wages, we think that the period of limitation would have had to be computed from the date of the admission. The period of limitation would, however, have been the same as that fixed by Clause 2, Section 1; for Section 4 provides that the new period of limitation is to be computed according to the nature of the original liability.

Servants' wages are a debt within the meaning of Section 4. But the nature of the liability is such that the period of limitation is one year from the time when the cause of action arose (Section 1, Clause 2). The admission of such a debt, therefore, would give only one year from the time of the admission.

Money due for goods sold by retail is also a debt; but it is a debt of such a nature that the period of limitation is three years from the time when the cause of action arises. Under Section 1, Clause 8, an admission of such a debt would give three years from the time of the admission.

In the present case, the letter of the 27th October 1864 did not admit any particular amount to be due, nor did it admit wages to be due for any particular period. It merely admitted that something was due for wages on the 27th October 1866. That being the date on which the plaintiff left, the admission did not extend the time from which the period of limitation was to be computed.

Whatever wages became due within the period of one year next before the commencement of the suit is within time without the admission, and the suit is not within time as to any other portion of the wages, notwithstanding the admission.

The 23rd February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction—Suit for Maintenance.

Reference to the High Court by Baboo Punchanund Banerjee, Judge of the Small Cause Courts of Hooghly and Serampore.

Nobin Kalee Debea

versus

Bindoobashinee Debea and others.

A suit for maintenance is not cognizable by a Small Cause Court.

Case.—THE plaintiff sues to recover maintenance for 9 months and 29 days, *viz.*, from Cheyt 1268 B. S. to the 29th Poos 1269 B. S., at 7 rupees a month, and for 2 years 7 months and 1 day, *viz*, from the 30th Poos 1269 B. S. to the end of Srabun 1272 B. S., at 5 rupees per mensem, laying her claim at Rupees 271-15-17-1-1. The plaintiff's pleader, on being questioned, states that the maintenance claimed is a charge on property inherited by, and in the possession of, the defendants. The defendants have not appeared. From an authenticated copy of a judgment of the Moonsiff of Serampore filed by the plaintiff, it appears that the plaintiff obtained a decree against the defendants, establishing her right to maintenance at 7 rupees per month, and subsequently another for arrears of the said maintenance. Under such circumstances, the following questions of law arise for determination:—

(1) Whether a suit of this kind is maintainable in a Small Cause Court; and

(2) Whether, under the Statute of Limitations, the plaintiff can recover maintenance for any period beyond three years before date of suit.

It was ruled by the Court in the case* marginally noted, on a reference made by me, that a suit for maintenance involving long and intricate investigations is not cognizable by the Small Cause Courts; and the Hon'ble Judges, who heard the case, observed that it is very questionable whether such Courts have jurisdiction at all to try a suit for maintenance when the maintenance is a charge on the inheritance of any estate. In the present case, the plaintiff admits that the maintenance in question is a charge on property inherited. The circumstance of the plaintiff having established her right to the maintenance does not make any great difference. I conceive it is still open to the defendants to contest their liability for the whole or any portion of the plaintiff's claim, on the ground of the whole or any portion of the estate inherited by them having suffered diminution from causes independent of them; and the question between the parties, as observed by the Hon'ble Judges above alluded to, "may involve long and intricate investigations unsuited to the speedy course of procedure prescribed for the Small Cause Courts." Moreover, a claim for maintenance does not come within the purview of Section 5, Act XI. of 1865, which enumerates the different classes of suits cognizable by Courts of Small Causes. It is certainly a claim for "money due," but not one for "money due on bond or other contract." For the above reasons, I am of opinion that the suit will not lie in a Small Cause Court.

* Tarasoonduree Debea *vs.* Hurrosoonduree Debea and others, decided on 6th February 1864, Sutherland's Small Cause Court References, p. 66.

There remains the question of limitation. Under Act XIV. of 1859, Section 1, Clause 13, suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, should be brought within the period of 12 years from the death of the person on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff or any person through whom he claims on account of such maintenance. The words of the Clause are general and unqualified. The effect of the decree establishing the plaintiff's right to maintenance cannot be to shorten the period to which the plaintiff would otherwise have been entitled for instituting her suit. I am, therefore, of opinion that the plaintiff is in time, and that she is entitled to recover the whole amount of maintenance claimed.

Judgment of the High Court.—We are of opinion that a suit for maintenance is not cognizable by a Small Cause Court. It is not a claim for money due upon contract, and does not fall within the definition of any of the claims made cognizable by Act XI. of 1865, Section 6.

If a case of this sort is not cognizable, it makes no difference that a particular case does not involve intricate questions of law or fact.

It is unnecessary to answer the second question.

The 23rd February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Witnesses (Recovery of expenses of).

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Kooshtea.

Edward Dubois de Saran

versus

Hurrish Chunder Biswas.

No action for the expenses of a witness will lie. Explanation of the manner of providing for the payment of such expenses.

Case.—THE plaintiff states that he was summoned at the instance of the defendant as a witness in a certain case instituted under Act X. of 1859. On the 27th October 1865, he appeared before the Deputy Collector of Kooshtea where the case was pending, and demanded from the defendant payment of his actual travelling expenses, upon which he declined to have him examined without meeting those expenses. He, the plaintiff, therefore seeks to recover from the defendant 14 rupees for his own diet, the feed of his horse, and the salary of his syce, and 10 rupees being one day's pay at the rate of 300 rupees per mensem, which his employers deducted for his absence from his duty on the day he attended the Court, making a total of 24 rupees.

The defendant contends that the payment of travelling expenses of a witness ought to be ruled by the Court which he attends as such witness, and that, therefore, a suit for the recovery of such expenses cannot lie in any other Court, and it becomes barred by Section 67 of Act X., and Section 151 of Act VIII. of 1859. The defendant further argues that he declined to have the plaintiff examined; and, even if he were examined, he would have been entitled to a sum of 5 rupees, which the Deputy Collector verbally ordered to be paid to him, and which he refused to accept, and that he, the defendant, is not liable to pay the loss of his one day's salary which could not have been lawfully mulcted for his absence to a Court of Justice under its process. The plaintiff, therefore, cannot maintain the present action.

There are two points which are to be decided in this case, *viz.*:—

1st.—Whether an action for the recovery of the necessary expenses of a witness can lie in a Court other than that which he attended as such witness; and

2ndly.—Whether a witness, a monthly hired servant, being mulcted of his salary for the period he attends a Court under its process, can maintain an action in the shape of damages against the person citing him as such witness, for the recovery of loss of his salary.

The plaintiff, being summoned by the defendant, appeared before the Deputy Collector of Kooshtea to give his evidence on his behalf on the 27th October 1865, and applied to the Court for his necessary expenses in the following terms:—

The petition of Mr. Edward Dubois de Saran of Salghurmoodea states that he, being summoned as a witness by the defendant Hurrish Chunder Biswas, has appeared, and he prays that he may be paid 10 rupees for the loss of this day's salary for his absence from his duty, also 14 rupees on account of his diet-expenses, amounting to 24 rupees. Dated in the year 1865, October 27.

Particulars of diet-expenses.

		Rs.	As.	P.
Breakfast	...	0	8	0
One Tiffin	...	1	0	0
One Dinner	...	3	0	0
2 bottles Beer	...	1	8	0
2 Glasses Brandy	...	1	0	0
Bed ...	...	2	0	0
Total	...	9	0	0
Hire and feed of horse with wages of syce	...	5	0	0
Total Rupees	...	14	0	0

Upon which the Deputy Collector passed the following order:—

Whereas the defendant having declined to have the witness examined, no orders as to the payment of his expenses can be passed. Ordered that the petition be recorded, and the witness directed to sue for the recovery of his expenses in the proper Court. Dated 27th October 1865.

In suits under Act X. of 1859, the rules for the attendance and remuneration of witnesses are provided for in Section 67 of the Act, and made applicable to Section 151 of the Civil Code, which sets forth that "the "person applying for a summons shall pay "into Court such sum of money as shall

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ppear to the Court to be reasonable to efray the travelling and other expenses f each witness or other person mentioned n the summons in passing to and from the Court in which he may be required to ttend, and for one day's attendance. The um so paid into Court shall be tendered o the witness or other person at the time f serving the summons if it can be served ersonally. If it shall appear to the Court that the sum paid into Court on ccount of the travelling and other expenses of the witness or other person assing to and from the Court is not ufficient to cover such expenses, the Court may direct such further sum o be paid to the witness or other erson as may appear to be necessary on hat account, and, in case of default in payment, may order such sum to be levied by ttachment and sale of the goods of the erson ordered to pay the same, or may discharge the witness without requiring im to give evidence."

In fact, the Section, rather than making y provision for instituting a fresh action r the recovery of such expenses, gives wer to the Court, in case of default of yment, to discharge the witness without quiring him to give evidence. The plaintrests his argument in support of the tion on Section 1 of the Civil Code; but consider it is of no avail to him; and, in ading that Section together with Section 1, the Court cannot take cognizance of ch a suit. If the Legislature meant to galize a fresh action for travelling expenses witnesses, it would not have provided in ction 151 of the Civil Code, on default, pay such expenses by attachment and le of the goods of the person ordered to y the same, or discharge the witness without taking his evidence. Besides, the Court tting to take the evidence of a witness, aving the discretion, on consideration of the rcumstances of the case and the reasonableess or otherwise of his expenses, to augment the charge and add the same to the osts of the suit; and I do not think that a eparate action for the recovery of such expenses can be lawfully maintained; and, otwithstanding the Deputy Collector has iven the plaintiff permission to seek redress n the proper quarter, a Civil Court is not ound to abide by the same.

As regards the *second* point, I think that public or private servant, who is lawfully equired to attend a Court as a witness, is ot liable to a loss of his salary for the period of his absence which is not wilfully caused by him. The deduction, therefore, of the salary under such circumstances is opposed to all good policy, and if the employer chooses thus to punish his servant merely because he was absent from his duty to a Court of Justice in obedience to its process, he cannot recover the loss of his salary in the shape of damages from the person at whose instance he was summoned as a witness. Besides, the deduction of a day's salary of a monthly servant under such circumstances not being consistent with propriety, it becomes a matter between him and his employer, and a servant has no other alternative than to look to him for the loss he unnecessarily sustained.

Judgment of the High Court.—We are of opinion that no action for the expenses of a witness will lie.

Before a witness is summoned, a sufficient sum for his expenses in going to and from the Court, and for one day's attendance is to be deposited in Court. If it shall appear that the amount deposited on account of the travelling or other expenses of the witness in passing to and from the Court is not sufficient, the Court may order a further sum to be paid to him on that account, and, if not paid, the Judge may order the amount to be levied or may discharge the witness. If the attendance of the witness is required for more than one day, the Judge may order a further sum to be paid, and, on default, may discharge the witness from further attendance.

The 23rd February 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

High Court (Power of—as to questions submitted for its opinion).

Reference to the High Court by Baboo Nobin Kishen Pauleet, Judge of the Small Cause Court of Midnapore.

Suroop Chunder Patre, *Decree-holder*,

versus

Jadoo Moytee, *Judgment-debtor*.

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The High Court cannot express any judicial opinion upon a question submitted to it when it does not arise in the course of a trial of a suit.

Case.—I HAVE the honor, under the provisions of Section 22, Act XI. of 1865, to request the opinion of the High Court, as to whether or not standing crops may be attached and sold in execution of a decree of a Small Cause Court.

An application has been made to me for such attachment and sale by the decree-holder in the case noted in the margin,* and his pleader, Baboo Nobin Chunder Banerjee, contends that the standing crops are the personal property of the judgment-debtor, and may legally be sold for the recovery of his personal debts.

* Application for execution of decree No. 697 of 1865. Suroop Chunder Patre, decree-holder, *vs.* Jadoo Moytee, judgment-debtor.

I am also of opinion that such crops belong to that class of the annual products of the soil which are of the nature of personal property. They are sown and reaped, and carried off or removed, at certain seasons of the year, and must, therefore, be considered as moveables or moveable property liable to attachment and sale in execution of a Small Cause Court decree.

But, as the question admits of some doubts, labouring under which my predecessors did not allow standing crops to be attached or sold, I deem it necessary to make this reference.

Judgment of the High Court.—This is not a question within the meaning of Section 22 of Act II. of 1865, inasmuch as it did not arise in the course of a trial of a suit. This is very clear, and if anything were wanting to make it more so, it is supplied by Section 23 and the following Sections to 28 inclusive. We have no power, therefore, to express any judicial opinion upon the question submitted to us.

The 9th March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Limitation—Deduction on account of prosecution of Appeal.

Reference to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Meherpore.

Shumboonath Biswas

versus

Kisto Dhun Sircar and others.

The time during which a plaintiff prosecutes an appeal *bonâ fide* and with due diligence, as well as that during which he prosecutes his case in the Court of first instance, must be deducted in computing the period of limitation.

Case.—THIS is an action brought by the plaintiff to establish, under Section 24 of Act VIII. of 1859, his right of ownership to a boat which was attached and sold on the 29th January 1864, as belonging to the third defendant, in execution of decree (No. 362 of 1863 of this Court); as well as to recover damages sustained by him on account of its sale. The plaint runs as follows:—

That the third defendant (judgment-debtor) gave me, on the 20th Kartick 1269 B. S., an *ekrar* for the balance of his former debt for 188 rupees, and that, on the 10th Pous of that year, he sold to me under a *kabala* (a deed of conveyance), a boat measuring 600 maunds for 88 rupees in part-payment of the above debt. This boat I took to my village, and was in possession of it since that time. In Kartick 1270 B. S. I kept the boat in a *khal* named Bora Garee near my dwelling-house for repairs, for which I was then making preparations, when the first defendant (decree-holder), in execution of decree, caused the attachment of the boat and the issue of a proclamation for its sale. On the 22nd January 1864, I put in a petition of claim, but unfortunately Baboo Dwarkanath Roy, the late Judge of this Court, without trying the application on its merits, rejected it on the 23rd idem, on the sole ground of its not having been filed in sufficient time. On the 29th idem, the boat was sold and purchased by Modoosoodun Biswas, the second defendant, of Gopeenathpore, a servant of the first defendant, for a small sum. I then brought an action in the Moonsiff's Court of this place (Meherpore) to establish my right of ownership to the boat. But the suit not having been cognizable in his Court, he dismissed it. I appealed to the Zillah Judge against this order, but he confirmed the decision of the Moonsiff. The judgment-debtor (the third defendant) had no right and interest in the boat. The decree-holder (the first defendant) having got it sold illegally, I have sustained great loss. Hence the present action is brought to establish my right of ownership to it as well as to recover damages incurred from 29th January 1864 up to the present day (13th Shrabun 1271), being 1 year 5 months and 28 days, on account of hire at the rate of 2-8 rupees per maund—269 rupees; from which, if the

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cost of repairs be deducted, the balance would be 209 rupees; if to this the value of the boat be added, the aggregate claim would be for 297 rupees, at which the present suit has been laid.

The first defendant did not appear in person, but his pleader urges that limitation applies to plaintiff's claim; that plaintiff has no right of action; that the boat, the subject of action, was third defendant's, and attached and sold as such, and that plaintiff had no share or interest therein; that the *kubala* filed with *nuthee* is a forgery; and that this false action has been brought by plaintiff against his client, as there is a suit pending between plaintiff's brother and his client; and that plaintiff's application claiming the boat was rejected by this Court: and second defendant's pleader states that his client purchased the boat at auction, and files a receipt for the same; and third defendant's pleader states that the boat, the subject of action, was his client's, and that the same was not sold to plaintiff by him. And first defendant's pleader urges that the damages claimed in plaint was excessive.

The pleader for the plaintiff contends that limitation does not apply to the present case, as the time during which the suit had been pending both in the Moonsiff's and the Appellate Courts should be deducted in computing the period of limitation.

It appears on reference to the records of the *nuthee* that the plaintiff's petition of claim was rejected on the 23rd January 1864, and that he brought an action in the Moonsiff's Court to establish his right of ownership to the boat on the 30th July following, and that Officer dismissed it on the 29th September 1864, on the ground that he had no jurisdiction to entertain the suit as it related to moveable property. Plaintiff appealed against this order on the 13th November 1864, and the Judge confirmed it on the 29th March 1865, *i. e.*, after a period of 4 months and 17 days. The question to be decided is whether this period is to be allowed to the plaintiff in calculating the period of limitation under Section 246 of Act VIII. of 1859, as Section 14 of Act XIV. of 1859 enacts: "In computing any period of limitation presented by this Act, the time "during which the claimant, or any person "under whom he claims, shall have been "engaged in prosecuting a suit upon the "same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, "in any Court of Judicature or other cause, "shall have been unable to decide upon it, "or shall have passed a decision which on "appeal shall have been annulled for any "such cause, including the time during "which such appeal, if any, has been pending, shall be excluded from such computation."

There is no doubt that, when the Moonsiff held that he had no jurisdiction to decide the suit brought by the plaintiff in his Court, it was clearly the duty of the plaintiff at once to have brought his suit in a Court having competent jurisdiction in the matter, and not to have appealed against that decision, as that decision virtually amounted to *a non-suit.* And the plaintiff having failed to do so from ignorance or other cause is no answer to the plea of limitation now raised in bar of the suit, as it is a maxim of law that "*ignorantia juris non excusat.*"

Thus, being of opinion that the only time which can be excluded from the period of limitation is the time which the plaintiff's first suit was pending in the Moonsiff's Court, and not the time which intervened between the order of non-suit and his appeal against such order (*see* Macpherson's Civil Procedure, pp. 84-5; and Sel. Rep., Vol. VII., p. 375; S. D. A. Rep., 1848, pp. 3, 246, 880, 891; 1849, pp. 84, 322; 1850, p. 513; 1853, p. 793; 1856, p. 180; 1857, p. 1194; 1858, p. 282), nothing remains but to dismiss plaintiff's suit with costs as being barred by limitation.

Judgment of the High Court.—The time during which the plaintiff was prosecuting his appeal *bonâ fide* and with due diligence, as well as that during which he was prosecuting his case before the Moonsiff, must be deducted in computing the period of limitation. He was prosecuting his suit within the meaning of Section 14, Act XIV. of 1859, whilst he was prosecuting his appeal. The Moonsiff held that he had no jurisdiction, and the Appellate Court, affirming that decision, held that it had no jurisdiction. Both Courts held that they were unable to decide for want of jurisdiction. The words in Section 14, "or shall have passed a decision which on appeal shall have been annulled for any cause," &c., apply to cases in which a plaintiff has prosecuted his suit with effect, and in which upon appeal prosecuted by the defendant, his adversary, the decision, either of the Court of first instance, or of the first Court of appeal, has been annulled. It is not certain that a plaintiff, *bonâ fide* resisting an appeal, filed on the ground of want of jurisdiction, would not be prosecut-

ing his suit *bonâ fide*. The words were probably inserted to prevent any misconception on that point.

The 9th March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Breach of Indigo Contract—Stamp-Duty—Damages (Mode of estimating).

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Jessore.

Mr. John Doyle

versus

Mundaree Mundul.

Suit on breach of contract to cultivate and deliver indigo, for recovery of the amount specified in the contract.

HELD (1) that the stamp-duty depended upon the amount of consideration for the undertaking; and (2) that, unless it was clear that the intention of the parties to the agreement was to treat the sum mentioned as liquidated damages behind which the Court should not look, the Court could not award damages beyond the amount of injury actually sustained.

Case.—THIS is a suit brought by Mr. John Doyle, manager of the Katgora Concern, on the part of the Bengal Indigo Company, against Mundaree Mundul, a ryot, for the recovery of 30 rupees, being the amount payable to the Concern by the said Mundaree, under a Clause in his contract, on account of his having failed to cultivate two beegahs of indigo and deliver the produce. The contract is in the usual printed form, which has been in use for some few years back in these districts. I find on the merits for the plaintiff, but solicit the opinion of the High Court on the two following points of law which I have reserved:—

First.—The agreement is drawn on a one-anna stamp, and is so properly stamped as an *agreement* under Article 4, Schedule A, Act X. of 1862. But in the same paper and in the same instrument is contained a bond covenanting to pay 15 rupees for every beegah not cultivated in accordance with the terms of the agreement—and 10 rupees per maund for seed, if not delivered at the Factory. It seems to me that the instrument should also bear a bond-stamp under Article 12 or Article 19, Schedule A, Act X. of 1862. Under Article 12, the failure to cultivate indigo might be held to be the condition upon which the sum claimed becomes payable. If the instrument were stamped as a bond, the bond-stamp might cover the agreement, the whole thing being one transaction; but it may reasonably be a question whether the agreement-stamp, which is the lesser, will suffice when the action is brought on the portion of the instrument which constitutes a bond. Had the plaintiff sued on a breach of contract to recover damages actually suffered, the agreement stamp would be sufficient. But the present action is on the covenant in the bond to recover the specific sum agreed upon between the parties, and there is a great difference between suing on the covenant for an exact amount, and waiving the covenant and suing for a breach of contract (*see* Mayne on Damages, p. 641). If the instrument be held to be improperly stamped, I think it a proper case for the exercise of the discretion allowed by Section 17, Act X. of 1862. Plaintiff has through his vakeel agreed to pay the penalty, if it should be *necessary* to do so.

Secondly.—Is plaintiff entitled to recover the whole amount claimed, or only so much of it as he can prove to be the measure of the actual damage sustained by him, *i. e.*, is the sum of 15 rupees per beegah to be regarded as a penalty or as liquidated damages? The rules of English Law have been generally followed by the Courts in India in deciding this point (*see* Macpherson on Contracts, pp. 63-65). "If," says Mr. Addison (Contracts, p. 1072), "the damages accruing from "a breach of contract are of an uncertain "nature, and the parties have chosen to "assess and fix them beforehand by con-"tract and agreement among themselves, and "the amount agreed upon is no more than "what may be a fair and reasonable mea-"sure of damages, equity will grant no re-"lief from the payment of it, and it is not a "penalty, although it is denominated a "penal sum." The present case might seem to fall within this *dictum;* the damages arising from the failure to cultivate a beegah of indigo are of an uncertain nature as depending upon the chances of the season and the state of the market when the indigo would be ready for sale.

Again (page 1074), "if the agreement con-"tains covenants or promises for the per-"formance of various acts and duties, and "thus provides one large sum by way of "compensation in case of the non-perform-"ance of all or of any one of the things "stipulated to be done, and the damages "in every case of non-performance are alto-"gether uncertain and incapable of accurate

"valuation, the sum agreed to be paid will "be treated as the liquidated damages, and "not as a penalty." But, if the damages resulting from the non-performance of some of these promises be capable of being measured by a precise sum, and one sum is stipulated to be paid in respect of the non-performance of the contract generally, that sum is a penalty (Addison on Contracts, p. 1075; Mayne on Damages, p. 66, where see the remark of Chief Justice Tindal, in the case of Kemble *versus* Farren). But, said Cresswell, J., in Sainter *versus* Ferguson; T. C. B. 730 (*vide* Mayne on Damages, p. 67), "there never was any doubt that, if there be *only one event* upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty." Now, I think this meets the present case. There could not be at the time of making the contract, and there scarcely is now, any adequate means of ascertaining the precise damage. The productive powers of the particular fields chosen for cultivation, the quality of the seed, the amount of care expended on the crop, the favorableness or unfavorableness of the season, want of sunshine, and too much or too little rain, are all uncertain elements for calculation; and when to these is added the state of the market at the selling season, as affected by these uncertain elements operating in various degrees all over those districts in which indigo is produced, it will, I think, appear that there is no adequate means of ascertaining the precise damage resulting from failure to sow a beegah of indigo. Then, again, though the contract contains two covenants—*viz.*, to produce indigo, and to deliver the seed, yet one and a separate sum is allotted to each covenant. Applying the above principles, it comes to the same whether each covenant with a fixed sum be contained in separate instruments, or both covenants with fixed sums allotted to each be included in the one instrument. There is in the case of each covenant only *one event* upon which the money is to become payable, *viz.*, the not sowing of the indigo in the one case, and the non-delivering of the seed in the other case (*see* also Chitty on Contracts, p. 786). It appears to me that, applying the Common Law as founded on equity and good conscience to the present case, the payment of 15 rupees per beegah must be regarded as liquidated damages. The point is one of law to be decided by the Judge, and not a question of fact (*see* Taylor on Evidence, p. 57, Vol. I.).

If, then, the case rested here, I think plaintiff would be entitled to a decree. But it becomes necessary to see if the Common Law has not been limited or controlled by Statute Law or express enactment. Section 3 of Act X. of 1836 is as follows: "And it "is hereby enacted that, when a lawful "contract shall have been made between a "ryot and another party, by which contract "the ryot shall have bound himself to culti-"vate indigo-plant for the other party, or to "deliver indigo-plant to the other party, "and when the other party shall have ad-"vanced money to the ryot for the purpose "of enabling the ryot to fulfil such contract, "then, if any other person knowing that such "contract exists, and that such advance has "been made, shall prevail upon the ryot to "break such contract, the party who made the "advance shall be entitled to proceed by "civil action against the person who shall "have so prevailed on the ryot, as well as "against the ryot, and to recover from him "or them, jointly or severally, *damages to the "extent of the injury sustained*, together with "costs of the suit."

This Section has been interpreted to mean that *damages to the extent of the injury sustained, and nothing more*, can be recovered in every case in which a ryot is sued under circumstances similar to those disclosed by the present case (*see* No. 338 of 1847, Mr. S. Mackintosh, appellant; 5th August 1848. S. D. A. Rep. for 1848, p. 736); and this ruling has been followed to the present day, so far as I am aware. If such really be the case, this Court would be bound thereby. I have been unable to find any later decision which affects the point, and it is with the utmost diffidence that, in the face of this ruling, I venture to discuss or re-open the point. The only ground for doing so is that, under the present system, these cases cannot be appealed, and a reference like the present is the only means afforded of correcting the former interpretation if erroneous.

Looking, then, at the Section in question, and seeking to arrive at its meaning, it must first be seen what was the object of Act X. of 1836. The Act has no Preamble, so that the mischief meant to be remedied does not immediately appear. The first Section repeals Clause 3, Section 5, Regulation VI. of 1823, which defined the liability of *third*

parties who with notice received the produce of ryots who were under prior engagements. The second Section provides for giving security in cases in which *two parties* claim to have given advances to the ryot for the same crop, and one party is permitted to cut it, pending the decision of the interpleader suit, lest the crop should in the interim be lost, or suffer from the delay. The third Section provides for *third parties* prevailing on a ryot to break his contract, and makes them liable in damages to the persons who gave the advance. Now, from this it would appear that Act X. of 1836 was not intended to regulate *dealings between the ryot and the person who gave him advances, but to define the rights and the remedy of this latter towards third parties* who should interfere between him and the ryots who took his advances. That such was the object of legislation up to 1836 would seem to appear from reading through Regulation VI. of 1823, Regulation V. of 1830, and Act XVI. of 1835. The Preamble of Regulation VI. of 1823 contains the following paseage: "It seems reasonable * * * * that "it should not be in the power of a ryot, "who has already conditioned for the deli-"very of the produce of his land to one "person to break the condition by a clandes-"tine and fraudulent transfer of such pro-"duce to another. The system at present "in force provides, as above observed, no "other remedy for parties injured by this "dishonest practice than by a regular action "in the Civil Court. The difficulty and "delay of obtaining redress by that course "have not unfrequently led to acts of vio-"lence and even to serious affrays, and the "mere occurrence of such affrays is to be "apprehended in consequence of the *eager "competition which now prevails amongst "the Indigo Manufacturers* in some parts "of Bengal, arising from the unusually high "price of indigo." This would seem to show that the subject of legislation was the disputes between rival manufacturers, and not the dealings between a manufacturer and his ryots.

The following passage occurs in the decision of the 5th August 1848 (S. D. A. Rep., 1848, p. 737): "We observe that the "several provisions of the Regulations, such "as Clause 3, Section 5, Regulation VI. of "1823, and Section 2, Regulation V. of 1830, "which authorized the Courts to award the "full amount of penalty specified in agree-"ments for the cultivation of indigo, have "been repealed by subsequent laws (*see* "Act XVI. of 1835, and Sections 1 and 3 "Act X. of 1836)." Would not these repealed portions seem to have defined the liability of third parties, adding that *this* and *liability* would attach to them jointly and severally with the defaulting ryots, and not to have limited the liability of the ryots themselves?

Referring again to the Preamble to Regulation VI. of 1823, the following passage occurs: "It is usual for the "Courts of Justice, in decreeing such causes, "to award such limited penalty as may "in each instance appear to be a fair com-"pensation to the person making the "advances for the non-employment of "his capital. In the absence, however, of "any rule for the regulation of the discretion "thus assumed, much confusion has arisen "from the conflicting opinions and judg-"ments of the several Judicial Officers as to "the extent of penalty recoverable in agree-"ments of this nature." Does not all this seem to refer to conflicting opinions and judgments when the damages were left to be settled, or from the construction of the agreement had necessarily to be settled by the Court. The law does not forbid the parties to settle them by agreement, does not make any mention of cases where they had done so, and therefore might seem not to prohibit the practice. If the construction put upon Section 3, Act X. of 1836, be warranted, would not this Section have concluded with some such prohibitive Clause as the following: "And greater damages shall in no case "be assessed either against the ryot or "such third party." Or, "and the actual "injury sustained shall in all cases be held "to be the measure of the damages to be "assessed."

The principle of the theory of liquidated damages is that the parties have chosen themselves to assess the damage at what is fair and reasonable; and nothing in the law seems to prohibit their judging for themselves in this respect. If the law be intended to protect the ryot at all; it is protection from what is understood literally by a penalty that it affords. The tendency of the practice of the Courts in England, and I think also in this country, is in these late years to give effect as far as possible to *bonâ fide* contracts entered into between parties; and the construction of such contracts by rules of law which the parties could not have had before them at the time of contracting is daily finding less favor.

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The points then which I wish to submit for the opinion of the High Court may briefly be stated as follows :—

"Are parties making contracts for the cultivation and delivery of indigo prohibited by existing law from assessing by consent beforehand the amount of damages to be paid on a breach of their agreement, and must they leave these damages to be assessed by the Court, with reference to the actual injury sustained, and, *secondly*, if they are not so prohibited, is the sum fixed in the contract in the present case to be regarded as a penalty or as liquidated damages?"

Further remarks by Small Cause Court Judge.—I was unaware, when drawing up the case already submitted, that the question had been very fully treated by the late Sudder Court on a reference by the Judge of the Small Cause Court at Kooshtea in the case of Messrs. R. Watson and Co. *vs.* Anundo Sirdar, decided on the 5th October 1861. In this decision the following passage occurs:—

"The effect of the rescission of Clause 3, Section 5, Regulation VI. of 1823, as regards cases like the present, in which the ryot of his own accord dishonestly commits a breach of contract by failing to sow, was nothing. Under that law it was declared that they should be dealt with on the principle of the general Regulations. The rescission of this declaration did not affect the action of the Courts which were at liberty to act and did act, as they had, according to the terms of the Preamble of Regulation VI. of 1823, all along acted, *viz.*, they awarded in cases of breach of contract for the cultivation of indigo, such limited penalty as might in each instance appear to be a fair compensation to the person making the advance for the non-employment of his capital.

"The law as to contracts of the nature of that before the Court has not since 1836 been altered. From the above analysis it would seem that *in all cases of whatever nature in which a sum is entered in the engagement, and there is nothing to show in words unmistakably that the parties intended* that the sum mentioned should stand as a *fixed measure of damages* beyond which the Court should not go, it is at the present time the duty of the Court to consider that sum merely in the light of a penalty, and to proceed to enquire into the actual injury sustained by the party suing, and to decree accordingly."

The passage would seem to confirm the view I have taken that a case like the present does not fall within the purview of the Statute Law affecting Indigo Contracts. Again, lower down, speaking of the case of Mackintosh *vs.* Bechoo Bewa, quoted by me, and another decision, Duff *vs.* Beharee Singh (S. D. A. Rep., 1853, p. 721), it is remarked that "both these cases were decided as "falling within the terms of Act X. of 1836; "the present suit clearly does not so. It is "simply an action for damages against the "ryot who of his own free-will commits a "breach of contract."

In the case of Messrs. R. Watson and Co. *vs.* Anundo Sirdar, decided on 5th October 1861, from the portion of the first passage (quoted above, and repeated in the margin), it would appear that the Sudder Court regarded the sum as a penalty, looking to the particular wording of the contract in that case; and they were of opinion that, where *there was something to show in words* unmistakably that the parties meant to fix the measure of damages, there was nothing to prevent them from doing so; in other language, that the question might be governed by the ordinary rule of interpretation as to whether a sum was to be regarded as a penalty or as liquidated damages.

"In all cases whatever nature in which a sum is entered in the engagement, and there is nothing to show in words unmistakably that the parties intended that the sum mentioned should stand as a fixed measure of damages."

Judgment of the High Court.—The questions in this case are governed by decisions in the late Sudder Court and in this Court. In the case of Smith *vs.* Gopal Sheikh (Rulings on References from Small Cause Courts, reported by Sutherland, page 148), it was held that the stamp in a case like the present depends upon the amount of consideration for the undertaking; and in the case of Watson & Co. *vs.* Anundo Sirdar (same reports, page 1) to which our attention has been called by the subsequent letter of the Small Cause Court Judge that, unless it is clear that the intention of the parties to an agreement like the present was to treat the sum mentioned as liquidated damages behind which the Court should not look, the Court cannot award damages beyond the amount of injury sustained.

In the present case, we are of opinion, upon the authority of those cases, (1) that the stamp was sufficient, and (2) that the damages are not liquidated, and that the plaintiff is not entitled to recover more than the damages actually sustained.

The 9th March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Registration—Agreement under Section 51, Act XVI. of 1864, how to be recorded—Evidence (Proof of Registrar's signature not necessary).

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Small Cause Court of Jessore.

Hobeebo Sobair

versus

Meer Hossein Ali.

Section 51, Act XVI. of 1864, does not require a Registrar to record the agreement there spoken of entirely with his own hand. The signature of the Registrar is sufficient.

Before enforcing a duly-registered bond without a suit, proof of the signature or handwriting of the Registrar is not necessary. The bond, with the further agreement endorsed thereon, when registered, becomes a record, and is of itself *primâ facie* proof of registration, and this with reference to the further agreement, as well as to the instrument itself.

Case.—THIS is an application, under Section 52 of Act XVI. of 1864, for enforcing without a suit a bond specially registered under the provisions of Section 51 of the same Act.

Section 51 is as follows: "Whenever "the parties to a bond or other written obli-"gation for the payment of money shall, "at the time of registering the same under "the provisions of this Act, apply to the "District Registrar or Deputy Registrar "*to record their agreement* that, in the event "of the bond or other written obligation "as aforesaid not being satisfied within the "time stipulated, the amount may be recover-"ed as hereafter provided without a suit, *it "shall be the duty* of the District Registrar "or Deputy Registrar, after making such "enquiries as he may think proper, *to record* "such agreement at the foot of the endorse-"ment required by Section 36, and such "record shall be signed by the District "Registrar or Deputy Registrar, and by the "parties to the bond or other written obli-"gation as aforesaid."

In the present case, the special agreement has been written in Bengalee by a mohurrir, and not by the District or Deputy Registrar, and the question is whether or not this is a compliance with the requirements of the law quoted above.

The parties are to "*apply to the District or Deputy Registrar to record their agreement,*" and it shall be his duty "*to record such agreement.*" Can the District or Deputy Registrar be said "to record the agreement," when it is written down by the hand of another? I think not. The meaning of the verb "record," according to Mr. Webster, is "to register: to enrol: to write or enter in a book or on parchment for the purpose of preserving authentic or correct evidence of a thing." None of these meanings contemplate doing the act signified by the agency of a third party. The verb has no *causative* force whatever, and, if the meaning of the Legislature were that any other than the District or Deputy Registrar should write down the agreement, the use of the words "cause to be recorded" would have been easy and obvious.

Apart from any argument drawn from the plain signification of the words themselves, there is the following further and very important consideration. One of the chiefest aims and objects of legislative progress of late years in this country has been to take out of the hands of native and irresponsible subordinates the discharge of important duties, which should properly devolve on their responsible superiors. The duties of a Registrar in the matter in question are of a semi-judicial nature; and, while the Civil and Criminal Codes have so carefully provided for the recording of evidence by Judicial Officers *themselves* instead of by *mohurrirs* sitting in obscure corners of the Court and out of the hearing of the Judge, I cannot think that it could possibly be the intention of the Legislature to allow the special agreement by which the debtor puts himself so entirely into the hands of his creditor, to be written down by a mohurrir, and then signed by the Registrar, and the parties without any provision for its being read over and explained to the obligor. In my opinion, the very object of the law is, that the fact of the agreement being recorded

in the handwriting of the Registrar should be a protection against fraud, as a guarantee that the debtor had clearly understood to what he had bound himself.

It has been contended that, as the last Clause of the Section requires the record to be *signed* by the Registrar, this goes to show that it is unnecessary for him to write down the special agreement. By a similar mode of argument, it could be proved that the Memoranda of evidence required by Section 172 of Act VIII. of 1859 and Section 195 of Act XXV. of 1861 need not be written by the Judicial Officer, if he *sign* them subsequently—an interpretation which would be directly contrary to the letter of the law. If the word "*record*" means "*write with his own hand*," this meaning cannot be altered by the fact of the Registrar having to sign the record.

I am of opinion that the bond has not been registered according to the provisions and requirements of the law; and that in consequence it is not competent to this Court to comply with the application for enforcing it without a suit.

I beg also to refer the following point: "Before enforcing any duly registered bond without a suit, is it necessary to prove the signature or handwriting of the District or Deputy Registrar?" Section 56 of Act II. of 1855 does not apply, as there is no provision in the Registration Act falling within the meaning of its first Clause. It has been doubted in England (*see* Taylor on Evidence, pp. 22, 23) whether the Royal sign manual or the signatures of the Lords of the Treasury would be judicially noticed without proof. The Law of Evidence on the point in this country is not so well settled as at home, and it may be a question whether the bare production of the registered bond without any proof of the signature of the Registrar or parties is sufficient for the Court to take action upon.

Judgment of the High Court.—We do not agree with the Judge in thinking that Act XVI. of 1864, Section 51, in providing that the Registrar should record the agreement there spoken of, requires him to write such record entirely with his own hand. A Court of Justice records evidence, and a Judge records his judgment, when it causes that evidence to be taken down, or when the Judge signs and delivers in his judgment, though neither evidence nor judgment is wholly in the handwriting of the Judge; and, when the Court is composed of more than one Judge, the evidence and the judgment recorded clearly could not be in the handwriting of all the Judges.

For a similar use of the word "*record*," the Judge is referred to the concluding part of Section 172 of the Code of Civil Procedure where, speaking of cases where the Judge cannot take down a memorandum with his own hand, he is directed to "record" the reason of his inability to do so, and to cause the Memorandum to be made in writing from his dictation.

We may add, in reference to the Judge's observations as to the expediency of requiring such agreements to be recorded in the handwriting of the Registrar, that this will often, and indeed generally, be impracticable where the agreement is, like the contents of the instrument itself, in the vernacular language, and the Registrar an Englishman. The agreement ought obviously to be recorded in a language which the parties understand; and, where that language is Bengalee, it could not be conveniently so recorded by an Englishman.

Upon the *second* question put to us, we are of opinion that the point is provided for by the latter part of Section 37 of Act XVI. of 1864, and that the document with the endorsement of registration and the agreement recorded therein becomes a record, and is of itself *primâ facie* proof of the registration of such document and further agreement, without proof of the signature of the Registrar as to either matter, though, of course, it will be competent to the Court, as provided by the Act, if it shall see sufficient cause, to require further evidence.

The 9th March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Estoppel—Statement in verified plaint.

Reference to the High Court by Baboo Doorga Persad Ghose, Officiating Judge of the Small Cause Court at Kishnaghur.

Mr. John J. Doyne

versus

Khoodee Ram Mundul.

Plaintiff sued before on a kubooleut of 1864, and did not admit in his plaint that he had cancelled a former kubooleut of 1862, but merely alleged that the defendant had executed the kubooleut of 1864, which recited that the kubooleut of 1862 had been voluntarily cancelled by the defendant. The defendant denied the kubooleut of 1864, and the plaintiff, having failed from inability to prove it, is not estopped now from suing on the kubooleut of 1862, and saying that that kubooleut was not legally cancelled by him.

Case.—THE plaintiff in this case had sued the defendant to recover damages sustained for breach of contract for the cultivation of indigo during the year 1864, under a kubooleut, dated 15th January 1864, alleged to have been given by defendant to plaintiff. Defendant denied the execution of the kubooleut, and the suit was dismissed on the 15th of March 1865, for want of proof of the genuineness and validity of the document. This kubooleut contained the recital that a prior kubooleut, dated 1862, for cultivating indigo till the year 1865, was voluntarily cancelled by defendant. Plaintiff now sues in the present case again to recover damages sustained during the year 1864 under the prior kubooleut. Defendant urges the two following pleas, *viz.*, *first*, the plaintiff cannot sue under the agreement which is stated to have been discharged in a former case. *Secondly*, the agreement was not given, and no advance was taken.

Although, admitting the genuineness of the kubooleut filed in the present case, it must be considered not to have been legally cancelled by the consent of both the parties, inasmuch as the defendant denied the execution of the subsequent kubooleut, and the Court did not hold it to be a good one; still, as plaintiff laid his former suit upon the subsequent kubooleut, and admitted the annulment of the prior kuboolent in a *verified* plaint, I hold he is bound by his admission and estopped by his declaration made upon oath from suing upon the former kubooleut.

The opinion of the High Court is requested upon this point, *viz.*, whether plaintiff is estopped by the statement made by him in his verified plaint in the former case as to abandoning the agreement on which this is laid.

Judgment of the High Court.—We are of opinion that the plaintiff is not estopped from setting up the kubooleut filed in the present case. The kubooleut, upon which the plaintiff relied in the former suit in which he failed, recited that the kubooleut now sued upon had been cancelled by the defendant. It did not state that it had been cancelled by the plaintiff. If the plaintiff had recovered upon the kubooleut in the former suit, he could not have sued upon the present one, for by recovering upon it he would have recovered damages, under another agreement, for the same omission to sow indigo. By suing on the kubooleut of 1864, he did not admit that he had cancelled the former kubooleut, but merely that the defendant had executed the kubooleut of 1864, by which it was recited that the kubooleut of 1862 had been voluntarily cancelled by the defendant. The defendant denied the kubooleut of 1864, and the plaintiff, having failed from inability to prove it, is not estopped from saying that the kubooleut of 1862 was not legally cancelled by him.

The 9th March 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Suit on contract compounding an Assault—Mahomedans.

Reference to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Meherpore.

Mothooranath Dey

versus

Gopal Roy and others.

A contract compounding an assault is not illegal, and may be sued upon. The fact of two of the defendants being Mahomedans does not affect the principle of this decision.

Case.—IN this case I find, as a fact, that an assault had been committed by the 1st and 6th defendants both inclusive; that the plaintiff complained against them in the Fouzdary Court at Meherpore; that they agreed to pay plaintiff 60 rupees; that they paid 50 rupees in cash, and that 6th defendant granted a bond for 10 rupees, which, together with 50 rupees, was deposited with 7th defendant to abide the event of plaintiff filing a *razeenamah* in that suit, which was accordingly filed; and that 7th defendant agreed to make over the said sum and the bond to plaintiff, but which he, in collusion with the other defendants, has not done. I have, therefore, decreed the case against all defendants, as they all denied the allegations contained in the plaint, subject to the opinion

of the High Court, on the following point, *viz.*, whether the contract, as disclosed in the plaint, is a contract affecting the course of justice, and, as such, is invalid or not?

The defendants' pleaders contend that the contract is illegal and void, as being contrary to the public policy of the law, and, in support of their contention, they quote Macpherson on Contracts, pp. 29-31. But the principles therein laid down, and the cases therein quoted, do not, in my opinion, bear upon the present case, inasmuch as an assault is a misdemeanor peculiarly of a private nature, and occasioning a private injury, for which a reasonable satisfaction, in consideration of proceedings being stayed, is not illegal (*see* Johnson *versus* Ogilvy, 3 P. Wms. 279, per Le Blanc, J.; Edgecombe *versus* Rodd, 5 East 303; and Elworthy *versus* Bird, 2 S. and S. 372); and it has been further held that compounding a private misdemeanor (such as an assault) is a good consideration for a note (*see* Drage *versus* Ibberson, 2 Esp. 643; Coppock *versus* Bower, 4 M. and W. 361). Further, a complaint of this nature may be withdrawn under the provisions of Section 271 of the Code of Criminal Procedure, if the complainant shall satisfy the Magistrate that there are sufficient grounds for permitting him to do so.

I am not aware that this point has been decided by any of the Indian Courts, nor can I find any Indian precedent in point. But Macpherson, both in his work on Contracts, and the Civil Procedure, p. 37, says: "If the act of the defendant "amounted to theft or any other heinous "offence properly punishable by the Cri-"minal Law, public justice must in the first "instance be vindicated, and the right of "civil action is suspended until the party "injured has performed his duty to society "by an endeavour to bring the offender to "justice; and the Court not only will not "enforce, but will regard as highly cul-"pable, an agreement to compromise a pro-"secution, when the thief promises to "restore the value of the thing taken, and "the person who has been robbed undertakes "not to prosecute the thief;" and he quotes S. D. Agra, 1852, p. 113, Con. 318, 7th July 1820, and Section 7, Regulation XII. of 1818; but this latter Regulation has been wholly repealed by Act XVII. of 1862. However, all the books are agreed that contracts obstructing or interfering with the administration of public justice are null and void, as being contrary to the public policy of the law, such as agreements in consideration of suppressing evidence, or stifling or compounding a criminal prosecution or proceedings for a felony or misdemeanour of a public nature, as perjury, &c But the contract, as disclosed in the plaint, is, in my opinion, not a contract of this nature, and, as such, is not null and void. However, if the High Court should be of opinion that the contract is null and void, the verdict entered for the plaintiff will be set aside, and a verdict entered for the defendants.

It may be as well to observe that two of the defendants are Mahomedans, and the objection as to the illegality of the contract, the subject of this action, does not come very well from their mouths, as by their own law composition for homicide is allowed, and the agreement for it becomes a binding contract (*see* Hedhya, Vol. IV., p. 99, Nundo Singh *versus* Meer Jaffer Shall, 10th April 1794). However, the rule is that the Court will not act in furtherance of an illegal purpose; and the objection is allowed, not because the real justice of the case as between that plaintiff and that defendant requires it, but because it would be an encouragement to immoral and illegal transactions, and injurious to the general interests of society if the Courts lent their aid in any way to a man who founds his cause of action upon an immoral or illegal act.

Judgment of the High Court.—We are of opinion that the contract was not illegal. The case in the Fouzdary Court, which was compromised, was one in which the plaintiff might have sued in a Civil Court for damages. The Judge of the Small Cause Court has stated his reasons so fully that we do not consider it necessary to do more than to state that we concur with him in those reasons. We may, however, add that the fact of two of the defendants being Mahomedans, does not affect the principle of our decision, and that it would not have made any difference if none of them had been of that religion.

The 6th April 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Jurisdiction (of Small Cause Courts)—Use of land—Damages—Rent.

Reference to the High Court by Syud Sukhawut Hossein, Judge of the Small Cause Court of Dinapore.

Reverend Mr. Brice

versus

Mr. Toogood, Commander of the Steamer "*Pioneer*."

Suit for rent or rather hire of land which defendant used and caused to be used for passing and re-passing to and from his steamer. HELD that, if there was no express hiring, the defendant ought to be sued for damages for trespassing upon the plaintiff's land; that, if he agreed to pay for the use of a way across the land, it would not be rent; and that in either case the Small Cause Court was competent to entertain the suit.

Case.—WITH reference to Section 22, Act XI. of 1865, I have the honor to solicit the Court's opinion on the following point of law arising in the case of the Reverend Mr. Brice, plaintiff, *versus* Mr. Toogood, Commander of the Bengal River Steam Company's Steamer "*Pioneer*," defendant, now pending before me:—

Whether the plaintiff's suit for rent of land said to have been wrongfully occupied or used by the defendant is cognizable by the Small Cause Court, or by the Revenue Court?

The plaintiff claims rent for his land which, as alleged, defendant had wrongfully occupied or used, having moved his steamer near to it for 8 days and opened a way through it for people from and to the steamer.

Section 6, Act II. of 1865, refers to arrears of rent; but by its exceptional Clause 4, the Small Cause Court is prohibited from taking cognizance of suits now amenable to the Revenue Court. Act X. of 1859 refers to all suits between landlord and ryots, and Section 4 of that Act lays down that suits for arrears of rent due on account of land, kherajee or lakheraj, are cognizable by the Revenue Court. According to the ordinary usage and understanding of the people here, there is a difference between rent of land held by ryots on fixed annual rent for raising crops or building permanent dwelling houses, and that of land held or used wrongfully on fixed monthly or daily rent for purposes of fixing tents, selling goods in a fair, drying goods cast on the bank from wrecks, repairing boats, and the like.

The pleaders for the plaintiff urge that the present case is cognizable by the Small Cause Court, and that there is no sufficient remedy against travellers, petty dealers, and other persons stopping in the town for short periods if the rent law is made applicable to suits against them.

To clear up the doubt, I have referred the question to the Court before entering into the merits of the case.

Judgment of the High Court.—The plaintiff sues for rent, or rather hire. But, according to the case stated, there does not appear to have been any rent due nor any amount for hire. What the defendant did was to use the land and to cause it to be used for passing and repassing to and from the steamer. If there was no express hiring, the defendant ought to be sued for damages for trespassing upon the plaintiff's land. If he agreed to pay for the use of a way across the land, it would not be rent. In either case the Small Cause Court is competent to entertain the suit.

The 6th April 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Suit against defaulting witness in Civil Suit—Onus probandi—Damages.

Reference to the High Court by Baboo Doorga Persaud Ghose, Judge of the Small Cause Court of Santipore.

Dwarkanauth Kooree and others

versus

Anundo Chunder Sannel.

Before a plaintiff is entitled to recover any damages from a defaulting witness in a former suit, the onus is on the plaintiff to prove that he is endamaged by the omission of the defendant to appear. The mere failure of the defendant to appear as a witness is not *per se* a sufficient proof of his liability to damages.

Case.—THE plaintiffs sued the defendant to recover from him Rupees 168-10 as damages sustained by them on account of the non-appearance of the defendant, to give his evidence as a witness in a former case instituted against them, though the usual process had been served on him.

The defendant, pleading non-liability, stated that he knew nothing of the subject matter of the case in which the plaintiffs cited him as witness.

Plaintiffs called no witness to prove that their plea in the former case, in which they were defendants, and which was decreed against them, was a true one, and that they lost the case in consequence of the defendant's failure to appear as their witness, their pleader contending that the plaintiffs were not required to begin the case, but that, as the defendant did not attend to the summons to give his evidence, it rested with him to prove that the plaintiffs were put to no loss by his non-appearance.

I hold that, in a case of this nature, the *onus* of proof lies with the plaintiffs. Though the unrepealed Section 26 of Act XIX. of 1853 authorizes the plaintiffs to proceed against the defendant, their defaulting witness in the former case, by a civil suit for damages, and under the practice of the English Court the defendant is liable to damages in an action in the case (*vide* Starkie on Law of Evidence, 4th Edition, page 103), yet I am of opinion that, before the plaintiffs are entitled to receive any damages from the defendant, it is necessary for them to prove that they are endamaged by the omission of the defendant to appear, and that the mere fact of the defendant's non-attendance as a witness cannot of itself be a good ground for the plaintiffs to come against the defendant, and to recover damages from him.

As the plaintiffs' pleader applies for laying the case before the High Court for their opinion on the point of shifting the burden of proof in this case from the plaintiffs to the defendant, I beg to request the opinion of the Court as to whether the *onus* of proof lies with the plaintiffs or with the defendant; and whether the defendant's failure to appear as a witness was itself a sufficient proof of his liability to damages.

Judgment of the High Court.— We concur with the Judge of the Small Cause Court in the view which he has expressed.

The 17th April 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, W. S. Seton-Karr, L S. Jackson, and J. B. Phear, *Judges.*

High Court (Powers of)—Questions arising out of execution of decree.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Tessore.

Anund Chunder Mozoomdar,

versus

Goburdhun Khan *alias* Ejatoollah.

Only questions which arise in the trial of a suit and not such as arise on applications for execution of decree, can be referred, under Section 22, Act XI. of 1865, for the opinion of the High Court.

Case.—In this case the plaintiff obtained a decree for rupees 329-2 on 31st August 1861. At the time of trial the defendants were resident *outside the local jurisdiction* of this Court, but neither the parties nor the Judge seem to have been aware of the fact. As far as appears from the record, no objection was raised on this score nor is any allegation now made, that any such objection had been raised, or that defendants were for any other reason subject to the jurisdiction of the Court. Execution was subsequently taken out, and withdrawn at the instance of the decree-holder, who filed a receipt for a portion of the debt due under the decree. In June 1865 execution-proceedings were again commenced, and the property of the judgment-debtors was attached. It was then discovered that they were resident outside the jurisdiction. They appeared and objected on this ground, and the Court directed the moveable property attached beyond the boundary to be released, as a Small Cause Court decree cannot under the present law be executed, either by the Court passing such decree or by any other Court, against moveable property not within the jurisdiction of the Court which tried the case. The decree-holder then applied for a certificate under Section 20, Act XI. of 1865, with a view to proceed against the immoveable property of the judgment-debtors. They, however, object that the decree was passed without jurisdiction; that the whole of the proceedings are, therefore, null and void; and that this Court has no authority to grant a certificate, or any other Court to act on it if granted. The question thus raised, which is an important one, may be put as follows: "Can a defendant by consent, or by silently acquiescing in the jurisdiction of a Small Cause Court, confer on such Court, as against himself, a jurisdiction which otherwise would have been barred by reason of his not residing within the local limits to which the authority of the Court extends?"

This question is only part of the general question. "Can a Small Cause Court obtain by consent of parties a jurisdiction which is not conferred by law?" The answer to the general question would be in the negative. No consent of parties could give such a Court jurisdiction over immoveable property, or as to a sum beyond that to which its

authority was limited by law. But there is a difference between these portions of the general question and the point that arises in this case. The High Court could not confer jurisdiction under either of the above circumstances; but under Section 6, Act VIII. of 1859, and Section 4, Act XXIII. of 1861, the High Court is competent to confer jurisdiction on a Court, which otherwise could have had none, with respect to persons not residing within its local limits. *Quære.*—Could a defendant by consent waive the necessity for the sanction of the High Court?

The cases quoted in the margin are in support of the position that the proceedings of a Court without jurisdiction are null and void. But in the case (No. 167 of 1864, Teekum Lall Dass, appellant, 7th December 1864, Weekly Reporter, Volume 1, page 279) a decree made without jurisdiction was allowed to stand, the defendant having acquiesced in the jurisdiction of the Court of first instance. This is a strong case, for here the decree had been passed without a jurisdiction which the High Court could not confer. Is this case to be received as a precedent, or was the order on appeal one which was only calculated to meet the equity of an exceptional case?

Gobindmonee Chowdrain, Sudder Decision for 1850, p. 41; Keshenath Nyapun Chamind, Sudder Decision for 1851, p. 250; petition No. 754 of 1851, Sudder Decision for 1852, p. 719; Gooroo Prosaud Roy, p. 15, special number of Weekly Reporter.

Under the County Courts Act at home it has been decided that a total want of jurisdiction cannot be cured by assent of parties. Yet, if at the hearing the defendant makes no objection to the jurisdiction and suffers the Court to act without protest, down to actual payment of damages and costs, it will then be too late to apply for a prohibition (Broom's Practice of the County Courts, page 90). But (page 91) "it had been said that a prohibition will be issued after judgment only where the matter is apparent; that is, where the defect of jurisdiction appears on the record, and not where it is made to appear *aliunde.*" In this case the defect of jurisdiction is not apparent on the face of the proceedings, but must be made to appear *aliunde, viz.*, from the Government orders fixing the local jurisdiction, and from an examination of the map; and the remarks of Mr. Justice Coleridge (same page) seem not inapplicable, *viz.*, "There is reason for refusing the writ after judgment when the proceedings set forth the *detail* of the matter, and the party has the opportunity of moving before judgment; if under such circumstances he chooses to wait and take the chance of judgment in his favor, he may be held incompetent to complain of excess of jurisdiction, if judgment is against him." But the learned Judge goes on to express his opinion that this principle cannot apply to the summary proceedings of the County Courts. It would, therefore, be inapplicable to a Court of Small Causes, and it appears to me that such Courts should be most careful in no way to exceed their jurisdiction, as there is no machinery for restraining an excess of jurisdiction similar to that of a writ of prohibition under the English Statute. Where they do accidentally or otherwise exceed their jurisdiction, all their acts should be not avoidable but absolutely void. For these reasons I am of opinion that the judgment in the present case is null and void, and that the Court ought to refuse to grant the certificate. I think, however, that the plaintiff is entitled to the benefit of Section 14, Act XIV. of 1859, though the case falls rather within the spirit than the letter of the provision contained therein, and that the plaint ought to be now returned to him for presentation to the proper Court.

The foregoing case was referred to a Full Bench by Peacock, C. J., and L. S. Jackson, J., with the following order:—

Referring Order.—It appears to us that this is not a case falling within Section 22, Act IX. of 1865, and that we cannot, therefore, express any judicial opinion upon the case.

The Section in question applies to questions which arise in the trial of a suit, and not to such as arise on applications for execution.

We should be very glad to answer the question if we could pronounce a judicial opinion thereon.

We observe that a question on a point relating to execution was answered under a similar Clause in Act XLII. of 1860, Section 12 (Rulings in Small Cause Court cases reported by Sutherland, p. 29). As it is important that all the Division Benches should act in the same way, we refer it to a Full Bench to determine whether the question asked in the case stated is one which falls within Section 22, Act XI. of 1865.

Judgment of Full Bench.—The Full Bench agree in the view expressed by the order referring this case, and think that the case does not fall within Section 22, Act XI. of 1865, and that the Court cannot, therefore, express any judicial opinion upon the ca

The 18th May 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Jurisdiction (of Small Cause Court)—Actions of debt against European soldiers and their Native wives.

Reference to the High Court by Baboo Digumber Biswas, Judge of the Cantonment Court of Small Causes, Berhampore.

Denis Keeffe

versus

Liset Christie, *alias* McAnany.

Regarding amenability or otherwise of European soldiers and their Native wives to Small Cause Courts in actions of debt.

Case.—THE plaintiff, a soldier of Her Majesty's 21st European Regiment, sued the defendant, a Native woman, the wife of a soldier, for Rupees 61 due by her to plaintiff, who had supplied the defendant with food and bedding for a period of 61 days at the stipulated rate of 1 rupee per day. This debt, the plaintiff alleges, was contracted by the defendant before her marriage.

The summons in this case was sent to the defendant through the Commanding Officer of the Berhampore station, who refused to cause it to be served on the defendant on the ground that such summons was illegal, defendant being a soldier's wife, and her husband is not amenable to the Small Cause Court by the Mutiny Act.

I doubt whether the Commanding Officer acted legally in refusing to cause the service of summons on the defendant, for, if the suit be not cognizable in the Small Cause Court by reason of the defendant being a soldier's wife, the objection to that effect should have been raised by the defendant herself in her defence, and not by the Commanding Officer. But, however, as a question of law respecting the admissibility of the suit has arisen, I beg to submit the following points for determination by the High Court:—

1st. Whether a European soldier is not amenable in an action of debt to the Small Cause Court established under Section 6 of Act XXII. of 1864.

2nd. Whether his wife, a Native woman who contracted a debt previous to her marriage with him, cannot be sued in the said Court with regard to the above debt.

In regard to the first point, I beg to submit that, as, under Regulation XX. of 1825, the Military Court of Requests had the power of trying actions of debt against European soldiers not exceeding 400 rupees, and as, under Section 8 of Act XXII. of 1864,

the Military Court of Requests of this station has ceased to exist since the establishment of this Court, I am of opinion that actions of debt against a European soldier is cognizable in this Court up to 500 rupees, under Section 6 of Act XXII. of 1864. I am aware of no law which precludes this Court from taking cognizance of such suits.

With reference to the second question, I have to observe that the debt contracted by a Native woman prior to her marriage with a European soldier can be recovered by an action against her in the Small Cause Court. The plea of coverture on her part cannot be maintained in a suit brought for the recovery of such a debt.

Judgment of the High Court.—The first question is a purely speculative one, as the soldier was not made a party to the suit.

The second question has not yet arisen upon a trial, and it is only when a question arises on the trial of a suit that a case can be referred for the opinion of this Court under Section 22, Act XI. of 1865.

We regret, therefore, that we cannot give any judicial opinion upon the questions propounded.

As the Small Cause Court Judge is probably not aware of the provisions of the Mutiny Act, we beg to refer him to Sections 40 and 98 of the 28 Vic., Cap. 11, passed on the 7th of April 1865 since the Small Cause Court Act, XI. of 1865. A copy of those Sections, so far as is material to this case, is quoted as follows :—

Section 40.—"No soldier or other person as aforesaid" (that is, a person attested for H. M.'s Army or serving on the permanent staff of the disembodied Militia or Volunteers other than a Commissioned officer) "shall be liable by any process whatever to appear before any Justice of the Peace or other authority whatever, or to be taken out of H. M.'s service by any writ, summons, warrant, order, judgment, execution, or any process whatever issued by or by the authority of any Court of Law, or any Magistrate, Justice, or Justices of the Peace, or any other authority whatsoever, for any original debt not amounting to thirty pounds, &c., "and all summonses, warrants, commitments, indictments, convictions, judgments, and sentences on account of any of these matters for which it is herein declared that a soldier or other person as aforesaid is not liable to be taken out of H. M.'s service, shall be utterly illegal and null and void to all intents and purposes."

Section 98.—"In all places in India where any body of H. M.'s forces may be serving situate beyond the jurisdiction of any Courts of Requests, or other Courts for enforcing small demands established at the cities of Calcutta, Madras, and Bombay respectively, actions of debt and all personal actions against officers or against persons licensed to act as sutlers, or other persons amenable to the provisions of this Act, not being soldiers, shall be cognizable before a Court of Requests composed of Military officers, *and not elsewhere*, provided the value in question shall not exceed 400 rupees, and that the defendant was a person of the above description when the cause of action arose."

The 8th June 1866.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Mourosee Lease by guardian of minor—Recovery of consideration—Fraud—Evidence.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes at Jessore.

Doorga Churn Bhuttacharjee and others

versus

Shoshee Bhoosun Mitter and another.

Suit for the recovery of a minor's share of the consideration paid for a mourosee lease granted by the minor's co-proprietors on their own behalf and as his guardians, in order to raise money required for the expenses of the joint estate, which lease was cancelled (on the suit of the minor when he came of age) so far as his share was concerned.

HELD that the plaintiff was not entitled to recover without proof of fraud, and that the evidence tendered by the plaintiff (namely, the record of the case instituted by the minor for the cancelment of the lease) was not admissible to prove the allegation of fraud.

Case.—THE plaintiffs in this case sue for the recovery of Rupees 300, being the amount (with interest) of one-third of the consideration paid to the defendants on the 4th Assin 1261 for the grant of a mourosee lease of certain land of which the two defendants, with Inder Bhoosun Mitter, then a minor, are joint proprietors in equal shares. The mourosee lease was granted by the co-defendants in the present case on their own behalf and as guardians of the minor; and it was set forth in the lease that money was required for the expenses of the joint estate, and that, in order to raise this money for necessary purposes, the mourosee lease was granted for the consideration stated therein.

The minor, on coming of age, sued for the cancelment of the lease as far as his own third share was concerned, and obtained a decree which was upheld in regular and special appeal. In that suit the plaintiffs and defendants of the present case were all co-defendants.

The pleas to the present suit are—

1st. Limitation.

2nd. Estoppel.

3rd. That plaintiff is not entitled to recover.

1st. With respect to the first plea, it is contended that the cause of action arose when the consideration for the lease was paid, or, more properly, when the lease was executed. This is clearly untenable. The cause of action did not arise till the minor, on coming of age, had obtained a decree for the cancelment of the lease in respect of his share.

2nd. It is urged that plaintiff is estopped from bringing this action because he had in the former suit unsuccessfully pleaded ratification of the lease by the minor after reaching his majority. This plea also I over-rule. The parties were differently arrayed in the former suit, the opposite parties being on one side as co-defendants. Moreover, no such effect could be given to the fact sought to be set up as an estoppel.

3rd. The third plea is more difficult to deal with. Putting the question of fraud out of sight, the first point to be decided is, whether or not plaintiff is entitled to recover back the sum paid by him to the defendants for a consideration which has failed. Now, under both English and Indian Law, a guardian has no power to grant a lease for a longer period than that of his own incumbency (Smith's Law of Landlord and Tenant, p. 46; Weekly Reporter, Vol. I., Civil Rulings, p. 211). But then it was at the time alleged that the lease was granted in order to raise money for the necessary purposes of management of the minor's estate, under which circumstances a guardian would have had authority to alienate any portion of that estate. An alienation by a guardian in this way, or for the benefit of the minor, would be good (*see* case No. 3610 of 1864, Weekly Reporter, Vol. II., p. 325). At the time that the lease was granted, the plaintiffs were aware of the grounds on which the guardians assumed power to grant it *quoad* the minor's share; and it was, I think, incumbent on the grantees to enquire into those grounds. The grant of a mourosee lease for a consideration in money is the grant of an estate in the land, and must, it seems to me, under the circumstances, be looked upon in the same light as a sale of a portion of the land; and the case will then resolve itself into one in which a purchaser who has been ousted by a title superior to that of his own vendor seeks to recover his purchase-money.

"Whenever," says Mr. Addison (Work on Contracts, page 110), "the vendor does "not assume on the face of the conveyance "to be the owner of an estate in fee, or to be

"possessed of any particular estate or inter-
"est in the lands or tenements thereby con-
"veyed, but transfers and conveys such
"lands and tenements generally and all his
"estate, right, title, and interest to the pur-
"chaser, the latter cannot maintain an action
"for the recovery of the purchase-money
"on the ground that the vendor is not
"clothed with the estate or interest which he
"was supposed to have possessed. It was
"the purchaser's duty to have looked into
"the title and made sure of his bargain,
"and, not having done so, he must pay the
"penalty of his own imprudence. If he
"might, by a careful investigation, have
"discovered that he was buying another
"man's property and not the estate of his
"vendor, he is concluded by his own *laches*,
"unless there has been *actual fraud* on the
"part of the vendor."

The law on the same point in India will be found at pages 125-126 of Mr. Macpherson's work on Contracts (1860). Two out of three Judges of the late Sudder Court laid down that, in the absence of an *express* warranty of title, there is no warranty implied in a simple sale of land, and that, after a deed of conveyance has been executed and the purchase-money has been paid and possession of the land obtained by the purchaser, no action can be maintained for a refund of his purchase-money on his dispossession on account of the title of the vendor being set aside by the Civil Court. Mr. Macpherson, however, remarks that the law upon this point can scarcely be said to be finally settled, as the above decision was subsequently set aside on review inasmuch as the conveyance did in fact contain words amounting to a warranty. I have not been able to find that the point has been since settled by any subsequent decisions. In the present case, there is nothing that could be construed into a warranty, and the lessee was for some time in possession under the lease. Looking at the broad question, then, without fraud entering into the consideration, I am of opinion that plaintiff is not entitled to recover.

No specific allegation of fraud was clearly made in the plaint. But at the hearing it was urged that the plaintiffs were entitled to recover, as there was a clear case of fraud made out against the guardians who had granted the lease, declaring that money was required for the management of the minor's estate, when in fact the lease was subsequently set aside on the express finding that money was not required for any necessary purposes. I postponed the case in order to give the parties an opportunity of producing evidence on this point. The only evidence produced on either side was the record of the case instituted by the minor for the cancelment of the lease. Now, as between the parties to the present suit, who were all co-defendants in that former suit, and between whom as opposite parties no point could have been decided therein, I hold that the findings on the issues of that record are inadmissible as evidence to prove the allegation of fraud (*see* Macpherson's Civil Procedure, 1860, page 56; and Taylor on Evidence, Vol. II., paragraphs 1497A, 1507, 1520). "A plea of *res judicata*," says Mr. Broom (Legal Maxims, p. 325), "must show either "an actual merger, or that the same point "has already been decided between the "same parties." In the present instance no point was decided as between the same parties in the former suit. Were the former judgment admissible as evidence without giving it the force of a *res judicata*, it would not, I think, prove *actual fraud*, and I doubt if the proof of *constructive fraud* would enable plaintiff to recover.

I am, then, of opinion that fraud is not proved; and as fraud cannot be presumed, I think the case falls well within the maxim "*caveat emptor; qui ignorare non debuit* "*quod jus alienum emit*" (Wharton's Legal Maxims, page 29).

The points upon which I solicit the decision of the High Court may be put as follows:—

1st. Is the plaintiff entitled to recover, without proof of fraud, on the simple ground that the consideration has failed?

2nd. Have I correctly ruled on the evidence that the allegation of fraud is not proved?

Judgment of High Court.—In this case, pleaders were retained for both parties, but the vakeel for the plaintiff did not appear, and the vakeel for the defendant consequently was not called upon to argue.

We certify to the Judge of the Principal Court of Small Causes at Jessore our opinion on the first question that the plaintiff was not entitled to recover without proof of fraud; and on the second question, that the evidence tendered by the plaintiff was not admissible to prove the allegation of fraud.

We come to this opinion upon the same grounds as stated by the Judge in his letter of reference.

We may add that there was in this case no total failure of consideration.

RULINGS ON RECORDERS' REFERENCES.

The 21st February 1866.

Present:

The Hon'ble J. P. Norman and G. Campbell, *Judges.*

Form of charge of Murder—Time for technical objections to Criminal charges.

Government *versus* Ramasawmy, son of Saolroydoo, aged 50 years.

A charge under Section 302 of the Penal Code need not set out at length all the facts necessary to constitute the offence of murder, and negative all the exceptions contained in Section 300 which defines the crime of murder.

Technical objections to criminal charges, particularly on the ground of the want of a sufficient specification of details, should be taken before the conclusion of the trial, when the Judge may, if necessary, amend the charge, and not afterwards, unless it appear that some failure of justice has been caused by the irregularity complained of.

Case.—The Recorder of Moulmein, in pursuance of Act XXI. of 1863, Section 44, respectfully submits the following case for the consideration of the Judges of the High Court of Judicature at Fort William in Bengal.

The following charge was preferred against one Ramasawmy:—

"That he, on or about the 10th day of "October 1865 at Moulmein, committed "murder by causing the death of Rungeeroo, "and that he has thereby committed an of-"fence punishable under Section 302 of the "Indian Penal Code and within the cogniz-"ance of the Court of Session."

The prisoner was convicted and sentenced to transportation for life.

The agent of the prisoner having objected to the form of charge as not negativing the exceptions in Section 300 of the Indian Penal Code, the Recorder overruled the objection; but in deference to the opinion alleged to be entertained by Mr. Justice Trevor, the Recorder begs leave respectfully to submit the following question:—

Whether the charge, as framed, is maintainable.

Judgment of the High Court.—By Section 42 of Act XXI. of 1863, the proceedings on trials held by the Recorder in a Court of Session are to be regulated by the Code of Criminal Procedure. The question therefore is whether the present form of charge is sufficient under the Code of Criminal Procedure.

Now, by Section 234 "the charge shall describe the imputed offence as nearly as

possible in the language of the Indian Penal Code, and shall refer to the Section under *which such offence is punishable.*" Section 235—It shall not be necessary to allege the absence of the General Exceptions contained in Chapter IV. of Indian Penal Code, nor (Section 236) to prove the absence of such circumstances in the first instance.

By Section 237, when the Section referred to in the charge contains an exception not being one of the General Exceptions, the charge shall not be understood to assume the absence of circumstances constituting such exception so contained in the Section without a distinct denial of the existence of the circumstances.

The 302nd Section is that which is referred to in the charge as provided by Section 234, and is the Section under which murder is punishable. It contains no exception whatever, and we are therefore of opinion that the charge is sufficient, and that it is not necessary that the charge should set out at length all the facts necessary to constitute the offence of murder, and negative all the exceptions contained in Clause 300 in which the crime of murder is defined.

The charge in the present instance follows clearly the form given in Section 239 (4).

The difficulties in framing charges of murder under Sections 300 and 302 according to the English system of Criminal Pleadings which was in use in the late Supreme Court, where the Code of Criminal Procedure was not in force, led to the passing of special enactments (Sections 10 and 26 of Act XVIII. of 1862) for the purpose of substituting a simple form of charge.

We certify that we are of opinion that the charge as framed is sustainable, and that the conviction under it should be upheld.

We may add that (if there was anything in the present objection) technical objections to criminal charges, particularly on the ground of the want of a sufficient specification of details, should be taken before the conclusion of the trial, when the Judge may, if necessary, amend the charge. If not so taken, no objection ought to be allowed to prevail, unless it shall appear that some failure of justice has been caused by the irregularity complained of, Section 439.

REFERENCES BY WASTE LAND COURTS.

The 9th February 1866.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Time for instituting suit under Section 5, Act XXIII. of 1863 (not extendible)—Vakalutnamah (Effect of filing).

Reference to the High Court, under Section 15 of Act XXIII. of 1863, by Mr. F. J. Cockburn, Officiating Judge of Sylhet, and Member of the Court constituted under that Act for the investigation and trial of claims to Waste Lands.

Taranath Dutt and others, *Plaintiffs,*

versus

The Collector of Sylhet and others, *Defendants.*

The Court cannot extend the period of 30 days allowed by Section 5, Act XXIII. of 1863, for preferring a suit to contest an award by the Board of Revenue.

The filing of a *vakalutnamah* is not an institution of such a suit.

Case.—On 13th January 1865, notice was ordered to be given to the claimants, and this notice was served on the claimants on 25th February. On 24th March, a *vakalutnamah* was filed on the part of the claimants. On the 27th March a petition was presented on behalf of the claimants, to the effect that the plaint was not ready in consequence of their not knowing the requirements of the law, and begging that time might be allowed them. Upon this petition, the order passed was, "Let the 31st March "be fixed for hearing this case. The peti-"tioner's vakeels to be told that none of "their objections will be heard after the "31st, and no further time will be allowed; "and they are to file their objections before "the 31st." On the 31st March, the memorandum of objections, *i. e.*, the plaint, was filed on the part of the claimants. Subsequently, witnesses were examined on behalf of the claimants.

Excluding the day of receipt of notice (25th February), the thirty days allowed by Section 5 for the institution of a suit expired on 27th March, the day on which an extension of the time was rejected.

By Section 5 it is enacted that, unless a suit be instituted within thirty days from the delivery of the notice, the order of the Board shall be final.

It appears to me that, no suit having been instituted within thirty days, the order of the Board became final. Act XXIII. of 1863 does not appear to me to give the Court constituted by Section 7 authority to extend the time allowed by Section 5 for the institution of a suit.

It cannot, I think, be said that Act VIII. of 1859 can be quoted as authorizing an extension of time, for, by Section 11 of Act XXIII. of 1863, that Act is only to regulate suits instituted under Act XXIII., that is (as I read it), that, until a suit has been instituted by the filing of a plaint, Act VIII. does not apply.

I am of opinion, therefore, that, on the expiry of the thirtieth day, no suit having been instituted, the Board's order *ipso facto* became final, and consequently that all subsequent orders and proceedings are void.

It may be said that, under Section 14 of the Act, the order of the 27th March on the petition of the claimants is not open to revision; but, if that order was passed without jurisdiction, it was simply no order at all; and I hold that such order was not warranted by law, and was, therefore, passed without jurisdiction.

Again, the order of 27th March directed that the plaint should be filed *before* 31st March. It was filed *on* the 31st March. I am of opinion that, even if it be held that the Court had authority to extend the time, such extension was only given by that order up to the 30th March; and, no suit having been instituted before the expiry of that day, the order of the Board became final.

The Member Moulvie Chund Buksh Khan, Principal Sudder Ameen, observes that the former Judge had not the jurisdiction to extend the period; but, as it was done, and issue was framed, and the evidence of the witnesses has been recorded, and also other measures carried out, the default cannot now be noticed, and the case should now, therefore, be decided on its merits.

The Member Moulvie Abdool Kadie is of opinion that the *vakalutnamah* filed by the claimants should be considered to be the case referred to in Section 5 of Act XXIII. of 1863, as it is provided in that Section that the case should be instituted within thirty days. Had the word "plaint" been clearly mentioned in that Section, the *vakalutnamah* would not have then been taken into consideration as the case. The former Judge had not the jurisdiction to extend the period; but, as he has done it, it is requisite that the sanction of the High Court should be obtained to the acts done in conformity with the above order of the Judge.

On the points above indicated, the opinion of the High Court is requested.

Opinion of the High Court.—We certify to the Judge of Sylhet our opinion that the Judge had no authority to extend the period allowed by the Act (XXIII. of 1863, Section 5) for preferring suits to establish claims or objections in contravention of an award by the Board; but that, by the failure of the claimant to institute his suit in the Court constituted for the hearing of such suits under the Act, within thirty days, the order of the Board of Revenue has become final.

We are further of opinion that the filing a *vakalutnamah* would not be an institution of a suit within the meaning of the Section.

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RULES OF PRACTICE OF THE HIGH COURT.

Rules of Practice adopted by the Sudder Court, on the 28th October 1859, under Act VIII. of 1859, for the guidance of the Deputy Registrar and Pleaders of the Court.

SECTION I.—REGULAR APPEALS.

Section 332.

1. EVERY appeal to the Sudder Court to be heard by two or more Judges, under the New Bill.

Section 333.

2. Every appeal to the Sudder Court shall be presented in the Court to the Deputy Registrar by the appellant in person, or his recognised agent, or by a pleader appointed under the provisions of Section 18 of Act VIII. of 1859.

Section 335.

3. With every petition of appeal there is to be presented also an authenticated copy of the decree appealed against.

Sections 334 and 335.

4. The appeal petition must be in the form of the memorandum prescribed by Section 335 of Act VIII. of 1859, and, without any detail of the circumstances of the case, shall state under consecutively numbered heads the grounds of objection to the decision appealed against.

Sections 333-336.

5. It will be the duty of the Deputy Registrar to examine whether the petition be correct with regard to stamp, whether it be in the prescribed form; also, whether copy of the decree appealed against accompanies, and whether, according to the date of decision therein recorded, the appeal has been preferred within the prescribed term, *i.e.*, within ninety days from the date of judgment, exclusive of that date and of the *time necessary for procuring of the copy.* Where all these particulars have been correctly observed, the Deputy Registrar shall admit and file the appeal.

6. The time "necessary for procuring a copy of the decree appealed against," shall be considered to be the time elapsed between date of presentation of petition in the Lower Court for copy thereof, and date of delivery of the same, or of certificate, that it was ready for delivery, to the petitioner, exclusive of those two dates; and a Circular Order will issue accordingly to all civil authorities, with view to their recording and attesting these particulars upon the back of every copy of decree granted to any party under Section 198 of the Act.

Section 336.

7. If no copy of the decree appealed against, be tendered along with an appeal, or if the appeal be not in prescribed form, or if it be presented beyond time, without any cause being stated by the presenter, the Deputy Registrar shall summarily reject the appeal, recording the fact in a book to be kept for the purpose. If the appeal be beyond time, but cause for the delay be shewn, the Deputy Registrar shall submit the case to the Judge or Judges sitting in the Miscellaneous Department, to determine whether it shall be admitted.

Section 341.

8. On admission of any appeal, the Deputy Registrar shall cause the same to be endorsed and registered in a Register C., in the manner ordained by Section 341 of the Act.

Section 343.

9. He shall then send a notice of the appeal, without delay, to the Lower Court, and call for transmission, as quickly as possible, of all the material papers and copies of exhibits, on account of the several parties to the cause. The Courts to be instructed to do this, ordinarily, within six weeks, reporting and asking for further time, whenever necessary.

Section 345.

10. It will be the duty of the Deputy Registrar at the same time to prepare and transmit to the Lower Court a notice of appeal for service on the respondent, unless the

respondent shall have already appointed a pleader or recognised agent on his behalf in this Court, in which case the service of the said notice upon such pleader shall be sufficient. It will also be the duty of the Deputy Registrar to keep a book, shewing the date of institution of suit, of issue of notice under Sections 9 and 10, and of the return of such notices and to report to the Court all instances of delay in replying to returns on the part of the Lower Court.

Section 344.

11. In the notice of appeal to the Lower Court, and in the notice to be served on the respondent or his pleader, shall be mentioned the day fixed for hearing of the appeal, calculated according to a table of distances for each Zillah, and the time necessary for service of notice on the respondent.

Section 347.

12. If an appeal be struck off the file by order of the Court for default, the Deputy Registrar shall summarily reject any petition for its restoration on the file, not submitted within 30 days after the said order. Petitions preferred within 30 days, shall be laid as soon as possible before Judges in the Miscellaneous Department.

13. On receipt of the papers from the Zillah Court, the Deputy Registrar is to ascertain, from the pleaders on both sides, what papers they wish to have translated into English, and shall make such papers over to the officer in charge of the Translation Department. He shall, at the same time, obtain from the officer in charge of the Printing Department, an estimate of the probable expense of printing 12 copies of these translations, and shall serve the appellant's pleader with a notice to pay this sum within six weeks from the date of notice, otherwise the case will be treated as one of default.

14. The appellant will be entitled to charge the expense of translation as costs in the cause, in the event of his obtaining a decree for his costs.

Section 346.

15. If, on the day fixed for hearing, the appellant does not appear in person or by pleader, the Deputy Registrar shall lay the case before the Judge in the Miscellaneous Department, in order that it may be struck off the file.

Sections 367-371.

16. Petitions of appeal in *formâ pauperis* shall be received and treated by the Deputy Registrar, if presented in the manner enjoined by Sections 367 to 369, and laid before the Judges in the Miscellaneous Department. When conveniently to be done, enquiries into the truth of alleged pauperism shall be made in this Court by the Deputy Registrar under Section 370: otherwise, the enquiry shall be referred by him to the Lower Court.

Section 361.

17. Of every order passed by this Court disposing of an appeal, the Deputy Registrar shall cause a certified and sealed copy to be transmitted to the Court which passed the first decree in the suit.

Section 362.

18. On applications being preferred for execution of this Court's decrees, the Deputy Registrar is to refer the applicants to the Court which passed the first decree in each suit.

Section 342.

19. Whenever it shall appear to the Deputy Registrar, or when a respondent or his pleader shall represent to the Deputy Registrar, that before issue of notice on the respondent or his pleader, or to the Lower Court, there are reasons to demand security for costs from the appellant, he shall lay the papers, as soon as possible, before the Judge in the Miscellaneous Department for orders.

Section II.—Special Appeals.

Sections 373-375.

20. Applications for admission of special appeal shall be received by the Deputy Registrar, subject to the Rules prescribed with regard to Stamp, lapse of time, accompaniment of copies of documents, and form, by Sections 373-374 of the Act.

Section 375.

21. Special Appeal Petitions admitted to be filed, are to be registered in a register D, as enjoined by the Act.

Section 375.

22. The Rules applying to regular appeals generally, shall be applicable to special appeals *after admission*.

SECTION III.—MISCELLANEOUS APPEALS.

23. THE Rules applying to regular appeals generally shall be applicable to Miscellaneous Appeals.

Section 366.

24. All urgent cases, such as have been hitherto heard summarily, and all appeals under Sections 36, 76, 85, 94, and 119, shall be entered in a separate file, and a list of such as are ready for hearing shall be stuck up every Saturday for general information, with notice that they will be brought up for hearing on that day fortnight.

25. The Deputy Registrar is to prepare and submit to the Senior Judge of the Full Bench, on the first of each month, a list of the Miscellaneous cases which have been reserved for hearing by a Full Bench, and have not been disposed of prior to the close of the preceding month.

26. Such cases shall be laid before *two* Judges.

SECTION IV.—REVIEW OF JUDGMENT.

27.* WITH a view to enable the Court when practicable to dispose of every application for review of judgment, and the review itself (when admitted) at a single sitting, the Court will henceforth require that notice of intention to apply for a review of judgment shall be, in all cases, served on the opposite party, and that the usual time be allowed for their appearance.

28. Petitions for review of judgment shall be admitted by the Deputy Registrar subject to the Rules regarding Stamp and lapse of time, laid down in Section 377 of the Act, and shall be laid before the Judge or Judges who passed the judgment of which review is sought.

Sections 377-379.

29. All applications for reviews and petitions for the amendment of obvious errors in the orders of the Judges, as well as all explanations furnished on the requisition of the different Judges shall be immediately, on their receipt in the Office, laid by the Deputy Registrar before the Judges who passed the original orders to which the petitions or applications refer.

30. All petitions for review of judgment to be accompanied by a copy of the order of which a review is applied for; and documents filed with applications for a review of judgment shall be received as exhibits in the same manner as if they had been entered or filed on the proceedings of the original suit, or when it was before the Court in appeal, whether regular or special.

31. No petition of review shall be read, unless there be endorsed thereon, and signed by the party or his Vakeel, in the most concise terms, a statement of the grounds on which the review is considered to be admissible.

32. The reasons shall be numbered, and the endorsement expressed nearly in the following terms:—

I, A. B., Appellant (or Vakeel on the part of the Appellant) or Respondent, file this petition for a review of the judgment passed by Messrs. B. C. D., Judges of this Court, on the following grounds.

33. On an application being presented for a review of judgment in a case decided by two or more Judges, only one of whom continues attached to the Court, it is to be laid before such remaining Judge, whose decision, as to the admission or rejection of the review, is final.

34. When two Judges, who have passed, or taken part in, a decision, are present, and hear an application for review thereof, the review will be granted only when both agree in the order for its admission.

35. When in a case decided by a single Judge, an application for a review of his judgment shall have been rejected by him, his rejection shall be final; and it shall not be competent to any other Judge or Judges of the Court, at any subsequent period, to admit a review of the order rejecting the application.

36. The foregoing rules will not, of course, affect the power of the Court in cases in which any single Judge may appear to have exceeded the powers vested in him by the Acts and Regulations.

37. Review of a judgment passed by a Judge or Judges who are no longer attached to the Court, or who are otherwise prevented by absence or other cause from hearing the application, is not to be admitted, except by two concurring voices.

38. Excepting as provided above, the decision of former or absent Judges cannot be overruled but by the concurring voices of a greater number of voices.

39. The order of a single Judge, on an application for a review of the judgment of a *former* Judge or Judges (no application for review having been preferred while such deciding Judge or Judges were attached to the Court) rejecting the application, shall be final; and it shall not be competent to any other Judge or Judges of the Court, at any subsequent time, to admit such review.

* Rules 27 to 36, both inclusive, were repealed and substituted by the Rules passed by the High Court on 1st May 1863.—*See post.*

40. Applications for review of orders passed in the Miscellaneous Department by a Judge who is no longer attached to the Court, or who is otherwise prevented by absence or other cause from hearing the applications, are not to be admitted except by the concurrent opinion of two Judges.

SECTION V.—GENERAL INSTRUCTIONS.

41. IF there be any clerical error in the petition of appeal, the Deputy Registrar is authorised, without reference to the Registrar, to permit such inaccuracies to be corrected in the presence of both parties, or their pleaders, if appearance has been made for both.

42. On the return of the District Judge to the notice or notices issued to his Court, the Deputy Registrar will place the case on the list of cases ready for distribution, and lay it before the Judges of the Full Bench for adjudication.

43. A list of regular appeals to be heard by the Court, to the amount of twelve in each week, will be prepared by the Native Deputy Registrar, and affixed in the Court House for at least three weeks previously to the week of hearing, so that the pleaders may be enabled duly to prepare and examine the issues to be proposed for trial on those appeals.

44. Notice is to be served on the Government Pleader in all cases in which Government is a party.

45. The Deputy Registrar is empowered to sign the list of papers for translation in appeals to the Privy Council.

46.* The Deputy Registrar shall prepare weekly lists of applications which have been filed during the week for the admission of special appeals, and the dates on which such applications are likely to be brought on for hearing, and shall transmit extracts from such lists to the Court in which the decisions appealed against were passed, with a view to such extracts being affixed to the respective Court Houses, to enable the holders of the decrees in question to be present personally or by vakeel at the hearing, should they desire to do so. The time to be fixed for the hearing shall, ordinarily, be not less than six weeks from the date of the despatch of the lists by the Deputy Registrar from this Court. The Deputy Registrar shall, on every Saturday, affix in the Court House a list of the applications for special appeal, which as having been filed for more than six weeks from the date of despatch of the lists, as above provided, will be ready for hearing during the weeks following.

[Extracts of the above lists of special appeals which are to be forwarded to the Tenasserim Provinces are to be translated into the English language.]

47. The duty of attesting *mooktearnamahs*, for appointing vakeels in cases in the Sudder Court, will be performed by the Native Deputy Registrar, and a list will be kept by him of the recognised agents of parties appointed under Section 17 of the Code.

48. According to a letter from the Officiating Junior Secretary to the Board of Revenue, requesting to be furnished, monthly, with a statement of the amount due to Government on account of Stamp Fees of pauper-suits decided by the Court, the Deputy Registrar is directed to furnish, monthly, a statement containing the above information, in the form annexed to Circular Order No. 127, dated the 24th April and 2nd October 1846, and lay the same before the Registrar for his signature.

49. It will be the duty of the Deputy Registrar to note any irregularity committed by the Lower Courts in the preparation and endorsement of the copies of decrees of their Courts, and submit his report of such irregularity to the Judge presiding in the Miscellaneous Department.

Sections 100-102.

50. It is not necessary that the Registrar should take any steps in future in consequence of the death of a plaintiff or defendant, unless moved thereto by one or other of the parties.

51. If the legal representative of a deceased plaintiff, in a case in which there is more than one plaintiff, should apply to have his name entered in the place of the deceased, and no objections are preferred by any party, the Deputy Registrar shall

* *N. B.*—This rule applies to Assam, Arracan, and Tenasserim only.

make the entry required. If no application is made, the suit shall go on at the instance of the surviving plaintiff.

52. In cases where there is only one plaintiff, and no application is made by his representative or representatives, or by the defendants in the suit within three months from the date of such plaintiff's death, the Deputy Registrar shall lay the case before the Bench sitting for the disposal of Miscellaneous business, in order that it may be struck off the file.

53. If the defendant apply to have the legal representative of the deceased plaintiff brought in, or if there be any dispute as to who is entitled to represent the plaintiff, the Deputy Registrar shall lay the case for orders before the Miscellaneous Bench.

54. If a defendant in a suit should die, and the plaintiff should make an application specifying the name, description, and place of abode, of the person whom he alleges to be the representative of the deceased, the Deputy Registrar shall enter the name of such person in the register of the suit, in place of the original defendant, and shall issue a summons to him through the Zillah Court, requiring him to appear and answer on a fixed day to be determined on the principle laid down in Section 11.

55. In the event of any delay on the part of the Zillah Courts, in the execution of the requisitions made to them by the Deputy Registrar, that officer shall bring the same to the notice of the Court to which the requisition has been made. Any continued delay after such second requisition he will report to the Judge presiding in the Miscellaneous Department.

56. If a regular case be compromised by the parties, the Deputy Registrar shall lay it, accompanied with the *razeenamah* and *safeenamah*, and the *nuthee* of the case, for orders before the Judges of the Full Bench.

57. Wilful neglect on the part of any pleader or mookhtear attached to the Court to attend the office of the Deputy Registrar will be brought by that officer to the notice of the Judge presiding in the Miscellaneous Department.

58. The Deputy Registrar shall address the Zillah Authorities by *roobacaree* without precept.

59. The Deputy Registrar shall also pass orders upon the *keyfeuts* submitted by the Naib Mohafiz regarding the state of the records of cases when received from the Zillah Courts. In cases of doubt or difficulty, the Deputy Registrar will refer to the Judge or Judges presiding in the Miscellaneous Department for the time being.

60. Returns to precepts requiring no special orders shall also be disposed of by the Deputy Registrar.

61. He is especially enjoined to see that the precepts and other processes of the Court are issued without delay, and that reminders and calls for explanation are despatched, whenever the return of the Lower Court is not made within the prescribed period.

Rules of practice adopted by the High Court on 1st May 1863.

It is ordered that, on and from the first day of May 1863, the following rules and orders shall take effect in this Court:—

1. In special appeals, the grounds of appeal shall be stated in English, and the application shall be accompanied by a certificate signed by an Advocate or Vakeel, stating that in his judgment there are reasonable grounds for contending that the decision of the Lower Court is erroneous upon a point of law.

2. In the case of a regular appeal, notice of the arrival of the record shall be given by fixing such notice in some conspicuous part of the Court-house.

3. The notice shall be dated and signed by the Registrar, or by the Deputy Registrar of the Court, or by such other officer as shall be appointed by the Chief Justice for that purpose.

4. Within thirty days after the date of such notice, the Advocate or Vakeel of the appellant shall deliver to the Deputy Registrar, or to such other officer as the Chief Justice shall direct, a list in writing in the English language, dated and signed by such Advocate or Vakeel, of such of the documents and depositions of the witnesses, or of such portions thereof as he wishes to be read at the hearing, and upon which he intends to rely in support of the appellant's case.

5. The time for the delivery of such list may be extended by the Judge sitting for the decision of Miscellaneous cases upon the verbal application of an Advocate or Vakeel, if the Judge be satisfied that there is a reasonable ground for the application.

6. The Advocate or Vakeel of the respondent, or of any party who may intervene, shall have liberty to inspect and take a copy of such list at his own expense.

7. Within thirty days after the date of such list, the Vakeel of the respondent, or of any party who may intervene, shall deliver to the Deputy Registrar, or to such other officer as the Chief Justice shall direct, a list in writing in the English language, dated and signed by him of such of the documents and depositions in the case or such portion thereof as he wishes to be read at the hearing, and upon which he intends to rely in support of the case of his client.

8. A further time for the delivery of such list may be granted by the Judge sitting for the decision of Miscellaneous cases, upon the verbal application of an Advocate or Vakeel, if the Judge be satisfied that there is a reasonable ground for the application.

9. If the respondent intends to object to the decision of the Lower Court, he shall, when he gives in his list under Rule 7, deliver to the Registrar a written statement of his grounds of objection.

10. After the expiration of the time allowed for the delivery of the last-mentioned list, the Registrar shall cause the necessary translations to be made, including a translation of the documents and depositions mentioned in the lists above-mentioned, if any shall have been delivered, and shall prepare a paper book for the Judges.

11. The paper book in regular appeals shall contain the following papers or translations of them, when they are not in the English language:—

I. The plaint and the date on which it was filed.

II. The written statements and depositions (if any) of the parties in the Lower Court.

III. The issues (if any) framed and recorded in the Lower Court.

IV. The judgment of the Lower Court.

V. The documents and depositions (if any) specified in the lists mentioned in Rules 4 and 7.

VI. The grounds of objection (if any) intended to be made by the respondent.

12. In all special appeals, except those entered in the list of short special appeals as hereinafter mentioned, the paper book shall contain the following documents or translations of them if they be not in English:—

I. The judgment of the Court of first instance.

II. The judgment of the Lower Court of appeal.

III. The grounds of special appeal.

IV. The grounds of objection made by respondent if any.

V. If the Advocate or Vakeel of either party shall give notice to the Registrar, or if it appear from the grounds of appeal that the question turns upon the construction of a document, a translation of the document shall be inserted in the paper book.

13. In all appeals, except special appeals entered in the list of short special appeals, the Registrar shall cause the paper books to be printed.

14. Each of the parties, who intends to have his case argued by an Advocate or Vakeel, shall, in cases of regular appeal, take one copy of the paper book, or two copies if he intends to have his case argued by two Advocates or Vakeels, and he shall pay for such copy or copies the cost price thereof.

15. The cost paid for the one copy or for the two copies (as the case may be), which shall be taken by the party who succeeds in the appeal, shall, unless otherwise ordered by the Court which hears the case, be allowed in the costs (if any) ordered to be paid to him by the party who fails.

16. Either party may have a copy of any printed paper book in special appeals on paying the cost price thereof; but such cost shall not be paid by the party who fails, unless the Court which hears the case shall otherwise specially order.

17. Any party may have as many copies as he wishes of any paper book upon payment of the cost price of printing, provided he give notice to the Deputy Registrar

before the paper book is printed of the number of copies he requires.

18. In all special appeals, which shall be admitted after these rules come into force, a Judge or the Registrar or such officer as shall be appointed for that purpose by the Chief Justice, shall peruse the grounds of appeal; and every case in which it shall appear that the grounds of appeal are frivolous or such as can be readily decided by the Court, shall be inserted by him in a list to be called the list of short special appeals.

19. If the Registrar, or such other officer as aforesaid, entertain a doubt as to whether any particular case ought to be inserted in the said list, he shall bring the same to the notice of the Judge sitting for the decision of Miscellaneous cases, and act according to his orders.

20. One day in every week shall be fixed for the decision by a Division Court consisting of two Judges, of cases inserted in such list, so long as any case inserted therein remains to be heard.

21. The Court may, if it thinks fit, order two or more days to be fixed in any week for the hearing of such cases.

22. Notice shall be given of the day or days fixed for that purpose, together with a list of the cases intended to be called on for hearing on such day or days.

23. The notice shall be fixed in a conspicuous part of the Court-house at least one week before the day appointed for the hearing.

24. Unless otherwise specially ordered, the paper books for the Judges in cases inserted in the list of short special appeals need not be printed, and shall consist of a written copy of the grounds of appeal and of the objections (if any) intended to be made by the respondent, and also of the decision of the Lower Court of appeal if in English, or, if not, a translation of such decision.

25. Rule 11 shall take effect as to all regular appeals admitted since the 1st day of January 1862, in which it shall be practicable to have the paper books printed. In cases preferred before the end of May 1863, the papers mentioned in Clause 5 will necessarily be omitted. The paper books prepared under this rule shall be printed.

Rules of Practice adopted by the High Court on 1st May 1863.

THE Court is hereby pleased to rescind Rules 27 to 36, both inclusive, of the rules of practice adopted by the late Sudder Court under Act VIII. of 1859, on the 28th October 1859, and in substitution thereof to enact the following rules for regulating the procedure in the presentation and hearing of applications for review of judgment:—

1. Petitions for review of judgment shall be admitted by the Deputy Registrar, subject to the rules regarding stamp and lapse of time laid down in Section 377, Act VIII. of 1859, and shall be forthwith laid before the Judges or one of the Judges who passed the judgment of which the review is sought. Such Judges or Judge shall appoint a day for hearing the same, of which notice shall be affixed in the Court three days at least before the day appointed.

2. All petitions for review of judgment shall be accompanied by a copy of the order of which a review is applied for; and documents filed with applications for a review of judgment shall be received as exhibits in the same manner as if they had been entered or filed on the proceedings of the original suit, or when it was before the Court in appeal, whether regular or special.

3. Every application for review shall be signed by the party or his Advocate or Pleader, and shall be accompanied by a statement in concise terms of the grounds on which the review is considered to be admissible; and in cases in which the argument in the first hearing has been conducted by an Advocate or Pleader on behalf of the applicant, by a certificate signed by an Advocate or Pleader of the Court, stating that in his judgment there are good grounds for granting the review.

4. Such statement and certificate shall be in the English language.

5. Every application for a review of judgment may be heard in the first instance by any one of the Judges who heard the original case.

6. Upon such hearing, the Judge may reject the application, or order the opposite party to be summoned.

7. An order for rejection shall be final. But if an order be passed for summoning

the opposite party, the application shall be determined by the Judges before whom the case was originally heard after due notice shall have been given to the opposite party to enable him to appear according to the provisions of Section 378, Act VIII. of 1859.

8. After the expiration of such notice, a day shall be appointed for hearing the application of which at least three days' notice shall be affixed in the Court.

9. If any of the Judges, who heard the case, shall be prevented by absence or other unavoidable cause from hearing the case, the application may be heard and finally determined by the other or others of such Judge or Judges; but nothing in this Rule shall be deemed to affect the provisions of Section 379, Act VIII. of 1859.

10. When only two Judges, who have passed or taken part in a decision, are present, and hear an application for review thereof, the review will be granted only when both agree in the order for its admission.

11. In all cases for application of review now pending, whether notice shall have been issued to the opposite party or not, the application may be heard and rejected by any one of the Judges who heard the original case.

12. No execution of decree shall be stayed by reason of an application for review of judgment, whether the opposite party be ordered to be summoned or not, except by special order of one of the Judges who originally heard the case, or, if all such Judges shall be prevented by absence or other unavoidable cause from hearing the application, by one of the other Judges of the Court.

13. These rules, with the exception of Rules 3 and 4, shall take effect forthwith. Rules 3 and 4 shall come into force on the 18th of May next.

Rules of Practice of the High Court of Judicature at Fort William in Bengal, dated the 21st day of June 1865.

I. Upon motions, if the application be not rejected, notice to show cause shall be given, or, if the application be granted, it shall be granted only subject to the condition that no cause be shown to the contrary within a certain time (to be fixed) after service of the order. The order will then be sent to the Mofussil Court for service.

II. On appearing to make the motion, the Barrister or Vakeel shall present a petition in English engrossed on a stamp of the value of 2 rupees, containing—

1st. A statement of the names of the parties and of the value of the suit or appeal involved in the motion.

2nd. The grounds of the motion.

And when the motion is for an order on the Lower Court for submission of documents or other papers not before the Court.

District or Court.	Date and nature of document.	Language in which it is executed.	Whether copy or original.	In what case filed and date of filing.	Remarks.

3rd. A specific statement of the papers, their nature, and the custody under which they are, as per marginal exemplar; and

4th. A certificate signed by the Vakeel that such documents or other papers are relevant and material for the purposes of the appeal, or the answer to the appeal for which they may be required.

III. When a document is wanted, and it will not delay the hearing of the appeal to send for the document, a motion shall not be necessary, but a written requisition to the Deputy Registrar shall be sufficient, unless he shall endorse therein that an application to the Court ought to be made.

IV. Whenever an application for a document is made to the Court by motion in a case in which the hearing of the appeal will be delayed by sending for the document, the petition shall state the reasons why the application was not made to the Deputy Registrar at an earlier period.

Rules for Pleaders and Mookhtars in Mofussil Courts (Regulation Provinces).

Rules drawn up in accordance with Section 4, Act XX. of 1865, for the Qualification, Admission, and Enrolment of Pleaders and Mookhtars in Mofussil Courts.

1. PLEADERS in the Mofussil Courts of the Regulation Provinces, within the limit of the jurisdiction of the High Court, shall, as regards qualification, be of two grades.

2. Those of the higher grade shall be competent to appear, plead, and act in any Civil or Criminal Court subordinate to and within the limits of the general jurisdiction of the High Court, and also before the Board of Revenue, or in any Revenue Court or Office within the said limits: Provided that they shall not appear, plead, or act in the High Court.

3. Those of the lower grade shall be competent to appear, plead, and act in the Courts of the Sudder Ameens and Moonsiffs and in the Courts of Assistant Commissioners, Extra Assistant Commissioners, and Registrars of Small Cause Courts, and also in any Criminal Court, or before the Board of Revenue, or other Revenue Court or Office, within the limits of the general jurisdiction of the High Court: Provided that they shall not appear, plead, or act in the High Court.

4. Mookhtars duly admitted and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear, and act in any Civil Court, and may appear, plead, and act in any Criminal Court within the same limits: Provided that they shall not appear, plead, or act in the High Court.

5. All persons who, on the 1st January 1866, were Pleaders or were lawfully qualified to act as Pleaders in any local Civil Court subordinate to the High Court, are qualified to be admitted and enrolled as Pleaders, subject to the provisions of Act XX. of 1865. Such persons must make their applications for enrolment in the manner prescribed in Section 43 of the said Act.

QUALIFICATIONS FOR PLEADERS OF THE HIGHER GRADE.

6. Every person may be admitted as a Pleader of the higher grade who shall be qualified as hereinafter prescribed, that is to say—

1st.—If he shall have obtained the Degree of Bachelor in Law of one of the Universities of Calcutta, Madras, or Bombay, or shall be a Licentiate in Law of one of the said Universities: Provided that his application for admission as a Pleader be made within three years from the time of his obtaining such Degree or License, or within such further time as the High Court shall for any special reason allow: or

2nd.—If he shall satisfy the Court that he possesses a competent knowledge of the subjects mentioned in this Clause by producing a certificate from the Examiners hereinafter mentioned that he has passed an examination in the Regulations, Enactments, and Text Books set opposite to the respective subjects. Where two or more books are mentioned in the alternative, it shall be sufficient if the applicant pass in one of such books to be selected by himself.

Subjects.	*Regulations, Enactments, and Text Books.*
1st.—The Law of property current in Bengal.	
A. With reference to the Permanent Settlement;—to the Government lien on land;—to claims to hold land exempt from the payment of Revenue;—and to the mode in which Estates can be brought to sale for arrears of Revenue.	Regulations (Bengal) I., VIII., X., XIV., XIX., and XLIV. of 1793, and the Regulations and Acts by which the same have been altered: Act XI. of 1859: and the preamble to Regulation (Bengal) II. of 1793.

B. The law of under-tenures and the mode in which the same can be brought to sale for arrears of rent.	Regulation (Bengal) VIII. of 1819: Act X. of 1859: Act VIII. of 1865 (Bengal Council).
C. The relation of Landlord and Tenant.	Act X. of 1859: Act VI. of 1862 (Bengal Council).
D. Mortgages: Registration of Assurances.	Macpherson on Mortgages: Act XX. of 1866.
E. The Hindoo Law of Inheritance, Succession, and Adoption.	Dayabhaga and Mitakshara; Dattaka Chandrika, or Macnaghten's Principles of Hindoo Law, first seven chapters.
F. Mahomedan Law.	Macnaghten's Principles of Mahomedan Law, except chapter 9.
G. The Indian Succession Act.	Act X. of 1865.
2nd.—Obligations arising from Contracts.	Macpherson on Contracts.
3rd.—Civil Procedure.	Act VIII. of 1859: Act XXIII. of 1861: Act XI. of 1865.
4th.—The Law of Evidence.	Act II. of 1855, and Best, or Goodeve, or Norton on Evidence.
5th.—The Law relating to Stamps.	Act X. of 1862: Act XVIII. of 1865.
6th.—The Law of Limitation.	Act XIV. of 1859.
7th.—Criminal Law and Procedure.	The Indian Penal Code (Act XLV. of 1860) and the Code of Criminal Procedure (Act XXV. of 1861).

7. The examinations will be held before such persons as the Government of Bengal shall appoint to be Examiners in pursuance of Section 6, Act XX. of 1865, according to such Regulations as shall be made by th Government for conducting such exa tions.

8. The application to the High for admission shall be made within years from the time of the applicant's ing the examination, or within such f time as the Court shall for any special allow.

9. In order to qualify a person t sent himself for the examination requi these Rules, for the higher grade—

1st. He must hold a certificate of passed the Entrance Examination University of Calcutta, Madras, or Bo or shall satisfy the High Court that received a liberal education elsewher in India.

2nd. He must hold a certificate of regularly attended a full course of in Law at one of the Colleges affili the Calcutta University, or such La tures elsewhere as shall be deemed High Court to be sufficient.

3rd. He must hold a satisfactory ce of good moral character.

4th. He must be between the ages and 40 years, unless he shall have admitted and shall have practised as a er of the lower grade previously application to be admitted to the exam for the higher grade, in which case h be admitted to that examination if h satisfy the Judge of the District in he resides that up to the time of t plication, he has been acting as a Ple the lower grade, and shall produce a cate from the Judge or Judges in Court he has been so practising, that, or their judgment, he is a proper to be admitted to examination for the grade.

10. Any person who, on the 1st J 1866, was practising as a Pleader lower grade, may present himself first examination for a Pleadership higher grade, which may take place af expiration of six months from the p tion of these Rules in the Calcutta C without having the qualifications re by Clauses 1 and 2 of Rule 9.

11. Every candidate for examination for the higher grade shall, six weeks at least before the day fixed for the examination, give notice to the Judge of the District in which he resides of his intention to present himself at the ensuing examination, and he shall establish to the satisfaction of the Judge that he possesses the qualifications declared by Rules 9 and 10 to be necessary for such candidates.

12. The Judge, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age, in a Register, with a certificate to the effect that the Judge has been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from, the said Register.

13. Before the date of examination, every candidate for the higher grade shall pay a fee of Rs. 20 into the Government Treasury of the District. The candidate shall at the same time present to the Collector the copy of the Register furnished to him under Rule 12, and the Collector's receipt for the fee shall be endorsed thereon. Every candidate for examination shall produce to the Examiners the copy of the Register granted to him by the Judge with the Collector's receipt endorsed thereon.

14. Candidates residing in Calcutta shall give the notice required by Rule 11, and make the payment required by Rule 13, to the Judge and Collector, respectively, of the 24-Pergunnahs.

15. Any person, who shall pass the examination as a Pleader of the higher grade, and who shall desire to be admitted, shall pay into the Government Treasury of the District in which he shall intend to practise Rupees 20, and shall, on presentation of the certificate of the Examiners and the Collector's receipt for the said sum of Rupees 20, be entitled to apply to the High Court for admission and enrolment.

16. The application, together with the certificate and receipt required by Rule 15, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court with such remarks as he may think fit to make thereon.

17. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the District, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX. of 1865, shall grant him a certificate as required by the said Act.

QUALIFICATIONS FOR PLEADERS OF THE LOWER GRADE.

18. Every person may be admitted as a Pleader of the lower grade who shall satisfy the Court that he possesses a competent knowledge of the subjects mentioned in this clause, by producing a certificate from the Examiners hereinafter mentioned, that he has passed an examination in the Regulations, Enactments, and Text Books set opposite to the respective subjects:—

Subjects.	*Regulations, Enactments, and Text Books.*
1st.—Hindoo Law...	Macnaghten's Principles of Hindoo Law, first seven chapters.
2nd. — Mahomedan Law.	Macnaghten's Principles of Mahomedan Law, except chapter 9.
3rd.—Law of Contracts.	Macpherson on Contracts.
4th.—The Law of property current in Bengal with reference to the Permanent Settlement: to the Government lien on land: to claim to hold lands exempt from the payment of Government Revenue: and to the mode in which Estates can be brought to sale for arrears of Revenue.	Regulations (Bengal) I., VIII., X., XIV., XIX., and XLIV. of 1793, and the Regulations and Acts by which the same have been altered: Act XI. of 1859, and the preamble to Regulation (Bengal) II. of 1793.

5th.—The relation of Landord and Tenant.	Act X. of 1859: Act VI. of 1862 (Bengal Council).
6th.—The law relating to Putnee Talooks.	Regulation (Bengal) VIII. of 1819: Act VIII. of 1865 (Bengal Council).
7th.—The Law of Limitation.	Act XIV. of 1859.
8th.—The Law relating to Stamps.	Act X. of 1862: Act XVIII. of 1865.
9th.—Civil Procedure, including the Small Cause Court Act.	Act VIII. of 1859: Act XXIII. of 1861: Act XI. of 1865.
10th.—The Law of Evidence.	Act II. of 1855, and Norton on Evidence.
11th.—Criminal Law and Procedure.	Penal Code (Act XLV. of 1860): Code of Criminal Procedure (Act XXV. of 1861).

19. The examinations will be held before such persons as the Government of Bengal shall appoint to be Examiners in pursuance of Section 6, Act XX. of 1865, and according to such Regulations as shall be made by the said Government for conducting such examinations.

20. The application to the High Court for admission shall be made within three years from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

21. In order to qualify a person to present himself for examination for the lower grade—

1st.—He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras, or Bombay, or a certificate of having passed the examination for a Government Vernacular Scholarship, or minor Scholarship.

2nd.—He must hold a satisfactory certificate of good moral character.

3rd.—He must be between the ages of 20 and 35 years.

22. Every candidate for examination for the lower grade shall, six weeks at least before the day fixed for the examination give notice to the Judge of the District in which he resides of his intention to present himself at the ensuing examination, and shall establish, to the satisfaction of such Judge, that he possesses the qualifications declared by Rule 21 to be necessary for such candidates.

23. The Judge, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age, in a Register, with a certificate to the effect that the Judge has been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from, the said Register.

24. Before the date of examination every candidate for the lower grade shall pay a fee of rupees 10 into the Government Treasury of the District. The candidate shall at the same time present to the Collector the copy of the Register furnished to him under Rule 23, and the Collector's receipt for the fee shall be endorsed thereon. Every candidate for examination shall produce to the Examiners the copy of the Register granted to him by the Judge with the Collector's receipt endorsed thereon.

25. Candidates residing in Calcutta shall give the notice required by Rule 22, and make the payment prescribed by Rule 24 to the Judge and Collector, respectively, of the 24-Pergunnahs.

26. Any person, who shall have passed for the lower grade under the preceding Rules, and who shall desire to be admitted, shall pay into the Government Treasury of the District in which he shall intend to practise Rupees 10, and shall, on presentation of the Examiner's certificate and of the Collector's receipt for the said sum of Rupees 10, be entitled to apply to the High Court for admission and enrolment.

27. The application, together with the certificate and receipt mentioned in Rule 26, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by him to the Registrar of the High Court with any remarks which he may think fit to make thereon.

28. Upon the applicant's being admitted nd enrolled by the High Court, a certificate that effect shall be forwarded by the egistrar of the High Court to the Judge the District, who, upon the applicant's elivering and leaving with him a declaraon in writing signed by the said applicant conformity with the recital in the form certificate given in the 2nd Schedule to ct XX. of 1865, shall grant him a certiate as required by the said Act.

RULES FOR MOOKHTARS.

29. *1st.*—Any person qualified to be mitted as a Pleader of either grade all be entitled to be admitted as ookhtar.

2nd.—Any person qualified to present mself for examination for a Pleadership either grade, may present himself for amination to be admitted as Mookhtar.

3rd.—Any person who can satisfy the dge of the District that he possesses the llowing qualifications, may be admitted to amination for the office of Mookhtar, :—

A.—That he is a person of good moral aracter.

B.—That he has received a liberal educan.

C.—That he is not above the age of 35 rs, unless he has been previously pracng as a Mookhtar, in which case no limit age will be prescribed.

30. Every candidate for examination as Mookhtar shall, six weeks at least before day fixed for the examination, give ice to the Judge of the District in which resides, of his intention to present himself the ensuing examination, and he shall, at time of giving such notice, establish to the satisfaction of such Judge that he possesses all the qualifications declared by Rule 29 to be necessary for such candidates.

31. The Judge, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age, in a Register, with a certificate to the effect that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from, the said Register.

32. Before the date of examination, every candidate shall pay a fee of Rupees 5 into the Government Treasury of the District. The candidate shall at the same time present to the Collector the copy of the Register furnished to him under Rule 31, and the Collector's receipt for the fee shall be endorsed thereon. The candidate for examination shall produce to the Examiners the copy of the Register granted to him by the Judge with the Collector's receipt endorsed thereon.

33. Candidates residing in Calcutta shall give the notice required by Rule 30, and make the payment prescribed in Rule 32 to the Judge and Collector, respectively, of the 24-Pergunnahs.

34. The examination shall be held before such persons as the Government of Bengal shall appoint to be Examiners in pursuance of Section 6, Act XX. of 1865, and according to such Regulations as shall be made by the said Government for conducting such examinations. The examination shall be in the following subjects :—

Code of Civil Procedure.
Law of Limitation.
Stamp Laws.
Small Cause Court Act.
Penal Code and Code of Criminal Procedure.

35. Any person, who shall pass the examination as a Mookhtar, and who shall desire to be admitted, shall pay into the Government Treasury of the District in which he shall intend to practise Rupees 8, and shall, on presentation of the certificate of the Examiners and of the Collector's receipt for the said sum of Rupees 8, be entitled to apply to the High Court for admission and enrolment.

36. The application, together with the certificate and receipt required by Rule 35, shall be presented to the Judge of the District in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court with such remarks as he may think fit to make thereon.

37. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the District, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX. of 1865, shall grant him a certificate as required by the said Act.

38. If any person, having passed the examination entitling him to be admitted and enrolled as a Mookhtar, shall fail to apply for such admission and enrolment for a period of three years, he shall not be admitted and enrolled, unless, by special order of the High Court, the time for such application shall be extended.

39. Provided that any person who, on the 1st January 1866, had been practising for the term of one year at least immediately preceding that date as a Mookhtar in a Criminal Court, and who shall satisfy the Judge of the District in which he ordinarily practised, that he is a person of good moral character, and qualified by his knowledge of Law and Procedure to continue practising as Mookhtar, shall be admitted to practise in any Criminal Court.

40. In any District in which there is a resident Magistrate and no resident Judge, it shall be sufficient for an applicant to satisfy the Magistrate that he possesses the qualifications mentioned in Rule 39.

41. The qualifications required by the foregoing Rules shall not be necessary for Pleaders or Mookhtars in the Non-Regulation Provinces under the Government of Bengal. Rules for the qualification, admission, and enrolment of such Pleaders and Mookhtars will be published hereafter.

42. If any person, having been admitted and enrolled as a Pleader or Mookhtar, shall neglect to take out a certificate, or having obtained a certificate, shall fail to renew it for a period of three years, he shall be suspended, and shall not be entitled to receive a certificate or to have his certificate renewed without further orders of the High Court.

43. Any person, who, having been admitted as a Pleader or Mookhtar, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the High Court, who may thereupon pass such orders as the said Court may think fit.

44. Any person, who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for admission as a Pleader or Mookhtar, shall state the fact in his application for admission.

45. Any wilful violation of any of the above Rules shall subject a Pleader or Mookhtar to suspension or dismissal.

The 2nd May 1866.

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before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And we do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

21. And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons, both within the limits of the Bengal division of the Presidency of Fort William, and beyond such limits, and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents.

Jurisdiction as to persons.

23. And we do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

Rs. 20,000 as above, and on the remainder at 1 per cent.

If the amount or value shall exceed Rs. 50,000, on Rs. 50,000 as above, and on the remainder at ½ per cent.

Provided that in no case shall the amount of any fee exceed Rs. 3,000.

Rule 2.—In suits for injuries to the person or character of the Plaintiff, such as suits for Assault or Defamation, or for injuries to property, or to enforce rights where the pecuniary value of such injury or right cannot be exactly defined, as in suits for interference with a Right to Light or Water, or to enforce a Right of Pre-emption, or suits for the Partition of Joint Property, where partition is improperly resisted, if the Plaintiff succeed, the Court may order the fee of the Pleader for the Plaintiff to be calculated with reference either to the amount decreed or according to the valuation of the suit, or according to such a sum not exceeding the valuation as the Court shall think reasonable and shall fix with reference to the importance of the subject of the dispute. In any such case the amount of the Pleader's fee shall be calculated according to the scale in Rule 1.

Rule 3.—If the suit be dismissed for default or upon the merits, or be decreed for the Defendant, the Defendant's Pleader's fee shall be calculated according to the scale in Rule 1 on the whole value of the suit.

Rule 4.—If the suit shall be decreed for the Plaintiff as to part only of his claim, and as to the remainder shall be dismissed or decreed for the Defendant, the fees allowed to each party's Pleader shall be fixed with reference to the value of that part of the claim in respect of which he shall succeed and shall be calculated according to the scale in Rule 1.

Rule 5.—If in any suit for Unliquidated Damages the Plaintiff shall succeed as to the whole of his cause of action, but shall fail to recover the full amount of damages claimed, the Defendant shall not be entitled to an allowance for a Pleader's fee in respect of the difference between the amount of damages claimed and the amount recovered, unless the Court shall be of opinion that the amount claimed for damages was unreasonable or excessive, and shall, for that or any other cause to be specified, direct that a fee for the Pleader shall be allowed to the Defendant.

If specially allowed, the amount of such fee shall be fixed with reference to the amount of damages disallowed to the Plaintiff, and shall be calculated according to the scale in Rule 1.

Rule 6.—If several Defendants who have a joint or common interest succeed upon a joint defence or upon separate defences substantially the same, not more than one Pleader's fee shall be allowed unless the Court shall otherwise order for a reason which shall be recorded. If only one fee be allowed, the Court shall direct to which of the Defendants it shall be paid, or shall apportion it among the several Defendants in such manner as the Court shall think fit.

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Rule 7.—If several defendants who have separate interests set up separate and distinct defences, and succeed thereon, a fee for one Pleader for each of the defendants who shall appear by a separate Pleader may be allowed in respect of his separate interest. Such fee, if allowed, shall be calculated with reference to the value of the separate interest of such defendant, according to the scale in Rule 1.

Rule 8.—The amount in respect of the fee of an adversary's Pleader, when allowed in any Miscellaneous Proceeding, or for any other matter than that of appearing, acting, or pleading in a suit prior to decree, shall be fixed by the Court according to the following scale, *viz.*:—

Rs. 10 to Rs. 80 in the Court of a Judge or Principal Sudder Ameen.

Rs. 4 to Rs. 16 in the Court of a Sudder Ameen.

Re. 1 to Rs. 4 in the Court of a Moonsiff.

The above scale shall apply to applications under Section 53 or 54 of Act XX. of 1865.

Rule 9.—In every suit in any Court of Original Jurisdiction which shall be undefended, the amount to be paid as the fee of the adversary's Pleader shall be calculated at one-half the sum at which it would have been charged had the suit been defended.

Rule 10.—If a review be rejected after summoning the opposite party, or if after the admission of a review the former judgment be upheld, the Pleader's fee, if allowed to the successful party in the review, shall be fixed by the Court at an amount which shall not in any case exceed one-half of the amount allowed by these Rules in case of an original decree.

Rule 11.—If, after the admission of a review, the former judgment be reversed, the fee of the Pleader in respect of the review, if allowed to the party who succeeds in the review, shall not exceed one-half the amount allowed by these rules in case of an original decree. The fee allowed in respect of the review will be irrespective of any Pleader's fee which may be included in any costs in respect of the original suit which may be adjudged to the successful party by the judgment in review.

Rule 12.—The amount to be allowed on account of the fee of an adversary's Pleader in appeals shall be calculated on the same scale as in original suits, and the principles of the above rules as to original suits shall be applied, as nearly as may be, to appeals.

Rule 13.—When the interest of several appellants is joint, not more than one Pleader's fee shall be allowed, unless the Court shall otherwise order for a reason to be recorded. If one fee only be allowed, the Court shall direct to which of the appellants it shall be paid, or shall apportion it

amongst the several appellants in such proportions as it shall think fit.

Rule 14.—If several respondents in one appeal appear by separate Pleaders, in determining whether several Pleaders' fees shall be allowed, the Court shall be guided by the principles laid down in Rules 6 and 7.

Rule 15.—If in any instance the payment of fees, according to the preceding Rules, shall not appear to the Court to be just and equitable, the Court may exercise its discretion in charging the fee of the adversary's Pleader in such manner as may appear just and equitable; but in every case when an allowance is made for a Pleader's fee, the amount shall be calculated according to the scale in Rule 1, or according to Rule 8, as the case may be.

Provided that, if, under the provisions of Section 351, Act VIII. of 1859, the decree of a Lower Court be reversed on appeal, and the case be remanded to the Lower Court to be tried upon the merits, the Lower Court, on passing its decree, may allow to the successful party such a sum as the Court shall consider to be reasonable, not exceeding half the amount calculated according to the scale in Rule 1 on account of his Pleader's fee in respect of the re-hearing, in addition to the full amount of his Pleader's fee calculated according to that scale.

Provided also that, if an appeal be preferred against the decree passed on remand, the fee, if any, allowed by the Appellate Court to the party succeeding in that appeal, shall not, unless for a special reason to be recorded, be less than quarter, nor more than half, of the amount calculated at the rate mentioned in Rule 1, if, by the decree of the Appellate Court remanding the case, the same party shall have been allowed a full Pleader's fee in respect of the former appeal in the suit either absolutely or conditionally upon his succeeding upon the remand.

Provided also that, if, under Section 354, Act VIII. of 1859, an issue be framed and referred by the Appellate Court for trial by the Lower Court, the Appellate Court may, if it think proper, allow to the party who shall succeed in the appeal, such a sum as the Court shall consider reasonable, not exceeding half the amount calculated at the rate mentioned in Rule 1 for his Pleader's fee in respect of the trial of the issue in the Lower Court, in addition to a full fee, in respect of the appeal, calculated at that rate.

exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

Jurisdiction as to Infants and Lunatics.

17. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the Bengal division of the Presidency of Fort William as that which was vested in the said High Court immediately before the publication of these presents.

Provision with respect to the Insolvent Court.

18. And we do further ordain that the Court for relief of insolvent debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And we do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

21. And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons, both within the limits of the Bengal division of the Presidency of Fort William, and beyond such limits, and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents.

Jurisdiction as to persons.

23. And we do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

And whereas by the said recited Act it is declared lawful for Her Majesty, at any time within three years after the establishment of the said High Court, by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty might think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty might think fit and as might have been granted or made by such first Letters Patent:

S. 17.

And whereas by the Act of the Twenty-eighth of Our Reign, chapter fifteen, entitled "An Act to extend the Term for granting fresh Letters Patent for the High Courts in India, and to make further provision respecting the territorial Jurisdiction of the said Courts," the time for issuing fresh Letters Patent has been extended to the First of January, One thousand eight hundred and sixty-six:

Title.

And whereas, in order to make further provision respecting the constitution of the said High Court, and the administration of justice thereby, it is expedient that the said Letters Patent, dated the Fourteenth of May, One thousand eight hundred and sixty-two, should be revoked, and that some of the powers and provisions thereby granted and made should be granted and made with amendments and additional powers and provisions by fresh Letters Patent:

1. Now, know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the Fourteenth of May, One thousand eight hundred and sixty-two, except so far as the Letters Patent of the Fourteenth Year of His Majesty King George the Third, dated the Twenty-sixth of March, One thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby.

Revocation of Letters Patent of 1862.

2. And We do by these presents grant, direct, and ordain that, notwithstanding the revocation of the said Letters Patent of the Fourteenth of May, One thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal for the Bengal division of the Presidency of Fort William aforesaid: and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court, prior to the date of the publication of these Letters Patent, shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

High Court at Fort William to be continued.

3. And We do hereby appoint and ordain that the person and persons who shall, immediately before the date of the publication of these Letters Patent, be the Chief Justice and Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges, or acting Chief Justice or Judges of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Judges of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, One thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed, until he be removed from such office and employment; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

Clerks, &c., of the said High Court to be continued.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority

Declaration to be made by Judges.

or person as the Governor-General in Council may commission to receive it:—

"I, *A. B.*, appointed Chief Justice [*or* a "Judge] of the High Court of Judicature at "Fort William in Bengal, do solemnly de-"clare that I will faithfully perform the du-"ties of my office to the best of my ability, "knowledge, and judgment."

6. And We do hereby grant, ordain, and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms, with an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Fort William in Bengal." And We do further grant, ordain, and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice, under the provisions of Section 7 of the said recited Act; and we do further grant, ordain, and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

Seal.

Writs, &c., to issue in name of the Crown and under Seal.

7. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Appointment of Officers.

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And we do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council. And it is Our further will and pleasure, and we do hereby for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said Rules.

Admission of Advocates, Vakeels, and Attorneys.

Powers of High Court in admitting Advocates, Vakeels, and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many advocates, vakeels, and attorneys, as to the said High Court shall seem meet; and such advocates, vakeels, and attorneys, shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

In making rules for the qualifications, &c., of Advocates, Vakeels, and Attorneys.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend

from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no persons whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court. except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of a co-suitor.

Civil Jurisdiction of the High Court.

Local limits of the ordinary original jurisdiction of the High Court.

11. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India, and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the Tenth day of September in the year of our Lord One thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Original jurisdiction as to suits.

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed One hundred rupees.

Extraordinary original civil jurisdiction.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Joinder of several causes of action.

14. And We do further ordain that, where plaintiff has several causes of action against defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

15. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court pursuant to Section 13 of the said recited Act; and that an appeal shall also lie to the said High Court from the judgment not being a sentence or order as aforesaid of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

Appeal from Courts in the Provinces.

16. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall

exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

Jurisdiction as to Infants and Lunatics.

17. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the Bengal division of the Presidency of Fort William as that which was vested in the said High Court immediately before the publication of these presents.

Provision with respect to the Insolvent Court.

18. And we do further ordain that the Court for relief of insolvent debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

Law to be administered by the High Court of Judicature at Fort William in Bengal.

By the High Court in the exercise of ordinary original civil jurisdiction.

19. And we do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

In the exercise of extraordinary original civil jurisdiction.

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of appellate jurisdiction.

21. And we do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Criminal Jurisdiction.

Ordinary original jurisdiction of the High Court.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons, both within the limits of the Bengal division of the Presidency of Fort William, and beyond such limits, and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India, as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents.

Jurisdiction as to persons.

23. And we do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.

24. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

No appeal from High Court exercising original jurisdiction.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

Court may reserve points of law.

High Court to review on certificate of the Advocate-General.

26. And We do further ordain that, on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court, shall be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

Appeals from Criminal Courts in the Provinces.

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Hearing of referred cases, and revision of criminal trials.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to or revision by the said High Court.

High Court may direct the transfer of a case from one Court to another.

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

Criminal Law.

Offenders to be punished under Indian Penal Code.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference, or revision, charged with any offence for which provision is made by Act No. XLV. of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

Judges may be authorized to sit in any places by way of circuit or special commission.

31. And We do further ordain that, whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and powers by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any places within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Admiralty and Vice-Admiralty Jurisdiction.

Civil.

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as may now be exercised by the said High Court.

Criminal.

33. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

Testamentary and Intestate Jurisdiction.

34. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority as that which may now be lawfully exercised by the said High Court, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal division, subject to the orders of the Governor-General in Council as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Matrimonial Jurisdiction.

Matrimonial Jurisdiction.

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction, within the Bengal division of the Presidency of Fort William, in matters matrimonial between our subjects professing the Christian religion: Provided always, that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

Powers of single Judges and Division Courts.

Single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, under the provisions of the thirteenth Section of the aforesaid Act of the twenty-fourth and twenty-fifth years of our reign; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

Regulation of proceedings.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, testamentary, intestate, and matrimonial jurisdiction respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII. of 1859, and the provisions of any law which has been made amending or altering the same, by competent legislative authority for India.

Criminal Procedure.

Regulation of proceedings.

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort

William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction, immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV. of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

Power to appeal.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Fort William in Bengal made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 15th Clause of these presents: Provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to, or of the value of not less than, 10,000 rupees; or from any other final judgment, decree, or order made, either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council. Subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to ourselves in Council from the Courts of the said Presidency; except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal from interlocutory judgments.

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said High Court in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such, party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences.

Appeal in criminal cases, &c.

41. And We do further ordain that from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council: Provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Rule as to transmission of copies of evidence and other documents.

42. And We do further ordain that, in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors,

in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Calls for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements, in such form and manner as such Government may deem proper.

Powers of Indian Legislature preserved.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our Reign, Chapter sixty-seven, and may be in all respects amended and altered thereby.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication; and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty King George the Third as was not revoked or determined by the said Letters Patent of the fourteenth of May one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster the twenty-eighth day of December in the twenty-ninth year of Our reign.

By Warrant under the Queen's Sign Manual.

(Signed) C. ROMILLY.

India Office, London, 31st January 1866.
Judicial No. 4.

Despatch from the Right Hon'ble the Secretary of State for India to His Excellency the Right Hon'ble the Governor-General of India in Council.

SIR,—I NOW transmit to you the amended Letters Patent for the High Court of Judicature at Fort William in Bengal. They have been issued under the authority of the High Court's Act, Section 17, the term for granting them having been extended by the Act of last Session 28 Vict., c. 15.

2. In transmitting them, I have to acknowledge your Despatches, of which the dates are annexed.*

* India Judicial Despatch, dated 5th January (No. 2) 1865.
Ditto ditto, dated 16th January (No. 6) 1865.
Ditto ditto, dated 20th September (No. 52) 1865.

3. I have at the same time to thank the members of Government and the Judges of High Court, in all the Presidencies, for the care and attention which they have bestowed to the subject, and the very valuable assistance which they have rendered me. I have also had, during the preparation of these documents, the great advantage of personal communication with distinguished persons of both classes.

4. Many of the recommendations which I have received from these various quarters will be found incorporated in the provisions of the Charters. And the subject has been so closely examined in correspondence, and is so familiar to the learned Judges who will have to carry the provisions of the amended Charters into execution, that it would be unnecessary for me to furnish any commentary on the several changes, generally of no great importance, which have been introduced. I will only notice a few.

5. The provisions of Clauses 9 and 10 (answering to 7, 8, 9, and 10 of the former Charter) have been framed in order to meet the views expressed to me, in particular, by

the Madras Judges. They are intended for the purpose of leaving to the several High Courts more ample discretion as to the admission of persons authorized to appear, plead, or act before them, and also to exercise a better defined discipline over them.

6. The alteration in Clause 12 will explain itself, and has been made in deference to the views of some of the Judges of the High Court.

7. I will only direct your attention to the alteration in the language of Clause 31 (30 in the former Charter), which does not appear to need explanation.

8. The addition in Clause 34 (testamentary and intestate jurisdiction) was introduced for the purpose of preventing, as far as possible, any clashing of jurisdiction, in this respect, between the High Court and other tribunals which have been or may be established by competent authority.

9. Clause 37 (rules of Civil Procedure) has been altered to its present form after full consideration of the difficulties suggested by the various communications I have received on the subject. The purpose is to leave the High Court's discretion in this respect fettered only by the authority of the Local Legislatures, not thereby excluding the authority of the various rules and orders which may be in force in the proceedings in the Admiralty and other jurisdictions named, but leaving it to the Court to adopt and modify those rules, bearing in mind, as no doubt they will do, the general advantage of conforming with those established in analogous cases in this country, but aiming, above all, at a simple and uniform procedure on all sides of the Court.

10. The question of the rules which are to govern appeals to the Privy Council (to which I directed attention in paragraphs 37, 38 of my Despatch of 14th May 1862 (No. 24), transmitting the original Letters Patent, being still under consideration here, no alteration has been made in the Clauses relating thereto.

11. I will now proceed to notice certain matters of importance, as to which further changes had been suggested to me by some of the authorities consulted, which changes have not been adopted. I can assure you that the suggestions in question have been very deliberately considered by myself in Council, and that it is only on most full consideration that I have felt unable to adopt them.

12. The first of these relates to the power of local legislation to interfere with the provisions of the Charters. This has been hitherto intentionally confined to the Governor-General in Council at meetings for the purpose of making laws and regulations. But it has been very strongly represented to me, from quarters entitled to my best attention, that the prohibition thus imposed on the Legislatures of the Presidencies of Madras and Bombay acts injuriously. It is said, for instance, that these Legislatures cannot enact laws, clearly within their competency, such as for the creation or regulation of inferior Courts of Judicature, without incurring the danger, in appeal or other causes, of interfering indirectly with the constitution or powers of the High Courts.

13. I do not at all deny that there is force in these observations, although, perhaps, it may be thought that an obstruction which can be at any time removed by having recourse to the legislative powers of the Central, to supplement those of the Presidency, Council, can scarcely be of a very serious class, and, on the other hand, that there are advantages in retaining the legislative control over these high tribunals, entirely in the hands of the Central authority. But, without entering into this discussion, it is enough to say that the reason which prevailed with me was, that I was not satisfied as to the power of the Crown to act as required. Without going on this occasion into technical reasoning, I will only say that I thought it by no means clear that such a change could be legally made by these Letters Patent, but that, even if this were otherwise, the intention of Parliament was so clearly confined to giving the Crown power to alter the constitution of the Courts, not to interfere with the respective powers of the Legislatures, that the required change would have been in violation of the spirit of the Statutes from which the Crown's authority in this matter is derived. I, therefore, leave this subject open for further consideration.

14. On the other hand, it was suggested to me by the Government of Bombay (Despatch of 13th January 1865), that it appeared doubtful whether the Governor-General in Council himself possessed full powers of legislation in relation to the High Courts. I am not aware that this doubt was shared by others; but I have thought it advisable to confer that power still more

expressly than before (so far as the Letters Patent are able to confer it) by the general Clause 44.

15. The next subject to which I will direct your attention is that of the relation between the High Courts and the Executive Government. I do not think it advisible, on the present occasion, to do more than advert to a subject which has occasioned a large amount of correspondence between the Home Government and those of India. It is enough to observe that here also I felt that, if the Crown were advised to make, by Letters Patent, any change in those relations, or to give any further directions concerning them, it would in truth be entrenching perhaps in strict law, certainly in spirit and substance, on the functions of the Legislature and overstepping the limits imposed on its authority by the High Court's Act.

16. I have sent copies of this Despatch to the Governments of Madras and Bombay.

I have, &c.,

(Signed) C. Wood.

Rules of Practice of the High Court of Judicature at Fort William in Bengal, dated the 4th April 1866.

Procedure in Civil Cases.

It is ordered that, until further rules shall be made by this Court in pursuance of the authority conferred by Section 37 of the Letters Patent, dated the 28th day of December in the 29th year of the reign of Her Majesty Queen Victoria, all proceedings in Civil cases which shall be brought before the Court, except proceedings in its Admiralty, Vice-Admiralty, and Matrimonial Jurisdiction, and in its Original Testamentary and Intestate Jurisdiction, shall be regulated by Act VIII. of 1859 and Act XXIII. of 1861, and by such other Acts and by such Rules and Orders of the High Court as were in force and regulated the procedure of the Court at the time of the publication of the said Letters Patent, except so far as the same are at variance with the provisions of the said Letters Patent.

Admiralty, Vice-Admiralty, and Matrimonial Jurisdiction—Regulation of Proceedings by Code of Civil Procedure.

2. The procedure in Civil cases which shall be brought before the Court in the exercise of its Admiralty, Vice-Admiralty, or Matrimonial Jurisdiction, shall be regulated, so far as the circumstances of the case will admit, by Act VIII. of 1859, and Act XXIII. of 1861.

Admiralty and Vice-Admiralty Jurisdiction—Regulation of Proceedings when Code of Civil Procedure not applicable.

3. In cases in the exercise of Admiralty or Vice-Admiralty Jurisdiction in which a ship or a ship and cargo have been or are to be proceeded against or arrested, or in which goods only have been or are to be proceeded against or arrested, either for the purpose of proceeding against the goods or the freight due thereon, or in which property shall have been or shall be arrested, and no party shall have appeared or shall appear at the return of the warrant, and in all other cases in the exercise of Admiralty or Vice-Admiralty Jurisdiction in which the rules contained in Act VIII. of 1859 are not applicable, the practice and procedure shall be regulated as nearly as possible by the rules and regulations made and ordained by order of His late Majesty King William IV. in Council in pursuance of the 2nd William IV., c. 51, touching the practice to be observed in the several Courts of Vice-Admiralty in the Colonies, except so far as such rules may be inconsistent with the 24 and 25 Vic., c. 104, or of the said Letters Patent.

Suits for Mariners' wages.

4. In suits for Mariners' wages brought before the Court in the exercise of Admiralty or Vice-Admiralty Jurisdiction, any number of Mariners may proceed jointly in one action.

Testamentary and Intestate Jurisdiction.

5. The procedure in all cases which shall be brought before the Court in the exercise of its Original Testamentary and Intestate Jurisdiction shall be regulated, as far as the circumstances of the case will admit, by the rules of procedure laid down in the Indian Succession Act of 1865 whether the Act itself applies to the case or not, and, in cases to which such rules are inapplicable, by Acts VIII. of 1859 and XXIII. of 1861.

Admission of Advocates.

6. All persons who, at the time of the publication of the said Letters Patent, were Advocates of the High Court of Judicature at Fort William in Bengal, are approved, and are now admitted, and shall be enrolled, as Advocates of this Court.

Admission of Vakeels.

7. All persons who, at the time of the publication of the said Letters Patent, were Vakeels of the said High Court, are approved, and are now admitted, and shall be enrolled, as Vakeels of this Court.

Admission of Attorneys.

8. All persons who, at the time of the publication of the said Letters Patent, were Attorneys of the said High Court, are approved, and are now admitted, and shall be enrolled, as Attorneys-at-Law of this Court.

Rank and precedence of Advocates, Vakeels, and Attorneys.

9. All such Advocates, Vakeels, and Attorneys-at-Law, shall be enrolled in this Court in the same order as that in which they were enrolled in the said High Court under the former Letters Patent, and they shall respectively have the same rank and precedence in this Court as they lawfully had at the time of the publication of the said Letters Patent.

Advocates may appear and plead in any branch of the Court.

10. Advocates of this Court may appear and plead for suitors in any branch of the Court, Civil or Criminal.

Vakeels may appear, act, and plead—Proviso.

11. Vakeels may appear, act, and plead for suitors in this Court, provided that they shall not appear, plead, or act for any suitor in any matter of Ordinary Original Jurisdiction, Civil or Criminal, or in any matter of appeal from any case of Ordinary Original Civil Jurisdiction, unless, upon appeal from a judgment in a case of such Original Civil Jurisdiction, a question of Hindoo or Mahomedan law or usage shall arise, and unless the Court or a Judge thereof shall think fit to admit a Vakeel or Vakeels to plead for any suitor or suitors in that case. In such case the Vakeel or Vakeels so admitted may plead accordingly.

Vakeels may act under Section 13 of the Letters Patent.

12. A Vakeel shall be at liberty to appear, act, and plead in any case removed under the provisions of Section 13 of the said Letters Patent.

Rules 11 and 12 applicable to Attorneys admitted as Vakeels.

13. Every Attorney, who has been admitted and enrolled as a Vakeel, shall, in his character of Vakeel, be bound by Rule 11, and be entitled to the privilege granted to Vakeels by Rule 12.

Attorneys admitted as Vakeels not deprived of their powers as Attorneys.

14. Attorneys admitted as Vakeels shall not thereby be deprived of their powers as Attorneys-at-Law.

By order of the Court,

(Signed) H. T. PRINSEP,

Registrar.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 1st December 1865.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Limitation (Clause 3, Section 3, Regulation II., 1805)—Suit for Rent—Possession rent-free for 60 years before suit.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Chundrabullee Debia

versus

Luckhee Debia Chowdrain.

A suit for rent is barred under Clause 3, Section 3, Regulation II., 1805, against a person who has been, by himself or by those under whom he claims, in peaceable possession without payment of rent for 60 years before the commencement of the suit.

That Clause takes away from the Courts all authority to take cognizance of any suit whatever if the cause of action shall have arisen 60 years before the institution of the suit; it precludes all enquiry into any original defect in the title under which the possession commenced, and makes it unavailing to show that the possession commenced under a grant made null and void by Regulation XIX. of 1793.

THIS was an appeal from a decree of the Sudder Dewanny Adawlut of Bengal, affirming a decree of the Principal Sudder Ameen of the Civil Court of Mymensing, which last had reversed a decree of the Sudder Ameen of the last named Court in favor of the appellant. The respondent has not appeared, and this appeal has been heard *ex parte*.

The original suit was brought by the respondent to recover arrears of rent for six years and nine months preceding its commencement, and the following may be taken to be the facts of the case: The appellant and those under whom she claims had been in peaceable and undisturbed possession of the property for more than sixty years; it is in the town Nusseerabad, and within and parcel of a 4-annas share of the zemindary of Pergunnah Allapsing, of which the respondent, as mother and guardian of her son, a minor, is the proprietor in possession. The appellant claims under a grant from the ancestor of the respondent, which purports to have been made for the setting up an idol; and concludes thus—"Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grandsons. For this purpose I have given you this *bromuttur pottro.*" The date of this instrument corresponds with 10th February 1796 A. D. The idol has remained, and its worship has been continued uninterruptedly from that time. The respondent's plaint, which was not filed until the 15th April 1857, was preceded by no demand of rent nor any suit for the assessment of it; but the rent sued for is stated to be "in accordance with the rate of rent obtaining in lodging-houses at this place of Nusseerabad:" this rate being fixed by the Bengal Regulation XIX. of 1793, Section 10; on which, indeed, the respondent's case entirely depends.

These are all the facts, and it seems clear that, if the original grant has not been annulled by any Regulation, or if the possession has become unimpeachable by reason of the lapse of time, either of the twelve years or of the sixty years prescribed by the Bengal Regulations, or if at all events it was under the circumstances necessary that this action should have been preceded by a suit for assessment of the rent, or a demand of rent ascertained in some way or other, the original suit could not be maintained, and the two latter decrees must be reversed. They were impeached for the appellant on all these grounds. Their Lordships, however, do not find it necessary in this case to give any opinion upon the first or third of these points, or upon the question whether under the circumstances of this case the twelve years' limitation prescribed by the Regulations, ought to be held applicable to it. They have reason to believe that questions of some importance, and possibly of some difficulty, have been raised, and that some cases which were not cited at the Bar have been decided in the Courts in India, bearing more or less directly on some at least of these points, and think it would neither be prudent nor safe for them, more especially in a case which has been argued on one side only, to give any opinion which might affect these questions. Moreover, it is obvious that to decide this case upon the last of the grounds on which the appellant relied, might only lead to renewed litigation. Their Lordships, therefore, abstain from giving any opinion whatever upon any of these points.

It may be assumed for the purpose of argument, but for that purpose only, and without the expression of any opinion by their Lordships, that all these points ought to be decided in favor of the respondent; but they are of opinion that the appellant was entitled to have the suit dismissed upon the ground of there having been peaceable possession by her and by those under whom she claims for sixty years before the suit was commenced, and of the suit being therefore barred by the early part of the 3rd Article of the Bengal Regulation II. of 1805.

The first and second Articles, and the second branch of the third Article of this Regulation, have reference to the twelve years' limitation which was previously in force, explaining and qualifying that limitation; and as their Lordships do not, as has been already said, rest their judgment on this limitation, it is unnecessary to comment on these parts of the Regulation; but the first branch of this third Article provides that "nothing in the preceding Clause, or *in any part of the existing Regulations*, shall be held to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have arisen sixty years before the institution of the suit; nor shall any plea on the part of the plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient ground for taking judicial cognizance of any suit so preferred." This branch of the Article, therefore, in its very comprehensive language, embraces every then existing Regulation by which any Court in Bengal was authorized to take cognizance of any suit whatever; it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit; it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all enquiry into any original defect in the title under which the possession for the latter period commenced; it makes it, in effect, in cases in which the Section applies, unavailing to show that the possession of the appellant commenced under a grant made null and void by the Regulation of 1793.

The question then is, what is the cause of action in the present case, and when did it arise? In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense, the cause of action.

The suit, indeed, may in some sense be likened to what is of daily occurrence, the action to recover the later items only of a long account, which have become due within six years, although the Statute of Limitations has barred the demand for the earlier items. The distinction, however, between such an action and the present suit is obvious; the items of an account are independent of each other: each represents a distinct contract or a distinct debt. But the right to recover rent, for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character through the whole sixty years.

It is the case of the plaintiff in the Court below that, by reason of the character of the grant and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. If, in spite of length of possession, an action for use and occupation could be maintained, so long as a plaintiff could show a good title in himself and a bad one in the occupier, of what avail would any Statute of Limitation be? A man might be barred in an action directly brought to recover the possession, such as ejectment, and yet not be barred when he sued from year to year, in use and occupation, for a compensation for the fruits of the land; because in this the occupation would be referable to the sufferance and permission of the real owner, and so be a good consideration for an implied promise to pay what it was worth. But this clearly could not be; and so here, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent, which is the compensation for the occupation—that occupation having been always of one and the same character; in fact, rent-free.

Their Lordships, being of this opinion, will therefore humbly advise Her Majesty that this suit was barred by the sixty years' possession of the appellant, and those under whom she claims, and, therefore, that the original judgment of the Sudder Ameen dismissing it ought to be affirmed, and the two later judgments reversed, and the costs of all the proceedings below, with those of this appeal, be paid by the respondent.

The 8th December 1858.

Present:

Lord Kingsdown, the Judge of the High Court of Admiralty, Lord Justice Knight Bruce, Sir E. Ryan, and Sir L. Peel.

Practice of Privy Council (in reversing decrees of Lower Courts on questions of fact).

On Appeal from the Sudder Dewanny Adawlut of Agra.

Cheyt Ram

versus

Chowdhree Nowbut Ram.

A very strong case is required to justify the Privy Council to reverse the decision of two Courts in India upon a mere question of fact as to the genuineness or forgery of an instrument which is the foundation of the action in which the appeal is brought, particularly when the Judges in the Court below had formed their opinions mainly on an inspection of the document which the Privy Council has had no opportunity of seeing.

THE appellant in this case has undertaken a task of no ordinary difficulty, since he asks for a reversal of the decision of two Courts in India, upon a mere question of fact, that fact being the genuineness or forgery of an instrument which is the foundation of the action in which the appeal is brought.

The Judges in the Court below have formed their opinions mainly on an inspection of the document, which we have had no opportunity of seeing. The case must be very strong to justify such an unusual exercise of authority, and the question is, whether the appellant has established such a case.

Radakishen, the original appellant, and whom we shall call the appellant in the observations we are about to make, brought an action against the respondent on a bond for 16,000 rupees. The name of the respondent appeared in the bond, impressed by the stamp of a seal. The Zillah Court, on examining the signature, and comparing it with other impressions of the seal of the respondent, acknowledged to be genuine, decided that the impression on the bond was a forgery, and dismissed the suit. The Sudder Court, on appeal, confirmed this decision, and, in effect, ordered the appellant to be prosecuted for forgery. He was so prosecuted, and was acquitted. He then applied for a review of the judgment against him in the civil suit, which was refused, and he has now appealed to Her Majesty in Council.

The appellant and respondent were both residents at Bareilly, the former being apparently a banker and money-lender, and the latter a land-owner. It is admitted on all hands that pecuniary transactions had taken place between these parties; that moneys were advanced by the appellant to the respondent, and securities given by the respondent to the appellant. In particular, a mortgage by the respondent to the appellant, under which the latter was in possession of a village of the respondent, and a bond for 4,000 rupees by the respondent to the appellant, are specifically mentioned.

But in addition to these transactions, the appellant alleges that there were many other advances made by him to the respondent upon bonds and notes-of-hand, in respect of which, in the month of August 1851, a large sum was due for principal and interest; that in the course of that month the parties came to a settlement of accounts; that the appellant having consented to make an abatement from the amount due, the balance was settled at 15,000 rupees; and on the 30th of August of 1851, a bond was executed by the respondent to the appellant to secure the payment of that sum, with interest at one per cent. per month, in the month of May then following.

The amount due upon the instrument being unpaid, the appellant, on the 30th September 1852, filed his plaint in the Zillah Court of Bareilly, claiming the sum of 16,955 rupees for principal and interest on the alleged bond.

On the 2nd October 1852, the defendant undertook to file a defence to the suit within two weeks.

This, however, he neglected to do; and on the 2nd December 1852, an order was made by the Court that the plaintiff should proceed to prove his case *ex parte*.

He, accordingly, on the 3rd December 1852, obtained an order to summon his witnesses, and brought into Court the bond in question, which was ordered by the Judges on that day to be kept with the *misl* or record of the proceedings.

The production of this bond, and its deposit in Court at this early stage of the proceedings, when it was open to the inspection of the respondent and his agents, appear to be of great importance in this case.

The bond purported to have been given after a settlement of accounts, to be stamped with the seal of the respondent, and to be witnessed by Doorgapershad, the *mootsud-*

witness; by Ramsookh, also an attesting witness (though his name is written by Doorgapershad, the agent of the respondent, as Ram Sing); and by Gholam Hossein, who was present, and saw the transaction, though there appears to be some error as to his being an attesting witness—at least, his name is not found in the instrument as printed in the appendix.

These witnesses are cross-examined, but their evidence is not in the least shaken, and, if it be believed, it proved most distinctly that the instrument in question was written by Doorgapershad, the agent of the respondent, who also attested it, and that the respondent deliberately stamped his seal upon it, in order to give it effect.

But what makes his evidence conclusive is this: that the respondent having the means of disproving the story if untrue, by producing his own agent to say that he did not write, and did not witness the bond, does not venture to call him, or any other witness, to the point. He examines thirteen witnesses upon matters totally irrelevant to the real issue, and does not examine one who tends even to throw a doubt upon one single material fact of the appellant's case.

But the matter does not end here. So far from denying this bond, the respondent, after its execution, endeavoured to obtain time for payment of it, which brings us to the third head of evidence—the recognition. Doorgapershad Mootsuddee is asked: "Did any one, ever coming before you, make any acknowledgment?" He answers:

"In the last month of Kartick, I went to Chowdhree Nowbut Ram, to write a note on account of Lalla Kalka Doss, resident of Peelhibeet, who had mortgaged the village of Rooppoor. Chowdhree Nowbut Ram told me to give Lalla Radhakishen 4,000 rupees, for which the latter had brought an action; further saying—'There is another suit for 15,000 rupees. You may give 4,000 rupees, and Lalla Radhakishen will take something less in the amount of costs; you should have this matter settled, and the suit for 15,000 rupees you may have adjusted afterwards.' I said that the matter, as it then stood, would cause disrepute, and that it should, therefore, be settled. Again, Chowdhree Nowbut Ram said: 'You should have the matter settled.' I said: 'Tell me what to say, that I may go to him and settle accordingly.' Chowdhree Nowbut Ram replied, 'that he would be able to pay the money in five years, and that if he were made to pay in a lump it would ruin him.' I said: 'Your and Lalla Radhakishen's affairs are founded on mutual friendship. He is like your patron, and will not ruin you; but he will not agree to the promise of payment in such length of time, because, in six years' time, interest on the sum of 15,000 rupees will accrue to nearly 15,000 rupees. Such promise of payment, without interest, he will not agree to.' Again the Chowdhree said: 'You may give 4,000 rupees on account of the suit for that sum. I shall send Sheonarain, and, as you also will be there, you may have the matter settled; and, if he will not come to terms, I will defend the suits.' After this I came and told Lalla Radhakishen what the Chowdhree had said; and also that, as the transaction was like a family affair, he should settle it amicably; adding, 'It is difficult for him (the Chowdhree) to pay 15,000 rupees at once. It is advisable to agree to instalment payment.' Radhakishen said: 'I have no objection; but how can I agree to receive instalments without any one's coming to propose it? Have instalments ever been agreed to without interest?'"

This attempt of the respondent to obtain time for payment of the bond is further proved by Seetaram, the witness already mentioned, who, speaking of Sheodut Ram, Jumadar, whom he describes as the Dewan of the respondent, and sole manager and agent of his household, says:—

"Sheodut Ram Jumadar told me that 'Lalla Radhakishen had brought an action for 15,000 rupees against the Chowdhree; you should persuade the latter to fix an instalment of 3,000 rupees per annum for five years without interest. You visit Lalla Radhakishen frequently, and should, therefore, have this matter settled.' I and the Jumadar accordingly went to Radhakishen, and introduced a negotiation relative to the payment by instalments. Lalla Radhakishen said: 'I will not agree to receive instalments for five years without interest.'"

There was, therefore, clear, positive, consistent, uncontradicted testimony of the agreement to give the bond, of its actual execution, and of its subsequent recognition; and, in the teeth of all this testimony, upon what grounds have the Courts below held it to be a forgery?

They compared the impression made by the seal on this instrument, with the impression made upon other instruments by what is admitted to have been a genuine seal of the respondent, and they say that, upon a very minute inspection and measurement by a pair of compasses, the letters, or some of the letters, of the defendant's name appear on the bond to differ something in their size from the signatures admitted to be genuine. Whether this may have arisen from the mode in which the stamp was affixed on the different instrument, or from the greater or less quantity, or the greater or less fluidity, of the ink used on such

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occasions, it is immaterial to enquire. The question is, is it or not proved, beyond all shadow of doubt, that the respondent did affix some seal to this instrument for the purpose of giving it effect? The evidence on this point is quite irresistible.

It is not till the case is on hearing that this objection is made. It never occurred to the respondent or his agents to set up such a defence when the bond was deposited in December 1852, nor, as far as appears, till July or August 1853. The bond had been lying in the interval in the office of the Court; it is to be collected from the Circular Order referred to in the argument, that it is not difficult and not unusual for parties to procure access to, and to tamper with documents so placed, and we cannot have the least doubt that such discrepancy as exists between this seal and the others produced, if they were the impressions of the same stamp, and if the difference is not to be accounted for by the accidental circumstances to which we have adverted, has been occasioned by the fraudulent acts of the respondent's agents while the bond was in the custody of the Court.

When the direct evidence in favor of the instrument is so overwhelming, it is needless to resort to confirmatory proof; it may, however, be observed that it is shown that the stamp on the instrument had been sold, shortly before the date of the bond, to an agent of the respondent for his use; and if the bond had been a forgery, it is utterly inconceivable that of all persons in the world the name of the respondent's own confidential agent should have been selected for forgery, as the writer of it and one of the attesting witnesses.

Every circumstance of suspicion which could be alleged against the appellant's claim was brought forward, and urged with great force and ability by Mr. Forsyth, but there really is none of any value.

The only observations which at first had some weight with their Lordships were three—*first*, that the bond was not registered; *secondly*, that the cancelled documents were not delivered up; and *thirdly*, that it was strange that a suit should have been instituted (as it was) upon the later bond for 4,000 rupees, instead of the two being united in one suit, or that which was first executed (the bond for 15,000 rupees) being first put in suit.

But as to the *first* point, we are informed by Sir L. Peel that in India two-thirds of the bonds which are payable at short dates, as this was, are not registered; as to the *second*, that a plaintiff is required to prove the consideration for his bond, and that the documents relating to it were, therefore, properly left in the possession of the appellant; and as to the *third*, supposing the two bonds could by the practice be included in one suit, we think that the delay in bringing the second suit is sufficiently accounted for by the negotiations which were carried on for payment of the amount of the bond by instalments.

Upon the whole, we can entertain no doubt that there has been in this case an entire miscarriage of justice in the Courts below; and we cannot but express our deep regret that the appellant should not only have had his suit dismissed, but been subjected to the indignity, vexation, and expense of a criminal prosecution in a case where the claim is established by testimony less liable to suspicion than we ever remember to have seen brought forward on an appeal from India in a case of disputed fact.

We must do to this gentleman, or to his representatives, such justice as is in our power, by advising Her Majesty to reverse the decision complained of, to establish the plaintiff's demand in the suit, and to order payment of the amount of the bond with the interest due upon it by the respondent, together with the costs both in the Zillah and in the Sudder Dewanny Courts, and the costs of this appeal.

The 9th December 1862.

Present:

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Sale of Estate in execution of decree—Regulation XX., 1795—Onus probandi (Title to land in old purchaser).

On Appeal from the Sudder Dewanny Adawlut at Agra.

Rajah Mohesh Narain Sing

versus

Kishramund Misser, and Rughobur Dyal Sing.

It is contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure to hold that when, for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside, and the proceedings

as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit.

The sale of an estate in execution of a decree under Regulation XX., 1795, is not impeachable on the ground that the Court, in ordering the sale, dealt directly with the Collector of the Zillah instead of with the Board of Revenue; the principal object of that Regulation having been the security of the public revenue. Nor was the Collector precluded from accepting a lower *bonâ fide* bid and rejecting higher bidders who could not satisfy him that they were real bidders, particularly in a case where, on several previous occasions, sales were attempted and rendered abortive by the highest bidders having turned out unable or unwilling to complete them.

It would be monstrous to make the title to land in a purchaser depend, years after it has accrued and possession has been enjoyed under it, on his proving the same affirmatively.

THIS is an appeal from a decree of the Sudder Dewanny Adawlut at Agra, which reversed a decree of the Civil Court of Zillah Jounpore, in favor of the appellant. The suits in which these decrees were made respectively on the 23rd February 1855 and the 10th May 1856 were brought by the appellant to recover back possession of an estate, called the Talooka Bazar Rajah, Pergunnah Gudwarra, which had been the property of his father, Rajah Surnam Sing, and which had been sold in execution of a decree obtained by one Petumbar Mookerjee in May 1830 in a suit first instituted by him in 1822 for the recovery of a debt. One Barwise, in 1837, had become, by purchase, the holder of this decree; and the respondents claimed by purchase for a valuable consideration, and through mesne conveyances, from his representatives, who had been purchasers at the sale held in execution of the decree. The claim in the present suit was rested not upon any supposed miscarriage in the determination of the original suit, nor any defect in the title of Barwise to the benefit of the decree, but on certain alleged informalities and defects in the course of executing that decree, and the sale under it.

In order to understand the questions now raised, a short statement of the material facts will be necessary.

It will be observed that the litigation commenced in 1822, and that the decree in favor of the original plaintiff was obtained in 1830; seven years were then passed in fruitless attempts by him to carry it into effect; his hopes or his means becoming exhausted, he was induced, for a valuable consideration, to make over this decree to an Englishman of the name of Barwise, who being in the service of the Government, it was supposed probably by both parties, might be more successful in defeating the various devices by which its execution had been up to that time prevented. It is immaterial to the decision of this case whether he purchased on too favourable terms, or succeeded in obtaining too great advantages. It may have been so—on that we pronounce no opinion. It was not, however, until the 6th June 1845, and after he had been murdered, as alleged, by the appellant, that his representatives obtained the order from the Zillah Court of Jounpore, on which the sale actually took place, the validity of which is questioned in the present appeal.

We propose now to examine the objections to this sale, adverting only, as we proceed, to the previous circumstances, so far as may be necessary for the understanding and disposing of these objections. The order for this sale will be found in page 26 of the joint Appendix, No. IV., and is as follows, dated June 6, 1845:—

"This case was brought up this day. It was found from the Report of the Moonshee of Execution of Decrees, that 48,522 rupees 0 annas 1 pice, the total estimated value of the claim, composed of 46,856 rupees 14 annas entered in the Report of the 22nd November 1844, and 1,664 rupees 11 annas on account of present interest up to the 22nd May 1845, and 8 annas for costs, is quite correct. As it appears from the accounts to be right and proper that Talooka Bazar Rajah, embracing sixty-three original and dependent villages, be sold to realize the amount above specified, it is, therefore, ordered that a copy of this proceeding be sent to the Collector of this Zillah, to apprize him of the above-mentioned facts, in order that the said Collector, after the issue of the second notification, may put up to sale the aforesaid estate, the property of the defendant the debtor, for the sum claimed as above, and afterwards inform this Court of the result."

It will be observed that this order deals directly with the Collector of the Zillah, and is silent as to the Board of Revenue. This, it is said, is in breach of the Regulations on this matter, then in force, of 1795, Regulation XX., which directs that, when any Court of Civil Judicature shall have occasion to sell lands in satisfaction of a decree, it shall transmit a copy thereof to the Board of Revenue, which is, with all practicable despatch, to cause lands to be disposed of at the Presidency, or in the district in which the lands are situated, as they may

deem most advantageous to the proprietor. The objection founded on the apparent non-compliance with this Regulation was taken, both in the Zillah and Sudder Courts, in this action, and overruled by both—and, their Lordships think, quite properly. It appears that, when a former order for sale had been made by the same Court in 1843, this Regulation had been fully complied with; that the Commissioner had authorized the sale of the whole talooka; that as many as four sales had taken place, ineffectual and nominal only, because the best bidders on each occasion were men of straw, who had, no doubt, been put forward for the very purpose of rendering the decree abortive. It is said that the order, directing these former sales, must be considered as having been made in a different suit from that in which the order now in question was made, for that the proceedings had been taken off the file, and the lands to be sold and the sums to be recovered were different in the two orders. There is no foundation for either of these assertions. It would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when, for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. Nor is it true, in any material sense, that either the properties to be sold, or the sums to be recovered, were different; in both the same whole talooka, rendering to the Government the same jumma, was directed to be sold, and for the same principal sum; but the number of villages comprised in it, owing to some inaccuracy, was differently stated, and the total sum was increased in the later order by adding the interest which had accrued, due in the interval between the two, with a few annas for the costs. The principal object of the Regulation in question was the security of the public revenue, as appears not merely from its own preamble, but by the modifications which were made in it by Regulation 7 of 1825, tit. ii.; and this object had been fully answered by the communication to the Commissioner in 1843, and the proceedings which were taken by him upon it. If this, therefore, had been a question raised between the original parties to the suit, and if the objection had been made promptly after the sale had taken place, their Lordships would still have been of opinion that it had received its proper answer in the Courts below; but it must never be forgotten that they are now called upon to give effect to it as against a purchaser for a valuable consideration, and, so far as appears, entirely without notice, in a suit commenced in July 1854, the disputed sale having taken place in July 1845. What safety could there be, except by the Statute of Limitations, for any man's title, where a judicial sale had taken place, if he were bound to satisfy himself of the decree-holder's compliance with every one of the many formalities prescribed by law for the conduct of it. This is a remark which their Lordships must bear in mind in considering the objection to which they now pass.

The next objection to be noticed is the alleged want of due notification of the time and place of sale. At the time when this sale was to take place, this matter was regulated by Regulation XX., Section 12 of 1795, which requires notices to be affixed one month before the day of sale in the Court room of the Dewanny or Zillah, the Collector's Office, in the principal town or village, and in the Office of the Secretary of the Revenue. Now, if it be taken that the burden of proof in respect of these notices can be properly cast on the respondent, it certainly does not appear to their Lordships that, in respect of all of them, it is clearly made out that they were duly given; but they are of opinion that it cannot be so cast, considering how he claims, at what distance of time the objection is made, and the extreme difficulty, if not impossibility, of satisfactorily proving a fact of this nature under such circumstances as are before them. In this country it is in many cases required by statute that notices should be affixed on the walls or doors of Courts, or in other specified places, and for certain specified times, in order to give jurisdiction to Magistrates to do certain acts which are speedily to follow. In such cases there is no injustice in calling upon the party who moves the Magistrates to exercise their statutory jurisdiction, to prove that these requirements have been complied with. But it would be monstrous to make the title to land in a purchaser depend, years after it has accrued, and possession as been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time; in others, where the

document ought in strictness to be filed, it is but too common for the officer whose duty it would be to file it to be neglectful.

Their Lordships are of opinion, therefore, that the *onus* lay upon the appellant, and that he has not discharged himself of it.

It was said in regard of another objection, and might be said in regard of this, that at the time in question he was in prison on the charge of murder; and that was so: but it is clear that he at least knew of the time fixed for the sale, and was able to apply to the Court, because he presented a petition on the 14th July 1845, to the Zillah Court, for its postponement for two months, which was heard and rejected by the Sudder Ameen of that Court.

The remaining objection is to the manner in which the sale was conducted. It will be remembered that on several preceding occasions, when sales were attempted, the highest bidders had turned out to be unable or unwilling to complete them, and so they had been rendered illusory; the Collector, therefore, had been very properly cautioned to satisfy himself of the trustworthiness of a bidder, before he concluded the sale in his favor. On the present occasion, after the representatives of Mr. Barwise had bid a sum of 48,000 rupees, being a little below the amount of the decree, one Hunnooman Pershad bid 49,000. The Collector asked if he was prepared with the deposit money; he was not. He was asked who and what he was: he said he was a servant, and was bidding for Ramdas of Sultanpore. He was asked whether he held a mooktarnama from Ramdas, and he said he did not. On this he was rejected as a bidder. Thereupon one Shunker Loll bid 50,000 rupees, and he was questioned as Hunnooman Pershad had been. It does not appear whether he answered that he was prepared with the deposit or not, but he stated that he was bidding for one Sheo Lall, a banker of Dostpoor. Like the former bidder he had no mooktarnama. The Collector rejected both their biddings, and there being no other bidder, knocked the estate down to the representatives of Barwise for 48,000 rupees.

Both Narain Sing and these two persons, but not either Ramdas or Sheo Lall, petitioned the Court against this proceeding of the Collector. It was urged that a production of the deposit ought not to have been insisted on before the estate had been knocked down, and that the effect of the proceeding was to deter bidders, and so diminish the amount for which the estate was sold. Certainly the payment of the deposit could not be required before the acceptance of the bidding, and the knocking down of the estate; but the Collector was bound, in their Lordships' opinion, to satisfy himself reasonably that these persons were, what they professed to be, real bidders, and that the course which he took for that purpose was perfectly justifiable; and so it was held in the Court below—their Lordships think quite correctly: they see not the least reason for believing that it was calculated to deter persons really wishing to buy from offering their biddings, or n any way to damp the sale. It might be unusual; but the circumstances were unusual; as practices had been suffered before in this case, which had made the sales under the order of the Court mere mockeries, available only for the purpose of defeating the course of justice, the Collector, forewarned, was bound to take care that this sale should be a reality; which it could not be, unless care was taken to distinguish between real and sham biddings, The result shows that his conclusions were correct; if there were such persons as Ramdas or Sheo Loll, or if either of them had, however, irregularly deputed Hunnooman Pershad or Shunker Loll to bid for them, we may be quite certain that claims would have been made on their behalf by way of petition to the Court. It is said that the estate was sold for less than its value. It may have been; it was certainly sold, some time afterwards at a great advance by the purchasers; but considering the character of the previous attempts to sell, and all the previous circumstances of the litigation, this is not to be wondered at. As a fact in itself, it is immaterial to the decision of the case: it is enough that the sale was a real one, conducted justly and regularly.

Their Lordships, in a judgment necessarily so long, have thought it right to take no notice of several matters important in themselves, but not affecting their decision: they have now disposed of the various points relevant to that decision, and which were urged by the learned Counsel for the appellant with their usual zeal and ability; but they cannot pass from this case without the expression of their surprise and deep regret that such a case should have been possible under the system of jurisprudence prevailing in any country under the British dominion.

"———pudet hæc opprobria nobis,
"Et dici potuisse et non potuisse refelli."

The subject-matter of the original suit a debt, it should seem undisputed, or at least as to which, in substance, no serious dispute was possible; where the plaintiff's difficulty had not been to establish his right to the judgment of the Court in which he sued, but to make that judgment available when obtained, though the funds were ample for the purpose. By fraud and chicanery by every possible abuse of the forms and procedure of law, by force and violence, even, it is to be greatly feared, to the shedding of blood, justice was evaded and defied for fifteen years, from 1830, when the decree was pronounced to 1845, when the final sale took place. The original plaintiff, wearied out with the long delay and expense, fain to sell the benefit of his decrees; the unhappy man who had been substituted for him losing his life, while vainly striving to realize its fruits. And now, in 1862, their Lordships have been called on to dispose of a suit, in which it is sought to invalidate that whole proceeding as against a purchaser for value, the second in succession from the execution creditor, against whom, or the party from whom he immediately purchased, no fraud, no collusion, no knowledge of the supposed defects in the title is alleged. They have had to deal with a record of nearly three hundred pages in folio, setting out more than three hundred documents and depositions. Their Lordships do not intend hastily to cast censure on any individuals; the materials are not before them for that purpose, nor is it within their province to do so; but it is useful to point out that a system under which all this is possible loudly called for amendment, and, administered as it here has been, defeated the very object for which it was instituted.

They will humbly recommend to Her Majesty that this appeal ought to be dismissed with costs.

The 15th December 1865.

Present:

Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Presumption of Hindoo Law—Separate acquisitions of property by a Member of a Joint Family.

On Appeal from the Sudder Dewanny Adawlut in Calcutta.

Prankishen Paul Chowdhry

versus

Mothoora Mohun Paul Chowdhry.

The presumption of Hindoo Law is that property not shown to be separate is joint. Where an elder brother is long in the management of the joint estate and in the receipt of the collections from it, and is accountable for them to his younger brother, if the monies employed in the purchase of certain talooks formed part of those drawn from the joint estate, the younger brother, on a re-union is entitled upon the general principles of Hindoo Law, and independently of the express provisions of any deed of agreement executed between the parties, to share in them as acquisitions made by the use of the joint funds.

THEIR Lordships are of opinion that no ground has been shown for disturbing either of the decisions below, and, therefore, they do not think it necessary to call upon the respondent's Counsel.

The case turns almost entirely upon the construction to be given to the deed of *Ongshobodhareet* at page 10 of the record. That deed not only defines the rights and obligations of the parties, but it contains a narrative of the facts of the case upon which we can rely, as it is a statement in which both parties joined, at a time when there was apparently no difference between them.

It appears, then, from that deed, that this was a joint Hindoo family, consisting of the appellant and the respondent, and a younger brother of the half-blood, who was a minor, and is since deceased. They were in all respects a joint and undivided family. In the year 1254, there were disputes between the adult brothers, and they separated, but there was no regular partition of the estate. The effect of the separation was that the lands remained undivided, but each brother, being no longer a member of a joint Hindoo family, took his share of the rents.

It appears from other parts of the record, and, although it is not very distinctly stated in the deed, it would almost follow from the nature of the case that the younger brother had then a large claim against the elder brother, who had been the manager of the estate, in respect of the rent and profits received previous to the partition. That is stated distinctly in the judgment of the Sudder Court where the Judges say: "We find that the plaintiff's pleader admits that, up to 1253, his client, as elder brother, made all the collections, and held all the joint funds of the family; that, although a separation took place in 1253, and the plaintiff was bound to give a full and honest account of his management, no such accounts were ever rendered for the satisfaction of the brother defendant."

The separation of the two brothers continued for little more than eleven months; they then agreed to come together again, and this deed was executed. The deed states that, during that period, the elder brother had entered into a treaty for the purchase of the putnee talooks, the price of which is the subject of the present contention; and further, that the youngest brother having died, and his mother having taken his share by inheritance, Prankishen Paul Chowdhry had purchased that share from her, subject to an annual payment of 1,200 rupees.

On the re-union of the two brothers, which of itself remitted them to their former *status* as members of a joint Hindoo family, it was expressly agreed that those acquisitions which the elder brother had made whilst the separation continued, should all go into the joint fund, and the deed provides the terms upon which that should be done.

Now, the material parts of the deed, with respect to these transactions, are these: *first* there is a recital "that I, Prankishen Paul Chowdhry, by contracting loans, negotiated to take in putnee Turruff Munsebpore and Dehee Rajahpore *benamee* in the name of my relative Sumboo Chunder Singh, inhabitant of Dowlutgunge, and advanced the *byana* or earnest money." Then it states—"Afterwards a settlement was effected between us brothers, and again the entire property came into our *ijmallee* possession, as it had been before, and the putnee, &c., that had been recently purchased, also came under the *ijmallee* settlement, and of the balance of the consideration or purchase-money of the aforesaid Munsebpore, &c., taking no putnee, some was paid by us two from our private funds, and some portion by loans raised on bonds given by us respectively, and by granting dur-putnee pottahs, and we obtained a pottah of the said putnee, and both brothers remained in *ijmallee* possession, having taken from the aforesaid Sumboo Chunder Singh an *ikrar* or acknowledgment of the *benamee;* at present we two brothers having brought under *ijmallee* the entire hereditary and acquired property, and that which has been recently acquired as putnee, and all real and personal property, have made this condition and settlement that from hence the whole is to remain *ijmallee*, and that such property of the share of Ramkishen Paul as I, Prankishen Paul, had purchased and held under a perpetual pottah was likewise to become *ijmallee*, and held by us in possession in equal shares, and that we two brothers will pay the profits of the said property to our step-mother, and that whenever we, or our heirs, share and take the aforesaid and other property, we, or our heirs, in such case, shall equally share and take our said deceased half-brother's property, and not more, and the shares of the same shall never be more or less."

In short, it is expressly provided that the entire property, whether ancestral, or then acquired, or thereafter to be acquired, is to be joint and enjoyed in equal moieties. Then follow certain directions for the management of this joint estate, including provisions for giving the elder brother a larger share in such management, all of which are immaterial to the present case.

Then follows that which appears to their Lordships to be one of the most important provisions in the deed. It is to this effect:—"All the money that has been borrowed on our joint bonds, and that which I, Prankishen Paul, had borrowed during the time of our separation, on bonds given in my own name, and which said money has been paid as the consideration or purchase-money for the putnee of Turruff Munsebpore and Dehee Rajapore, shall all be accounted as our *ijmallee* debt, and the said *ijmallee* debt shall be liquidated by us out of the profits of the *ijmallee* property." As their Lordships understand that stipulation, it provided that whatever Prankishen Paul had borrowed on bonds given in his name, or whatever the two had borrowed on their joint security, in order to provide the cons-

deration-money paid for the purchase of these two putnees, should be a charge on the joint estate, and should be liquidated out of the joint property, but they can find in that no provision whatever for the repayment, out of the joint property, or to the elder brother, of any funds which he might have advanced, or might have alleged that he had advanced, on the same account, out of his private money. The deed is, upon that point, entirely silent, and, as one of their Lordships observed in the course of the argument, it would be a strange thing to infer from this silence an implied promise to pay the sum sought to be recovered in this suit.

Then follow provisions to which we shall afterwards refer, providing for the event of a subsequent disagreement between the parties, and a second partition, and then comes this stipulation: "No party shall make any claim hereafter upon the other on account of any cash having reference to the former *ijmallee* period, that is, for the time anterior to the year 1254 B. S., I, Prankishen Paul, have no claim upon you, Nobokishen Paul, on account of the price of the real and personal property of Ramkishen Paul's share, for which I had obtained a perpetual pottah, and which I had obtained in the way of a purchase, and whatever writings have been executed and given by me to our step-mother, we both shall be bound to comply with the conditions thereof." Now, those last words show that, although Prankishen Paul may have paid out of the money which he had collected formerly, or out of private resources, or in any way, for the share of his half-brother, yet he throws all that into the joint concern, and there is no claim to be made upon the younger brother in respect of that acquisition. That is express. Again, there is, no doubt, a general covenant or agreement that no claim shall be made upon him in respect of any monies for which he may have been accountable in respect of those earlier collections. And Mr. Leith relies upon that as an answer to that portion of the respondent's case, which rests upon the assumption that the monies which are in dispute came out of these former collections, and were applied by Prankishen Paul to the purchase of the putnee talooks. But it seems to their Lordships that the whole deed must be taken together, and as one general compromise; and if they are right in their construction of the former Clause, that there was no provision made for the payment or the adjustment of the price of the putnees, except in so far as it consisted of borrowed money, which was to be paid out of the assets of the joint estate, then, when they find afterwards an agreement that there shall be no account in respect of the former collections, the two must be taken together, and must be construed to import that whilst, on the one hand, the elder brother makes no claim in respect of any monies which he may have applied in that way, so, on the other hand, the younger brother says, I will make no claim for any monies *ultra* that, and I will treat the whole account as settled and closed by this arrangement.

Therefore upon this deed, if it stood alone, it would be very difficult to say how the present claim could be supported.

We find, however, that the case which the parties contemplated really happened, and that after a short period of re-union they again separated, and the deed of partition which, though not printed in the record, has been produced to-day, and is now before us, was executed. We find in that deed no provision at all for such a claim as this, while we do find a provision for the payment of those debts which, upon the construction which we have put upon the Clause at line 20 of page 11, really would fall upon the joint estate. That provision imports "that the money borrowed under simple and mortgage bonds is to be liquidated by both in equal portions." Therefore, the subsequent deed of partition seems to be entirely consistent with what was contemplated by the former deed, and does not in any way re-open any of the accounts settled by that deed.

It would, then, as it seems to us, be extremely difficult to support the case made by the appellant, even supposing that the funds in question were really his private funds. If, indeed, the sums mentioned in the *jumma-kurruch* which seems to have been used originally to meet the fraudulent claim of the trustee, to hold the putnee talooks as his own, if those sums, though described as coming from the private funds of the appellant, had been alleged and proved by him in this suit to have been money actually borrowed on bond or otherwise, and had been so brought within the stipulation of the deed, the case would have been very different. But no such issue was raised by the appellant.

The issue of fact upon which the parties went to trial, was raised by the other side,

and, as ultimately settled, was this: "Whether it was true that the plaintiff had, out of his own funds, paid the sum of 20,120 rupees, or that the said amount had formed a part of the *ijmallee* funds of the two parties." The appellant gave no evidence on this issue; the respondent examined four witnesses upon it, and it was found in his favor. Their Lordships have no doubt of the propriety of that finding. It is not even alleged upon these proceedings that the parties originally had any separate property; the presumption of Hindoo Law in such cases is that property not shown to be separate is joint; and it is an admitted fact that the appellant was long in the management of the joint estate, had received the collections from it, and was accountable for them to his younger brother. And, if the monies employed in the purchase of the talooks formed part of those so drawn from the joint estate, it follows that the respondent on the re-union was entitled upon the general principles of Hindoo Law, and, independently of the express provisions of the deed, to share in them, as acquisitions made by the use of the joint funds.

Their Lordships are, therefore, of opinion that the decrees of the Courts below were right; and they have no difficulty in determining humbly to recommend to Her Majesty that this appeal be dismissed with costs.

The 1st December 1865.

Present:

Lord Chelmsford, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Compensation in lieu of Pilgrim Tax at Gya—Government system of accounts not to prejudice private rights of parties.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Maharanee Inderjeet Kooar

versus

Ismudhi Kooar and Soonnut Kooar.

The late Maharajah Mitterjeet Singh was entitled to the levy of a tax upon pilgrims resorting to the temple at Gya. On the abolition of the tax by the Government, a compensation was awarded to the Maharajah in lieu of it in the shape of a perpetual annual payment, which sum, it was settled by an agreement, and a decree of the Sudder Court during the Maharajah's lifetime, was on his death to be divided in certain proportions between his two sons through whom the present appellant and respondents claim as their heirs respectively. HELD that, in whatever mode the Government might think proper to deal with this sum with reference to the jumma, the rights of the parties could not be affected thereby without their consent, but would continue to be adjusted according to the proportion originally established.

THIS is an appeal from four decrees of the Sudder Court of Calcutta, reversing four decrees of the Principal Sudder Ameen of Zillah Behar in favor of Maharajah Heetnarain Singh, whose widow and heiress is the appellant. The respondents are the widows and heiresses of the late Modenarain Singh, who was the brother of Heetnarain Singh, and the plaintiff in one and defendant in three of the suits in which the decrees now under appeal were made.

The four suits involved the same question, which is shortly and accurately stated in the appellant's case, as follows:—

"Whether Heetnarain Singh and Modenarain Singh were entitled to the annual sum of 17,212 rupees 9 annas 5 pies, in the proportions of $\frac{9}{16}$ths and $\frac{7}{16}$ths respectively, in accordance with the contention of Heetnarain Singh; or in the proportions of the amounts of *sudder jumma* payable by them respectively on account of the nineteen mehals in the pleadings mentioned in accordance with the contention of Modenarain Singh." The two brothers were sons of the Maharajah Mitterjeet Singh, who died on the 3rd October 1840. During the lifetime of the Maharajah, an agreement was entered into for a division of the property between his two sons after his death. The particulars of this agreement are stated in a former suit between the brothers, which was brought by appeal before their Lordships, and is reported in 7 Moore, p. 312, to this effect: "Family dissensions having arisen during the lifetime of Mitterjeet Singh, certain proceeding were instituted and on an appeal to the Sudder Dewanny Adawlut, in a suit in which Mitterjeet Singh and the appellant and respondent were parties, a compromise was entered into, and a *raseenamah* and *ekrarnamah*, dated the 7th February 1824, was filed by Mitterjeet Singh, which instrument was to the effect that the real and personal estates held by him after his death were to be divided between the appellant and the respondent; the former was to take a 9-annas share, and the latter a 7-annas share. Partition deeds of the same tenor were also filed, and, on the 4th March 1824, the Sudder Court decreed that the parties should act up to the terms entered

into by them in the above mentioned instruments."

The Maharajah Mitterjeet was entitled to a tax levied upon pilgrims resorting to the temple at Gya. This tax was abolished by the Government in the month of January 1840. and a compensation was awarded to the Maharajah in lieu of it in the shape of a perpetual annual payment of 17,212 rupees 9 annas 5 pies. The grant of this compensation was the subject of a Government letter of the 16th January 1840, which, unfortunately, is not printed in the proceedings.

On the death of the Maharajah, his property, whether moveable or immoveable, had to be divided between the sons according to the porportions of $\frac{9}{16}$ths and $\frac{7}{16}$ths settled by the agreement and decree of 1824. And the compensation tax, as part of that property, was divisible in these proportions. His immoveable property, which was very extensive, consisted partly of nineteen mehals which were held by him in severalty, and partly of mehals which he held conjointly with other persons. Disputes arose between his sons immediately after his death. The Commissioner of the district intervened and induced them to make a partition of the immoveable property. Under his advice and with his approbation, the deeds of partition were executed on the 30th December 1840, and that which was executed by Modeharain is at page 76 of the record. It specifies the different villages which fell to the lot of Heetnarain and Modenarain respectively; and also the sums which each, as between him and his brother, was bound to pay in respect of the *sudder jumma* or Government revenue. The partition, however, was not made upon the principle of dividing each mehal, with the burthen of the public revenue assessed thereon, in the proper proportions, but of assigning certain villages and parcels according to their real or supposed value to each share, so as to give to Heetnarain $\frac{9}{16}$ths in value, and to Modenarain $\frac{7}{16}$ths in value of the whole immoveable property. In consequence of this mode of division, in six out of the 19 mehals which had been held by Mitterjeet Singh in severalty, Modenarain took more than a nine-annas share (his share in some of them being absolutely much larger than that of his brother), with the liability of having to pay a corresponding share of the public revenue assessed on those mehals. This deed of partition, which was confined to immoveable property, made no mention of the compensation for the pilgrim's tax; and the *jumma* or revenue stated therein to be chargeable on the different mehals, and to be apportioned between the brothers as therein mentioned, was the full amount of *jumma* assessed upon them under the Perpetual Settlement. It follows, then, that as far as this partition went, the compensation for the pilgrim's tax was not included therein, and presumably continued to be one of the assets of Mitterjeet Singh divisible between his sons in the proportion of nine to seven annas.

In Mitterjeet Singh's lifetime the payment of this annuity would have been very simple; he had annually to pay a very large sum (upwards of three lacs of rupees) for Government revenue, and would naturally have retained the 17,212 rupees by way of deduction or set-off. It would seem, however, that in his lifetime, or very shortly after his death, the Revenue Authorities of the district entertained the notion of putting, in some way or other, this payment against the *sudder jumma*, in respect of the nineteen mehals held by him in severalty, distributing the whole sum of 17,212 rupees amongst the different mehals according to the *jummas* assessed upon them respectively. This appears from the letter of the Accountant of the Revenue Department, which is at page 198 of the record, and purports to be in answer to a letter from the Collector of the 22nd October 1840, which is not in evidence. The Accountant's letter is dated the 26th December 1840, and is in these terms: "I have the honor to acknowledge the receipt of your letter No. 344 of the 22nd October last, and, with reference to the seventh paragraph thereof, I beg to acquaint you that, on examining the items rateably distributed by you among the several mehals in your statement, trifling errors have been discovered to exist in almost every item. I, accordingly, transmit herewith a copy of your statement with an additional column added to it, showing the calculations made in this Office, agreeably to which you will have the goodness to allow the remissions in favor of the several mehals. I have used the term *remissions*, though, as far as the course of entry is concerned which the settlement with the Rajah will render necessary, no remissions in account will appear; for the compensation in question to the Rajah's heirs, you will be pleased to recollect, will have to be charged under the head of sayer compensation, subordinate to pensions, the charge being balanced by a distinct credit

per contra 'to land revenue' (the estates being in your district *towjee*). This course of entry you will observe will prevent you from exhibiting the transaction in account as a 'remission.'"

By a proceeding, dated the 23rd March 1841, the Collector directed that effect should be given to the letter of the Accountant, and that the 17,212 rupees 9 annas 5 pies should be credited on the 1st April of the current and of every future year to the *mouzahs* of each lot, as was specified in the letter of the Accountant, that is, on the list of mehals annexed to it; but it appears that in April 1841, and again on the 31st of March 1842, a warrant was written for the whole sum of 17,212 rupees 9 annas 5 pies, and this settlement of accounts was, therefore, in the nature of a set-off of one independent demand against another, and did not imply the permanent remission or deduction of part of the *jumma* originally assessed on the several mehals.

On the 6th June 1842, the Secretary of the Government wrote to the Accountant that the remission of the 17,212 rupees 9 annas 5 pies was to be adjusted by reduction of the *jumma*. The letter is in the following terms: "With reference to the communication made to your Office from this Department, under date the 16th January 1840, I am directed to inform you that the Hon'ble the Deputy-Governor of Bengal has this day been pleased to determine that the remission granted to Rajah Mitterjeet Singh shall be adjusted by a reduction of the *sudder jummas* of the estates recorded in his name on the Behar Collector's *towjee*." And a letter to this effect, of the date of 14th June 1842, was sent to the Collector of Behar. Whether that Court was right in this statement, their Lordships, not having the letter of the 16th January before them, are unable to determine.

This order of June 1842, for adjusting the remission by a reduction of the *jumma*, apparently rendered a change in the mode of stating the accounts necessary; but in fact, no alteration was made in them down to the year 1850. This appears from a letter to the Collector of Behar of the 17th of September 1850. Part of that letter is in these terms: "As regards the mode of adjusting the remission still observed by you, I beg to remark that instructions from this Office, based upon the orders of Government of the 6th of June 1842, were, under date the 14th idem, issued to you, wherein you were requested to account for the remission by a reduction of the *sudder jumma* of the estates recorded in the name of Rajah Mitterjeet Singh on the *towjee* of your district," which instructions apparently set aside those contained in letter No. 426 of the 26th December 1840. It would seem that, after this communication, the Government accounts were kept in accordance with the Government letter of the 6th of June 1842, which is obviously treated as having introduced a mode of accounting for the compensation for the pilgrim's tax differing from that established by the Accountant's letter of the 26th of December 1840, in that it proceeded less upon the principal of set-off, and more directly upon that of remission of revenue. Assuming, however, that the order so to deal with the compensation was within the competence of Government as a direction to their officers for the more convenient mode of keeping their accounts, or otherwise, how could that affect the rights of Heetnarain Singh and Modenarain Singh *inter se?*

The Government might keep their accounts in any manner they pleased, but the 17,212 rupees would still continue to be the property of the brothers in the settled proportions, unless they acquiesced in the course adopted by the Government, and acted upon it in such a way as to indicate a fresh agreement between them. Now, there is no evidence that Heetnarain Singh ever assented to this arrangement, or that he ever agreed to alter the proportions in which the property was originally divided. On the contrary, on the 15th April 1843 (and no action can have been taken on the letter of June 1842, until the 1st of April 1843), he presented a petition to the Collector, in which he complained of his being called upon to pay a larger sum than was due from him for the *jumma*, and praying relief. That petition was rejected. He then appealed to the Commissioner, and the Commissioner, in refusing to interfere, said: "It appears that the *malikanah* allowance has been rateably credited to the revenue of the mehals of both the parties. If there is a diminution in their respective shares, as opposed to the fixed allotment of share, let them adjust the differences among themselves; Government has nothing to do with this. The Collector is to communicate this to both the parties." Accordingly, from the date of this order until the commencement of these suits in 1853, Heetnarain continued to assert his right to $\frac{9}{16}$ths of the 17,212 rupees 9 annas 5 pies,

by retaining so far as he could, out of the sums which under the partition he was bound to pay as his share of the *jumma* assessed in the different mehals, his proportion of the remission allowed in respect of each particular mehal. The suit of Modenarain is brought to recover the sums which, according to his contention, were in this manner improperly retained by Heetnarain, in satisfaction of his full proportion of the remissions allowed in respect of three of the mehals, whilst the three suits of Heetnarain are for the recovery from Modenarain of the differences between the sums actually returned by him, and his full $\frac{9}{16}$ths of the remissions allowed in respect of three other mehals. The deed of partition, as has already been shown, made no alteration in the original rights of the parties, and the observations of the Principal Sudder Ameen in this respect are perfectly correct. It is to be observed also that Modenarain Singh, in his plaint filed on the 8th April 1853, as to the three mehals of which Heetnarain had received his $\frac{9}{16}$ths, does not found himself upon any new agreement between them, but upon the authority of the Government order of June 1842. The ground upon which the Sudder Court proceeded in overruling the decree of the Principal Sudder Ameen in appellant's favor was "that the parties were aware that the remission of the *jumma* had been made, and that there was a deduction from certain specified mehals, and that the amount of remission from each of these mehals had been ascertained and determined, and that it was therefore a reasonable inference from the silence of the deed of partition on the subject that the parties believed, and were willing that the amount of remission on each estate should be apportioned to the amount of *jumma* for which each of the contracting parties was responsible." There is, however, not the slightest proof that, when the deed of partition was in preparation (the consent to an amicable adjustment in which it resulted having been given on the 21th December 1840), or even at the time of the execution of the instrument on the 30th December 1840, the parties were aware of the mode in which the Government accounts had at that time been made out. The letter of the Revenue Accountant of the 26th December 1840 can hardly have reached the Collectorate of Behar before the 30th December, and the proceeding of the Deputy Collector, at page 197 of the Record, shows that that letter was not taken into consideration by him until the 4th January 1841, and that no final orders were passed thereon until the 23rd March 1841. But even if the parties, at the time when the deeds of partition were executed, had known of the letter of the 26th December 1840, they would have had no notice of the determination on the part of the Government to settle the account by way of reduction or remission of *jumma*. The arrangement was effected by the letter of Government of the 6th June 1842, and it is treated throughout the proceedings as differing materially from that contemplated in the letter of December 1840. It is in the letter of 1842 that Modenarain in his plaint founds his claim, and the sums which he sought to recover were those retained by Heetnarain after the date of it.

The Sudder Court puts the case of the sale for arrears of revenue of one of the lots on which a reduction of *jumma* had been allowed, and the danger of the Government revenue suffering from a doubt whether the parties would consider themselves obliged to give up so much of a remission which they now enjoy, or would expect the Government to submit to the loss of revenue consequent on treating the *jumma* on the mehal as permanently reduced by the amount of the remission now allowed. But it is difficult to understand how, because in a supposable case the Government may be thrown into a state of uncertainty with respect to the mode of dealing with the reduction, this can have any influence on the rights of the parties between themselves.

Their Lordships are of opinion that the view of the case taken by the Sudder Court cannot be adopted, but that the 17,212 rupees was divisible between the brothers in the proportion of nine-sixteenths and seven-sixteenths, and that, in whatever mode the Government may think proper to deal with this sum with reference to the *jumma*, the rights of the parties cannot be affected without their consent, but will continue to be adjusted according to the proportions originally established.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the decrees of the Sudder Court in all the four suits, and to affirm the decrees of the Sudder Ameen in all those suits, and with costs.

Mr. Rolt.—The costs of the Court below and the costs here?

Lord Chelmsford.—All costs.

The 16th December 1865.

Present:

Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Limitation (Punjab Code)—Admission of debt—Part payments.

Shah Mukkum Lal and others

versus

Nawab Imtiazood-Dowlah and another.

Under the Punjab Code, and before Act XIV. of 1859 took effect in Oude, letters offering to pay a debt by instalments, and praying to be excused from the payment of interest, are an ample acknowledgment of the debt to save limitation.

Under the same Code, payments made by an agent upon account, and continued monthly for several months, ought to be regarded as tantamount at least to, if not correctly described as, a running account, and are therefore part payments which amount to "a partial satisfaction of demand," whereby the period of limitation is renewed.

THE printed cases both of the appellant and respondent assume that the question upon the appeal is to be governed by the new Law of Limitation in the Act XIV. of 1859. But the last Section of that Act provides that the Act "shall not take effect in any Non-Regulation Province (to which class Oude belongs), until it shall be extended thereto by public notification by the Governor-General in Council; and that, whenever it shall be so extended, all suits within such Province, which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed." In a case from Oude which was recently before the Judicial Committee (the case of Saligram and another *vs.* Mirza Azim Ali Beg, decided on the 12th November 1864), it appeared that the Act XIV. of 1859 was not extended to Oude till July 1860. As this suit was commenced on the 13th January 1862, it falls within the exception, and must be determined as if the Act had not been passed.

In the case just referred to, in which the question arose what Law of Limitation was to be applied, it appeared that, since the annexation of the Province, various rules of limitation had prevailed; that, in 1857, suits of the nature of the present one were subject to a limitation of six years, and to the general provisions of the Punjab Code; that, in March 1859, these rules had been modified by a Circular Order No. 51, which had afterwards been repealed by a Circular Order No. 104, dated the 4th July 1860; and their Lordships held that the case before them was to be governed by the last mentioned order. Upon the authority of that decision, it appears that this case must fall within the 10th of the Rules then promulgated under that order. This declares the period of limitation to be three years "in all suits for money lent for no definite period or for interest thereon, unless there is a written engagement, and where Registry Offices existed at the time, such engagement was registered and signed by the party to be bound thereby, or by his duly-authorized agent."

The rules which were promulgated under this Circular Order were modifications of the Punjab Code which previously existed, and, therefore, it may be necessary in this case to resort to that Code for the purpose of determining the time from which the period of limitation is to be calculated, or the circumstances which will take a particular case out of the operation of the limitation. Having ascertained the law to be applied in this case, we proceed to consider the question to be decided.

The suit was instituted by the appellant, carrying on business as a merchant at Lucknow, to recover a balance of 11,278 rupees 3 annas, principal moneys and interest, alleged to be due from the first-named respondent on account of advances made to him for the maintenance of his family through his agent, the other respondent, Hajee Ali.

The plaint was filed on the 13th January 1862, and the last advance was in 1858: consequently more than three years before the commencement of the suit.

Issues were settled by the Judge, the *first* of them being "limitation;" and the case was ultimately decided upon the question whether the plaintiff had given sufficient evidence of an admission of the debt by the respondent to prevent the application of the period of limitation to his claim.

In order to prove such an admission, the plaintiff produced three letters, marked respectively B, D, and F. B appearing by its own date, and the other two letters by the post-marks upon their envelopes, to have been written in the year 1860. The letter F purports to be signed by the Nawab, but has no seal. The other two letters have neither signature nor seal; but the envelope of D bears to have been "despatched by Imtiazood-Dowlah Bahadoor from Khizzirpoor in Calcutta." Letter F is stated to have been filed with the plaint, but no attempt was made to prove that it was signed by the Nawab. No other evidence was given of

the letters B and D, except by Hajee Ali who was called by the plaintiff, and said "B came to the plaintiff, not through me; D ditto." This was perhaps scarcely sufficient to admit them to proof, but the Judge received them, and then the question arose whether, being admitted, they did not carry with them internal evidence of their genuineness. There can be no doubt that, when the Nawab left Lucknow, his family remained behind, and would require to be maintained during his absence. Hajee Ali was appointed his agent by a *mookhtearnamah* sealed with his seal, in which it is contemplated that money would be borrowed from the appellant's firm, and Hajee Ali, besides this authority, was armed with blank pieces of paper impressed with the Nawab's seal, to be used when required. It is not pretended that the family were maintained out of the funds of the Nawab, and no other source of supply was ever suggested, except that which was derived from the appellant. Under these circumstances, the debt to the appellant was incurred. His claim is for nothing else than advances made to meet the wants of the Nawab's family, with interest upon these advances. The Nawab was examined upon interrogatories. He denied all knowledge of the appellant. Asserted that he never had himself, nor permitted any one to have, any money-transactions with him. That he was not aware that money had been advanced by the appellant, and that nothing was due to him for principal or interest. It is impossible not to agree with the observations of the Civil Judge upon these answers of the Nawab. "That defendant was largely indebted to plaintiff through his old *Karindah*, Hajee Ali, there can be no doubt, and there is much perjury on that score in the defendant's deposition."

But if the respondent was indebted to the appellant through his agent, is it at all credible that he should have been ignorant of the fact, and that, knowing that his own funds had not been applied to the maintenance of his family, he should never have had the curiosity to enquire from what source the supplies were drawn? It is clear that he must have known that he was indebted to the appellant for the means of support of his family, and it is most improbable that, when the debt had grown to a large amount, and his own affairs had suffered considerably from the annexation of the province of Oude, no communication should have taken place between him and his creditor. Assuming the probability, in this state of things, that something would have passed between them, it will be found that the letters in question are precisely those which might have been expected to be written under the circumstances. They are in the following terms:—

"TRANSLATION of a LETTER to the address of SAHJEE.

"*Suit No. 77 of 1862 B.*

"DEAR SIR,—(After compliments.) I beg to inform you that I have received the account through your *gomashta* (agent), Lalla Sham Soonder, and become acquainted with its content. But dear Sahjee, it is known to the world how we have been ruined; and you also are well aware of my circumstances, that no private property has been left to me, and I am obliged to manage my expenses (out of the salary which is allowed to me) the best way I can.

"A friendly intercourse and money-transactions have been carried on between you and me for a long time, and there never took place any disagreement of any kind, and even now, please God, no difference will arise. I am every way willing to pay off your money, and have no objection on that head. But I wish you will, under present circumstances, receive from me the principal due to you by instalments; my means do not enable me to pay you the interest, and I will not be able to pay it. I have no hesitation or objection to pay you the principal sum. I shall suffer inconvenience, but, please God, I will pay you your debt by instalments; but I certainly demur to pay the interest, because I do not know how to pay it. Under such circumstances, it becomes you also to give up your claim to interest, because you and I having been on friendly terms for a long time, it is nothing but proper that you should show me such consideration. After the revolution that has taken place in our affairs may God enable me to pay off your principal debt. I will consider myself very fortunate and thank God if I succeed in liquidating it.

"Dated 20th Suffer, 1277 Hijree.

"*Postscript.*—Having stated above that I am ready to pay you by instalments, I take this opportunity to let you know that I can arrange to liquidate your debt by monthly instalments of 200 rupees each, to be paid to you, please God, monthly, through your agent, when I receive my allowance from the British Government."

"TRANSLATION of a LETTER to the address of SHAH MAKHUN LAL.

"*Suit No. 77 D.*

"DEAR SIR,—(After compliments.) I beg to inform you that, before this, I wrote to you that I could pay the principal by instalments, but that you would excuse me for the interest, but you have not yet sent me any satisfactory answer. I, therefore, write to you again that a friendly communication and money-dealings have existed between you and me for a long time, and that no disagreement ever arose, nor did I make any objection in my

dealings with you. I did whatever you told me. But my objection to pay you the interest now arises from my being involved in ruined circumstances, which is known to the world, and even you yourself are well aware that I have been robbed of all the private property I had, and that nothing is left to me. My salary was stopped for a long time; but, as it is now allowed, I am ready to pay off your principal without any hesitation, although I shall suffer much inconvenience, even by paying your principal money, because God knows how I manage my expenses in so small a sum. Hence, under the present state of affairs, when times have been so much changed, it is nothing but proper that you should have a regard to the friendly intercourse which has subsisted for a long time between you and me, and not demand the interest. You should show me some consideration and receive the principal due to you by instalments. Pray do not withhold your kindness in this respect, and, under present circumstances, consider it a booty if you have your principal debt liquidated. I am unable to pay the interest, and can by no means pay it. Otherwise, I would have made no objection to discharge the interest, and would have paid it. You should send me an early answer."

"TRANSLATION of a LETTER to the address of SHAHJEE.

"*Suit No. 77 F.*

"DEAR SIR,—I wrote to you frequently, asking you to return me the whole of my bonds, and to have one drawn in lieu of them; that I can pay you interest at the rate of 8 annas per cent.; that you should make up your account, and have one bond executed for the aggregate sum, and that you should receive payment from me by monthly instalments of 200 rupees each, and I told the same to your agent; but I am surprised to find that neither you have written to me anything on the subject up to this time, nor has your agent given me any answer.

"I am, therefore, under the necessity of writing to you again, and request you will send all my papers, consisting of bonds, &c., which you have in your possession, to your agent here, who may return them to me, and have one bond executed in lieu of all of them. I also wish that your agent may be allowed to receive from me the instalments of 200 rupees a month promised by me, which I am ready to pay. Please send me without any hesitation an immediate and complete reply as soon as you receive this letter.

(Signed) "IMTIAZOOD DOWLAH BAHADOOR."

Assuming, then, the genuineness of these letters to be thus established, the question arises whether they contain a sufficient admission of the debt to prevent the application of the period of limitation to the appellant's suit. As the Judges below seemed to regard the letter F as probably not genuine, and some suspicion may rest upon it, it will be better to confine the consideration of this question to the letters B and D. Their Lordships entertain no doubt that, if the question were to be tried by the rules of English Law before Lord Tenterden's Act, these letters offering to pay the principal money by instalments, and praying to be excused from the payment of the interest, would be an ample acknowledgment to take the case out of the Statute of Limitations, and they are not aware of anything in the Punjab Code which would lead to a different construction. The Judges in the Courts below dealt with the questions rather summarily, and disposed of the case without affording the appellant an opportunity of supplying any deficiency which they found in his proof. But if they proceeded upon the Act for the limitation of suits, No. XIV. of 1859, and both the Civil Judge and the Judicial Commissioner thought that letter F was out of the question, their conclusion was right, because, letters B and D being without signature, there was no acknowledgment in writing signed by the party to be charged. But that Act not being applicable, and an admission of the debt being all that was requisite to save the limitation, even if letter F were put aside, the letters B and D being before the Judges, they ought to have considered them, and determined whether they were sufficient to prevent the plaintiff's remedy being barred. To this consideration their minds were never applied, and, in dealing with another point which arose in the case, there seems to have been a miscarriage. It was proved by Hajee Ali that the Nawab's brother, Hadee Ali Khan, paid the appellant 1,700 rupees in two sums after he became agent. The Civil Judge appears to have entirely overlooked this fact. But the Judicial Commissioner, dealing with the argument that the period of limitation should be calculated from the last of these payments which was made on the 14th July 1859, observed that "a period of limitation cannot now be renewed by a payment unless it be made at a time specifically conditioned." It is difficult to understand to what Code the Judicial Commissioner was referring when he made this observation. In the Act XIV. of 1859 there seems to be no provision giving effect to a payment on account of partial satisfaction. The Punjab Code, Part II, Section 1, Clause 6, limits suits to a certain time after the cause of action shall have arisen,

unless (amongst other things) the complainant has "obtained an admission or partial satisfaction of his demand from the opposite party."

But from Clause 7 it appears that it is not every part payment which will amount to "a partial satisfaction of demand" within the meaning of the rule. It must be a payment according to a regular and continuous course of dealing, "something tantamount to a running account." It was this qualification which the Judicial Commissioner probably had in his mind when he made the observation; but, if he meant to apply this Code, and had turned to the words of it, he probably would have thought that the payments made by the defendant's agent upon an account, continued monthly for several months, ought to be regarded as tantamount (at least) to a running account, if not itself correctly described as a running account.

The case has not been properly dealt with, nor fully and sufficiently considered in the Courts below, and in their Lordships' opinion it ought to be submitted to further and more careful investigation. They will, therefore, recommend to Her Majesty that the decrees be reversed, and the case remitted to the Court below for trial of the issues between the parties.

The 22nd December 1865.

Present:

Lord Chelmsford, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Compulsory Arbitration—Appeal—Waivor.

On Appeal from the Judicial Commissioner of Oudh.

Sheonath *alias* Burray Kaka

versus

Ramnath *alias* Chotay Kaka

In appealing to set aside an award of arbitrators which the appellant contends is not binding upon him, he is not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award.

Both the Code of Civil Procedure and the Punjab Code require the consent of the parties to a reference to, and the appointment of, arbitrators.

A party by appearing before arbitrators appointed without his consent, and in spite of his repeated remonstrances, does not forfeit his right to question the validity of their award.

THE appellant and respondent are first cousins, and natives of Lucknow, and were formerly jointly interested in certain ancestral property, and in the business of three *kotees*, or firms, the styles of which were Hurjus Roy and Gungaram, Gungaram and Juggurnath, and Sheonath and Ramnath. Each appears to have been also possessed of separate property.

In 1859, they made a partition, as far as they then could, of their joint property; and on the 16th of September of that year, they interchanged *farighkuttees*, or instruments of mutual release, of which that executed by the respondent is at page 4 of the record. This document, after stating that the two parties were jointly interested in the before-mentioned firms, and had settled the accounts of them amicably, and had made an equal division of the entire ancestral property, moveable and immoveable, cash, promissory notes, &c.; and after formally abandoning all claims on account of the said firms against the appellant and his heirs—contained this passage—"But I have a claim to an equal share of such moneys as may be realized on account of debts due to these firms on this date, and I also hold myself liable for a moiety of such sums as may be due by these firms up to this date."

In 1861, there was a dispute, the precise nature of which is not disclosed, between the cousins respecting the division of the paternal estate, and the debts due to or by the firm of Sheonath and Ramnath; and they agreed to refer the matters in dispute to the arbitration of five persons, named Hyder Hossein Khan, Meer Wajid Ali, Mr. Jacob Johanness, Sah Mukhun Lal, and Gridharee Lal. A written agreement to this effect was executed by each on the 8th of May 1861, and both documents are in the Appendix; but the appellant afterwards drew back from his agreement, and refused to have it registered; and nothing came of this attempt to settle the dispute by arbitration.

In September 1861, the respondent Ramnath instituted this suit against the appellant. The plaint sought a general account and partition; it alleged that no account had ever been settled between the parties; it mentioned the execution of the *farighkuttees*, but alleged that there had been no partition as stated in them; and that the partition was intended to take effect after a settlement of accounts, when the *farighkuttees* were to have been registered; and that, in the meantime, they had remained with the appellant as incomplete instruments. It referred also to the agreement for a reference to arbitra-

tion, but only as evidence that the whole property still remained undivided.

The cause was tried by the Civil Judge of Lucknow, with the assistance of a Jury, and his decree founded on the findings of the Jury established that there had been an actual partition and division of the joint property; that the *farighkuttees* had been executed on the footing of it, without taint of fraud; and that the respondent had failed to prove that he had any interest in a fourth firm, which the appellant carried on under the style of Ramnath Rughonath. It also decided against the respondent a question in the suit touching the profits made by the appellant by means of sale and purchase of Government Notes during the rebellion.

The respondent appealed against the decision to Mr. Campbell, then the Judicial Commissioner, who, by his order of the 15th of May 1862, affirmed it on all the points raised by the appeal. His judgment, however, contained these passages: "But it seems clear that there is one account between the parties still quite unadjusted, *viz.*, the division of the outstandings which was left open at the time of the division of assets. I think it would be proper that a sum in satisfaction of all claims on this account should be awarded to plaintiff, so as to settle the matter, and I remit the case to the Judge to decide that point. If possible, a decision should be obtained from the arbitrators previously appointed by the parties." And again—"There was something very considerable to be settled, that still remains to be settled; and I trust that, in accordance with my order, the Judge will manage, by a successful arbitration, to give the plaintiff a fair equivalent for his share in the outstandings of the three firms."

The effect, therefore, of this order was conclusively to limit the claim of the respondent to his share in the outstandings of the three firms; and to direct, or at all events to suggest, that that claim should be enforced, not by taking the accounts upon the footing of the *farighkuttees* in the regular way, but by giving him a lump-sum as the value of his interest therein, and that such value should be fixed by the award of the arbitrators to whom the parties had formerly proposed to refer their disputes.

The cause being thus remitted to the Civil Judge, that Officer on the 7th of June 1862 made an order whereby he referred to four out of the five arbitrators formerly named (the fifth, Gridharee Lal, having left Lucknow) the decision of the following questions: *first*, what accounts remained unadjusted between the parties; *secondly*, what amount of outstandings remained then unrealised and undivided; *thirdly*, what amount should be given to the plaintiff (the respondent) as an equitable acquittance of his share therein? He directed the arbitrators to file their award within two days, and empowered them, should they be equally divided in opinion, to elect an umpire.

The appellant did not acquiesce in this order. On the 10th of June 1862, he petitioned the Judicial Commissioner against it. In his petition he stated that he had no objection to the order of the Appellate Court referring the question of joint but divisible debt to arbitration; but that he objected, on the grounds therein stated, to the arbitrators to whom the Civil Judge had referred the case, and requested that other arbitrators might be selected by the parties, and that his case be referred to them. The order of the Judicial Commissioner on this petition was in these words: "It is in the Judge's discretion to employ the arbitrators formerly named by the parties, or to arrange new ones if he can. I do not think it possible that a complicated amount can be settled by a Jury."

The appellant being thus referred back to the Civil Judge, presented on the 13th of June a petition to that Officer, in which he reiterated his objections to the arbitrators named, and begged the Judge, as authorised by the Judicial Commissioner, to dismiss them, and to order "other arbitrators to be named, composed of such parties as I and the plaintiff may select." This application was, on the 23rd of June 1862, rejected by the Judge, who gave the following reasons for his decision; I see no reason to change. I acted on the Judicial Commissioner's order, and transferred the case to the old *punches*. If their work, when it comes to prove open to suspicion, or is anywise unsatisfactory, I shall not decide upon it, but I think it desirable to have the fullest light they can throw on the matter. If they are partizans, and go in favor of plaintiff unduly, they will still have to show grounds. If they go against the plaintiff, whose friends they are said to be, it will be all the more satisfactory to the defendant." Against this last order the appellant appealed by petition, dated the 25th of June 1862, to the Judicial Commissioner, whose order thereon was in these words: "I will not interfere in this stage."

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The appellant afterwards, and before any award was made, presented two further petitions to the Civil Judge. The *first* of them is dated the 22nd of July, the *other* the 19th of August 1862. In these, after referring to his ineffectual protests against the nomination of the particular arbitrators, and to the determination of the Judge not to change them unless they proved themselves partial and unfair, he objected to their mode of proceeding. And in the last petition he expressly asked that their award might be set aside, and that new arbitrators might be appointed in their stead, by which means justice might be done him.

The arbitrators filed an award about the 20th of August 1862, on which day it was returned to them by the Judge for amendment as to its form. It was filed in its amended form on the 25th of that month. Its effect was that the amount which the respondent could fairly claim from the appellant, in respect of the outstandings, was 66,090 rupees, besides one moiety of a judgment-debt which had been recovered in the Civil Court of Cawnpore, and was described as the *Rusdhan* decree. On the 4th of September, the award was discussed before the Civil Judge. He overruled the appellant's objections to it; observed that it did not include the sums due to the firms on mortgage, and that the question to what the plaintiff was entitled in respect of these must be referred back to the arbitrators. His decree was to this effect: "I accept the decision of the arbitrators, awarding 66,090 rupees to plaintiff as equivalent for all outstandings except the mortgages, and half of the *Rusdhan* decree."

Against this decree the appellant, on the 16th of October 1862, appealed to the Judicial Commissioner. The order passed by him on the following day was in these words: "Case is not completed. Appeal will be heard when the whole is complete."

On the 20th of December 1862, the arbitrators, to whom a fifth (Ihtimamood Dowlah) seems to have been added, made their award in respect of the mortgages. The effect of it was that a further sum of 15,000 rupees should be paid on this account to the respondent by the appellant.

On the 22nd of December 1862, the Civil Judge adopted this finding in spite of the appellant's objections, and ordered that he should within three months make good this sum, as well as those which, by the decree of the 4th of September, he had been ordered to pay.

The appellant appealed also against this decree to the Judicial Commissioner. His petition of appeal, which is dated the 16th of March 1863, states, amongst other things, that the arbitrators had been challenged by him both in the Lower Court and in the Judicial Commissioner's Court. This appeal, and that against the decree of the 4th of September 1862, of which the consideration had been postponed, was brought before Mr. Couper, who had then become Judicial Commissioner in the place of Mr. Campbell, and he, on the 3rd of July 1863, upheld the awards of the arbitrators, and affirmed both the decrees of the Civil Judge.

Against this decision the present appeal is brought.

Their Lordships will assume—and such is, in fact, their opinion upon the facts before them—that, if the questions which the arbitrators have determined were properly referred to them, no sufficient grounds for impeaching their award have been established. It has, however, been wrongly urged at the Bar that it was not competent to the Judicial Commissioner, except with the consent of both parties, to vary, as he did vary by his order of the 15th of May 1862, the rights of the parties under the *farighkuttees*, and to impose on the appellants the obligation of purchasing the respondent's interest in the outstandings on a rough estimate of its value. Another objection to the proceedings—and it is that on which the petition of appeal chiefly insists—is that the nomination of the particular arbitrators by the Judge without the consent and against the repeated protests of the appellant, was altogether irregular, and that their award is, therefore, not binding upon him.

Their Lordships do not deny the force of the arguments addressed to them on the *first* point, but they are nevertheless of opinion that the determination of this appeal must depend upon the validity of the *second* objection; because, if the nomination of the arbitrators were regular, there is evidence in the petition of the 10th of June, and in other parts of the proceedings, that the appellant accepted the issue proposed by the Judicial Commissioner, and was willing that the accounts between him and the respondent should be settled on that principle and by arbitration.

That both points are open to the appellant, although he has in terms appealed only against the final decision of the Civil Judge, and the confirmation of it by the Judicial Commissioner is, we think, established by

the case of Maharajah Moheshur Sing *vs.* the Bengal Government (7 Moore's I. A., p. 302). The appeal is, in effect, to set aside an award which the appellant contends is not binding upon him. And, in order to do this, he was not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award.

Was it, then, competent to the Judge to refer the decision of this question to arbitrators selected by him against the will and in spite of the repeated remonstrances of the appellant? When the suit was commenced, the powers and procedure of the Courts in Oude were still regulated by the rules and ordinances which had been passed by the Governor-General in Council in order to provide for the administration of justice in the province on its first annexation. These were substantially the same as those which had previously been in force in the Punjab, and were known as the Punjab Code. But on the 6th of August 1861, the Governor-General in Council, by a notification issued under the 385th Section of Act VIII. of 1859, extended to the Province of Oude, the provisions of that Act (which is generally known as the Code of Civil Procedure), subject to certain exceptions and provisions, as from the 1st of January 1862. The exceptions are only five in number; they are modifications of the 3rd, 17th, 111th, 172nd, and 205th Sections of the Act, and none of them have any bearing on the questions raised by this appeal. At the date, therefore, of the Judicial Commissioner's order of the 15th of May 1862, the Code of Civil Procedure had thus been extended to, and was in force in Oude.

The 388th Section of that Code provides that, from and after the time when this Act shall come into operation "in any part of the British Territories in India, the Procedure of the Civil Courts in such part of the said territories shall be regulated by this Act, and, except as otherwise provided by this Act, by no other law or regulation." The only exception, as to suits pending at the time when the Act shall come into operation, is contained in the preceding Section, and is in these words: "If in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect." There is no expression upon the face of the proceedings of an intention on the part of the Judges below to suspend or modify the operation of Act VIII. of 1859 by virtue of the provision last quoted, or otherwise. Nor is it easy to see how the compulsory reference to arbitration which is here complained of could have been brought within the definition of a right belonging to the opposite party. Moreover, that party himself in the proceeding, at page 61 of the record, appealed to certain Sections of the Act as establishing the finality of the award, thereby admitting that the reference was to be taken as made under the new procedure. Any larger powers, therefore, which the Judicial Commissioner and his subordinate may have possessed under the Punjab Code must be held to have been superseded on the 15th of May 1862; and the only question is whether the subsequent proceedings were authorized by the Code of Civil Procedure.

The 312th Section of the Act provides that, if the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the joint decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference. The 314th Section provides that the arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, *and the parties are desirous that the nomination shall be made by the Court* the Court shall appoint the arbitrator or arbitrators.

These Sections clearly import that the parties must either name the arbitrators or consent to the nomination of them by the Court. They are the only provisions which bear upon the subject; and it follows that the Code gives no authority to the Court to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion. It may be observed that the Punjab Code, Part II., Section 2, Clause 15, seems to require, as might be expected, equally with the Code of Civil Procedure, the consent of the parties to a reference to, and the appointment of, arbitrators.

Their Lordships need hardly observe that, if the appointment of the arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the appellant had, on a former occasion, agreed to refer the matters then in dispute between him and the respondent. That agreement to refer had proved abortive; the respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court; and the question referred to the arbitrators was an entirely new question suggested by the Judicial Commissioner.

Again, the appeal having been heard *ex parte*, their Lordships have felt bound to consider whether this case could be brought within the principle of those authorities which establish that a defect in the nomination of arbitrators may be cured by the waivor implied from the act of the party in going in before them, and taking his chance of a favorable decision. Their Lordships are, however, of opinion that the appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. From what has been already stated, it appears that his protests and appeals were frequent, and were repeatedly rejected as inadmissible by the Judges. Whatever part he took in the proceedings before the arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence.

Their Lordships, therefore, however much they regret the necessity of re-opening this litigation, feel bound to allow the present appeal.

It is not improbable that the decrees impeached give no more to the respondent than upon a proper adjustment of the accounts will be found to be his due. But this result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to arbitrators who were not duly authorized to determine it. The consent of the appellant was essential both to the form of the issue and to the constitution of the tribunal that was to decide it. It was wholly wanting to the one; if given at all to the other, it was, at most, a qualified consent.

The only remaining question is, with what direction this cause should be remitted to the Courts below? It will, of course, be open to the Judge, if both parties consent, to refer the question suggested by the order of the 15th of May 1862, or any other question directed to the ascertainment of their respective rights in the outstandings, to arbitrators duly appointed under the Act of 1859. But if the parties do not consent to any such mode of settling their disputes, it will be the duty of the Judge to adjust the accounts still unsettled between them in the regular way, by taking an account of the debts which were due to and from the three firms at the date of the *farighkuttees*, and of what has been received and paid in respect thereof, and by whom; and by enquiring whether any and which of the debts due to or from the said firms remain outstanding and unpaid respectively, and by ascertaining what, upon the result of these accounts, is due from either and which of the parties to the other of them. Act VIII. of 1859, Section 92, seems to give to the Court the power of appointing a receiver if one should be necessary.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Judicial Commissioner of the 3rd of July 1863, and that of the Civil Court of Lucknow of the 4th of September 1862, and to remit the cause to the Judge, with directions to wind up the outstanding concerns of the three firms pursuant to the *farighkuttees*, unless the parties shall consent to any other mode of determining their rights in these outstandings. Their Lordships think that the appellant is entitled to the costs of this appeal, and also to the costs of the order of the 15th of May 1862, and of the proceedings following upon it.

The 26th November 1866.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, T. Erskine, and Sir A. Johnston.

Onus probandi—Razeenamah—Fraud—Duress—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Motee Lall Opudhiya

versus

Juggurnath Gurg.

Where an appellant alleges that a razeenamah was obtained from him by duress or fraud, the *onus* is on him to prove his allegation. Mere possibiltiy or probability that there may have been such an origin of the

transaction, is not sufficient to entitle a Court to set aside the razeenamah.

Where also an appellant complains that he had not an opportunity of giving his evidence to the Court below, it is for him to show that he had tendered evidence which the Court had rejected.

Lord Brougham.—We shall not trouble the respondent upon this case. We are of opinion, in the first place, that the *onus* of proof lies clearly upon the appellant; the affirmative of the question, was or not this razeenamah obtained by duress? Fraud also is mixed up in this question of duress, but it is principally a question of duress, whether or not there was a conspiracy by these persons to obtain from him this release, and we are of opinion (as indeed there is no occasion to argue that point) that the *onus* lies upon the appellant to satisfy the Court here, as it lay upon him to satisfy the Court below, that there was such duress or fraud through which the razeenamah was obtained. It is not sufficient to say that there is a case of doubt; that it is not perfectly clear that the man is a free agent; that there may be suspicions on the conduct of the other party; that there is a possibility, and that there may be ground for the conclusion that it was not his own act. That is not sufficient. Mere possibility, or even, to go further, probability, that there may have been such an origin of the transaction, is not sufficient to entitle the Court to set aside this razeenamah. Now, we are of opinion that the evidence is not enough, that there is not sufficient to satisfy us, and ought not to have satisfied the Court below, and, consequently, we think that the right conclusion has been come to.

The other point that has been taken is, that the question before the Court below, and brought by appeal before us, is, whether or not there was ground for further enquiry, and that the Court below did not give an opportunity to the parties to adduce all the evidence that they were in possession of? Here, again, we are of opinion that the proof lies upon the appellant, and that he complaining that he had not an opportunity of giving his evidence to the Court below, it is for him to shew from these proceedings, that he was ready to produce evidence and offered that evidence, and that the Court rejected it. Now, we are of opinion that he has not made out that, that he has not proved that he made that tender, and that the Court rejected it. On the contrary, taking the statement which we have of what took place below, principally from that on which both parties most rely, as well as upon the more formal and distinct account of those proceedings (namely, the statement of the third Judge's judgment), it rather appears that a certain mode of enquiry was pointed out; that a certain mode of taking the evidence was suggested; and that there was, I will not say, acquiescence of the parties in that, for it is not necessary in that case, but that there was no objection by the parties, and that there was no evidence tendered by them which the Court refused to hear. Consequently we are of opinion that upon that ground also the appellant has failed; that he has not satisfied us that he tendered evidence which was rejected; and that, upon the whole, the trial of the question was substantially gone into, the only evidence which he did adduce having been examined by the Court, and he having had the benefit of that examination. Under the circumstances of the case, while we affirm the order of the Court below upon the ground I have stated, we do not think that costs ought to be granted to the parties.

The 7th December 1866.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, T. Erskine, and Sir A. Johnston.

Evidence (Test in cases of conflicting)—Registration under Section 20, Regulation XXXVII, 1793—Presumption.

Meer Usud-oollah *also called* Shah Chaman

versus

Beeby Imaman, widow of Shah Khadim Hoossain.

There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

The act of registration after a proclamation under Section 20, Regulation XXXVII., 1793, amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, affords an equally strong presumption of the non-existence of any title on the other.

Mr. Baron Parke.—Their Lordships are called upon in this case to pronounce their opinion on a single question of fact, with respect to which, however, there is a great mass of documentary and parol evidence on both sides, and conflicting decisions of the

Provincial and Sudder Dewanny Courts, between which we are left to decide without much assistance in investigating the truth from either. We must therefore determine for ourselves, in the best way we are able, upon the evidence, oral and written, which was adduced on both sides, and which has been laid before us and very elaborately discussed.

The plaintiff, the appellant, seeks, by the original suit commenced in 1813, to recover from the defendant a property of which he was then in possession. This circumstance alone throws upon him the burthen of proof. He was bound to shew to the satisfaction of the Court that he had a just title to the possession. The nature of the property is not very clearly explained, but it is certain that it had the character of real estate, being a part of the land-revenue of a certain district originally granted by the Mogul Government for religious purposes, or rather burthened with a religious obligation, and subject to it, to be enjoyed by the grantees for their own benefit. This property is denominated a muddud-mash. It had been undoubtedly in the actual possession of those under whom the defendant claimed, and of the defendant herself, prior to and since the year 1761 down to the commencement of the suit. The plaintiff deduced no title to himself by proof of any conveyance from the original grantees of the Moguls, or from any of the persons who had been in possession; he was obliged, therefore, to claim on the ground that the possession of the defendant and her predecessors was legally his own, and that the persons in the actual occupation or receipt of the profits were his agents, and received them on his account. The single question of fact was, in effect, the only question in the cause, and the plaintiff was bound to prove the affirmative. The course which he took for this purpose was, in the first instance, to prove by several witnesses payments of money by Meer Gholam Kullendar, who was in possession prior to and about 1760, and by Beeby Zenut, who subsequently occupied. Those made by her were stated to have been in 1776 or 1777, on the occasion of the plaintiff's marriage, also in 1793 and 1802, and such payments in all amounted to between ten and eleven thousand rupees. He also gave evidence of the expenses of the plaintiff's marriage having been defrayed out of the revenue, and that the ceremony was performed in 1777, when he acted as Malik or owner; and the like on the occasion of the marriage of a son (whether the same or a different one is left uncertain) in 1793 and 1812. One witness spoke to an act of ownership in the plaintiff or his father in 1783, Beeby Zenut having restored, by his order, the witness's father to a house from which he had been removed; and several others deposed to declarations of Meer Gholam Kullendar and of Beeby Zenut on different occasions, and particularly in 1776 and 1777, and even by Shah Khadim Hoossain in 1812, that the plaintiff was the real owner of the mash, and the case was then closed. But in a subsequent stage, and a very short time before the judgment was given, the plaintiff gave more parol evidence, and produced three letters appearing to be under the seal of Beeby Zenut, each recognizing the plaintiff's title and that of his father, and he exhibited six copies of papers from the Court of Bhaugulpore, one of which purports to be a deed of relinquishment from Beeby Boodhun to Beeby Zenut in 1767, a durkhast or petition from Beeby Zenut for the management, dated in 1762, and a grant of the management accordingly. The last, if genuine, and duly proved, would have been decisive in the plaintiff's favor; but these six documents were considered by the Sudder Court as forgeries, and upon that assumption the decree of that Court was founded. A great suspicion undoubtedly attaches to them. But it is not necessary to discuss the question whether there was sufficient proof that they were actually forged, because, at all events, the *copies* were inadmissible, for there was no evidence of a search for the originals. These six papers must, therefore, be altogether dismissed from the case for that reason, and it must rest, on the part of the plaintiff, on the other documents and the oral testimony.

On the other hand, the defendant called many witnesses to prove that she and those under whom she claimed acted and were always treated as the owners of the mash, that the plaintiff and his ancestors were never supposed to be so, and several deeds were put in, proving a dealing with the property from a very early period. There were two mortgages from Meer Gholam Kullendar in 1756 and 1761, shewing that he was then acting as owner. In 1765 Beeby Boodhun mortgaged the property. A deed was then put in of the date of 1768, dividing the whole between Beeby Zenut,

to whom eight shares were assigned, and Beeby Noorun, who took seven. That both were subsequently in possession was proved by their joining in a lease in 1775, and by one leasing in 1782 her seven shares, and the other mortgaging her eight shares in 1783. This possession of both is shewn by perwannas to have continued in 1786, and is said to be an absolute possession; and there is parol evidence on the cross-examination of the plaintiff's witness, Mahto, and the examination of the defendant's witness, Bux, that both were at one time in possession, for the latter mentions that there were two cutcherries. A conveyance was then proved of Beeby Noorun's share to Beeby Zenut in 1789; after which, in 1791 and 1793, the latter leases as sole owner, and conveys the whole, in 1796, to Shah Khadim Hoossain, her nephew, of whose actual possession in 1794 parol evidence was given; and four leases, two of the subsequent dates of 1799, 1800, and two of 1805, were produced, all purporting to be made by Shah Hoossain alone, and proving that he acted as owner from that time.

From this outline of the defendant's case, so far as I have stated, and without adverting to two important facts, which I shall afterwards notice, it appears that a title is deduced from Beeby Boodhun to the defendant, and confirmed by regular acts of ownership exactly corresponding with the documentary title. On contrasting this case with the plaintiff's, several observations occur in favor of its truth. So far, indeed, as relates to the acts of ownership of Beeby Zenut, it is not absolutely inconsistent with the plaintiff's case, which admits her to be in possession, and, being so, she might deal with the estate by leasing and mortgaging it as her own; but the acts of ownership of Beeby Boodhun and Beeby Noorun are altogether inconsistent, and cannot be explained upon the plaintiff's hypothesis, and they are very distinctly and satisfactorily proved. Again, the admissions of title sworn to as having been made by Meer Gholam Kullendar and Beeby Zenut and Shah Khadim Hoossain or Borge, are wholly at variance with their solemn acts; for these declarations are said to have been made about the very times that these persons were actually conveying the property as their own, and it is impossible to suppose that, when they were acting as owners, and in their own right, they should be admitting to witnesses that they had no right at all. Much greater credence is to be given to their acts than to their alleged words, which are so easily mistaken or misrepresented. As to the proof of payments, their amount is small compared to the actual revenue; and it may be true that, considering the connection of the families (for the plaintiff married Beeby Zenut's niece), money has been occasionally sent as an act of bounty, and the expenses of the marriage of the plaintiff may also have been defrayed, in part or in all, by her. But if the proceeds of the mash had really belonged to and been remitted to the plaintiff down to the commencement of the suit, which the plaintiff alleges, whatever difficulty there might have been to have proved such payments at a more remote period, there certainly would have been none in giving abundant evidence, in recent times, by numerous living witnesses; but the proof, instead of growing stronger, becomes weaker, the nearer we approach to the present period, and no remittances whatever are shewn to have occurred since 1801.

The restoration of the witness Mahto's father in 1783 by Beeby Zenut, at the request of the plaintiff's father, may have a foundation in truth, without leading to the inference that the father was the malik; and it is to be observed that it is at variance with a fact asserted by other witnesses of the plaintiff, namely, that in 1776, seven years before, the plaintiff himself was the owner of the property.

I proceed to the written evidence. The three letters alleged to be from Beeby Zenut are open to much observation: they were brought forward late in the case, after the plaintiff's vakeels had closed their cause, the last of them on the very day of the decree, when the opposite party had no opportunity to contest their genuineness, and that was not proved, except by the similarity of the impression of the seal with that of a seal produced by the defendant.

The first of these letters, which, according to the testimony of a witness, named Golam Hoossain, was written in 1793, is addressed to Mahomed Meer as the malik, whereas it is proved by several of the plaintiff's witnesses that the plaintiff himself filled that character in 1776. The second, dated 1797, might, if true, have been confirmed by the production of the account therein referred to; and, if it had been really written by Beeby Zenut to the plaintiff, it is singular that after the strong entreaties it contains that the plaintiff would come over on account of her age, infirmity, and failure of

sight, he should have permitted her still to continue his agent till her death, which happened nine years afterwards.

The third letter is open to no observation peculiarly belonging to it, but all are very inconsistent with the solemn acts, leases, and mortgages, proved on the other side on corresponding dates, a lease in 1765 by Beeby Boodhun, in 1793 by Beeby Zenut, and a conveyance by the latter in 1796 to Shah Khadim Hoossain of all his estate.

We should therefore feel little difficulty in deciding on which side the truth lay, if we had nothing else to guide our judgment than the comparison of these conflicting acts and declarations, parol and written, on one side and on the other; but we are not thus confined. There are some other facts which are established beyond all possibility of doubt, and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

Now, there were two facts most distinctly established. The first was, that, in pursuance of a notice given according to Regulation XXXVII., 1793, Section 20, Shah Khadim Hoossain in 1797 entered his claim in the public records as the owner of this mash, deriving his title by grant or tumleek-namah from Beeby Zenut, dated in 1796, and no proof was given on the part of the plaintiff that he ever was, or claimed to be, registered as the owner. The second fact was that, although the plaintiff's case proceeded on the ground that Beeby Zenut and Shah Khadim Hoossain were in possession as his agents, and accounted to him for the profits, yet he produced no single account-current or duftar for any part of the time. These two facts, then, being undoubted, we have to consider whether the case on the part of the plaintiff can be reasonably reconciled with them. If that case were true, is it likely that the claimant, who lived fifty or sixty miles from Patna, would have abstained to bring forward his claim on so important an occasion as that which occurred, when the Government called upon all persons having title to property of this description to appear and enter it on public Registers, in order to prevent its being forfeited to the Government? This fact is most important, not because the Registers themselves are at all of the nature of conclusive evidence of title (for the Regulations provide against that), but because this act of registration after a proclamation amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, afford an equally strong presumption of the non-existence of any title on the other. Again, if the plaintiff was for near fifty years the owner, having either the whole of the mash or the surplus of its revenues, after satisfying the supposed religious purposes for which it was given, is it to be believed that he would not have had a regular annual account, at all events some occasional statement, from his agents, of the receipts and disbursements? and we have the means of knowing, from the assistance we receive at this Board from persons conversant with the subject, that the natives are particularly exact in keeping written accounts.

For these reasons, we are of opinion that the weight of evidence is in favor of the defendant, and that the claimant has by no means satisfied the exigency of the law, which throws on him the burthen of proof. We therefore affirm the decree of the Sudder Dewanny Adawlut, and we are of opinion that it must be affirmed with costs.

Lord Brougham.—Did the appellant sue *in formâ pauperis?*

Mr. Miller.—I am not aware, my Lord.

Judgment affirmed with costs.

The 17th December 1836.

Present:

Lord Brougham, Sir L. Shadwell, Mr. Justice Bosanquet, T. Erskine, and Sir A. Johnston.

Evidence—Production of Account-Books.

Sorab-jee Vacha Ganda

versus

Koonwur-jee Manik-jee.

One party, by merely producing his own books of account, cannot bind the other.

Sir L. Shadwell.—On the 6th of April 1813, Koonwur-jee Manik-jee, the respondent in this appeal, brought his plaint in the Zillah Court of Surat against Mun-jee Bhaee and the respondent Sorab-jee, alleging that

they had dealings with him, that their account-current was regularly adjusted by their gomastahs up to 1860, and that on the 9th Poos-sood 1862 there was a balance in the respondent's favor of Rupees 7,132-1-60. His claim against the defendants was for that sum, principal and interest, equal in the whole to Rupees 13,689-0-75; from which he deducted Rupees 2,125 principal, and 2,070-3-6 interest, making 4,195-3-6, on the acceptance of Hormuz-jee Bheem-jee, who, it was alleged, had not paid the plaintiff a rea, leaving a balance against the defendants of Rupees 9,043-1-69. The defendants answered separately. The appellant denied having settled accounts with the plaintiff's gomastah.

In support of his case the respondent produced an extract from his own accounts. Two letters were also put in evidence, and some witnesses were examined. The inference from the letters rather was, that there had been separate transactions between the respondent and the appellant; but there was no evidence to shew that the appellant was privy to the respondent's accounts. The Zillah Court, however, on the 24th of May 1815, decreed that the defendant should pay to the plaintiff the sum of Rupees 7,132-1-60 according to the dufters of the plaintiff.

The respondent, on the 17th of October 1815, brought another plaint in the Zillah Court against Mun-jee Bhaee and the appellant, to recover the 2,125 rupees and interest, and on the 26th of March 1817, the Court decreed that the defendants should pay to the respondent the 2,125 rupees and interest. The only evidence in that suit was, that the 2,125 rupees had not been paid to the plaintiff: no additional evidence was offered to shew that the defendants could be bound by the plaintiff's accounts.

The respondent appealed to the Provincial Court against the decree of the 24th of May 1815, because interest had not been allowed him on the sum recovered, and the Provincial Court, on the 10th November 1815, decreed the appellant and Mun-jee Bhaee to pay the interest which had been disallowed by the Zillah Court, and the costs of the appeal.

The appellant appealed to the Provincial Court from the decree of the 24th of May 1815, but on the 23rd of July 1816 the Provincial Court affirmed the decree.

The appellant also appealed to the Provincial Court from the decree of the 26th of March 1817, but, on the 14th of April 1818, the Provincial Court affirmed it.

Upon three distinct appeals to the Court of Sudder Dewanny Adawlut, in two of which Sorab-jee was sole appellant, and in the third he and Mun-jee Bhaee were joint appellants from the three decrees of the Provincial Court, those decrees were affirmed with costs by three decrees, two of the 25th of March 1818, and one of the 12th of May 1819.

The appellant, Sorab-jee, has presented his appeal to His Majesty in Council against those decrees of the Sudder Dewanny Adawlut. It is observable that, if the first decree of the Zillah Court were right, its second decree might be right also; for the claim for the sum of 2,125 rupees and interest rested on the same ground as the claim by the first plaint, and if those decrees were right, the decree of the Provincial Court upon the appeal of Koonwur-jee Manik-jee for the interest disallowed by the Zillah Court might be right; but if the decree of the Zillah Court upon the first plaint were wrong, then that plaint, as well as the plaint in the second suit in the Zillah Court, and the appeal of Koonwur-jee Manik-jee to the Provincial Court, should have been dismissed with costs.

No evidence was brought before the Provincial Court or the Court of Sudder Dewanny Adawlut, which was not before the Zillah Court, so that the decrees can only be supported by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable; and the result is, that all the eight decrees are wrong; that the three decrees of the Sudder Dewanny Adawlut Court complained of must be reversed as to the appellant, but without costs; and not only must the decrees of the Provincial and Zillah Courts be reversed, so far as they direct the appellant Sorab-jee to pay principal, interest, or costs, but the two original plaints in the Zillah Court, and the respondent's appeal to the Provincial Court, must, as against the appellant Sorab-jee, be dismissed with costs.

The 8th February 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Vaughan, T. Erskine, Sir E. Hyde East, and Sir A. Johnston.

Limitation (Section 13, Regulation I., 1800, Bombay Code)—Offer of Compromise—Residence of Defendant in Foreign Territory.

On Appeal from the Sudder Dewanny Adawlut at Bombay.

Bhaee-Chund and Koosal-Chund

versus

Purtab Chund.

The offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise (an inference which is never permitted), cannot bring the plaintiff within the exceptions in Section 13, Regulation I. of 1800 of the Bombay Code, under which a suit is barred by limitation if not brought within 12 years from accrual of cause of action.

The defendant's residence beyond the limits of the E. I. Co.'s Courts is not a good and sufficient cause, within the meaning of the same exceptions, to excuse the plaintiff's delay in suing beyond the 12 years.

Right Hon'ble T. Erskine.—This was an appeal from a decree of the Sudder Dewanny Adawlut at Bombay, which formed the last of a series of proceedings in the Court of that province upon the question now pending for the final decision of His Majesty in Council.

The first of these proceedings was a complaint filed in the Zillah Court at Surat, in the year 1819, against Roop Chund, since deceased, by the present respondent Purtab Chund, suing *in formâ pauperis*, in which he claimed, as heir of his late uncle Pana Chund, deceased, the sum of 3,477 sicca rupees, and an equal amount of interest upon a note-of-hand, alleged to have been given by Roop Chund, in the year 1792, to Koorum Chund, the partner of the respondent's uncle, Pana Chund, to secure the amount of the balance then due from Roop Chund to the partnership. After several intermediate proceedings in the Zillah Court and in the Sudder Adawlut, which it is not necessary to particularize (during which the defendant Roop Chund died, and the present appellants intervened, and were admitted to defend the suit), the cause came on before the Zillah Court for final hearing on the 14th of February 1823. The defence set up during these proceedings by Roop Chund, and afterwards by his heirs, was, *first*, that Roop Chund never owed anything to Pana Chund or Koorum Chund. *Secondly*, that the note produced had been fraudulently obtained from the widow of Koorum Chund by the plaintiff, who had no legal interest therein, or right to sue thereon. *Thirdly*, that the supposed cause of action had arisen more than twelve years before the commencement of the suit, and was, therefore, barred by the Regulations of the Company.

In reply to the *first* defence, the plaintiff relied upon the production of the books of account and the note. In reply to the *second* defence, it was stated that, after the death of Koorum Chund, and the respondent's uncle, Pana Chund, he, the plaintiff, came to a settlement of the partnership-accounts with the widow of Koorum Chund, who, having received from him her dues, gave him a deed of release, whereupon he took possession of the *dufter* and the note as having the exclusive right to them. In reply to the *third* defence, he relied upon the fact that the note was executed at Poonah, where Roop Chund resided, and that he had never been at Surat since, until just before the commencement of the suit; and, further, that Roop Chund, on his arrival from Poonah in 1819, had admitted the justice of his claim, and had offered to pay a sum of money by way of compromise.

The widow of Koorum Chund was examined upon interrogatories exhibited by the direction of the Court, and stated in substance that the note had no reference to any partnership-concern between Koorum Chund and the plaintiff's uncle Pana Chund, but was given for money due to her husband alone, and that the release was executed by her without reading it, and was intended to relate only to charities and other like expenses. That, at the time she executed it, she did not give the note to the plaintiff, but that he stole it, together with her books and papers.

The Zillah Court, upon consideration of the whole case, was of opinion that the evidence of Koorum Chund's widow was fatal to the plaintiff's claim, and also that the plaintiff had not shown in proof why the Statute of Limitations of twelve years should not bear upon his case, and, therefore, passed judgment against the plaintiff, and decreed that one-half of the fees of the defendant's vakeel should be recovered from the defendant, and the remainder from any property that might be found to belong to the plaintiff, and the fees of the plaintiff's vakeel should also be recovered from any property found to belong to the plaintiff. The cause was carried back by appeal to the Sudder Adawlut, before which fresh evidence was taken, relative to the several questions raised

before the Zillah Court, and on the 3rd of June 1823, the Second Judge, before whom the cause was heard, recorded his view of the case, delivering his opinion, for the reasons therein stated, that the decision of the Zillah Judge should be reversed, and the amount of the note with interest and costs in both Courts should be awarded to the plaintiff below and their appellants, and referred the case for the consideration of the full Court. And afterwards, on the 26th of the same month, the rest of the Court, after considering the documents and proceedings, concurred generally in the view taken by the Second Judge, and determined to reverse the decree passed by the Zillah Court at Surat, and decreed that the sum of 6,954 sicca rupees 3 annas be paid to the appellant by the heirs of Roop Chund, with full costs in both Courts.

Against this decree the present appeal has been lodged, and the case was argued before this Board on the 7th of December last, when the Counsel for the appellants insisted—*first*, that the respondent had made out no right of action against Roop Chund or his heirs; *secondly*, that, as the supposed cause of action had arisen beyond the jurisdiction of the Court at Surat, and as the defendant Roop Chund was not resident within it as a fixed inhabitant, but had only come to Surat for a temporary purpose, the Zillah Court had no jurisdiction in the case; and, *thirdly*, that the plaintiff's right of action, if it ever existed, had been barred by the lapse of time.

Their Lordships intimated their opinion in the course of the argument, that, the plaintiff's title to sue, unless he had been barred by the lapse of time, was sufficiently established by the evidence, and that as the heirs of Roop Chund had intervened in the suit, and there was no evidence that they were resident at Surat, where Roop Chund had formerly lived, no objection could be raised by them to the jurisdiction, especially as no such point was made by them in either of the Courts abroad, where the fact could have been easily ascertained. It is, therefore, unnecessary to say any thing now upon those points, and the less so because their Lordships are of opinion that upon the *third* objection the decree of the Sudder Adawlut must be reversed, and the plaintiff's suit dismissed. That objection was founded upon the first Regulation of the Governor of Bombay, confirmed in Council in August 1800, for the institution of a Court of Justice in Surat.

By the 13th Article of that Regulation the Judge of that Court is prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period for the matter in dispute, to a Court of competent jurisdiction, to try the demand, and assign satisfactory reason to the Court why he did not proceed in the suit, or that, either from minority or some other good and sufficient cause, he had been precluded from obtaining redress. In this case the cause of action arose twenty-seven years before any suit was commenced. Unless, therefore, the respondent can bring himself within one of the exceptions to this prohibition, the dismissal of the complaint by the Zillah Court of Surat must be held to have been right, and the decree of the Sudder Adawlut erroneous. The respondent contended, and the Sudder Adawlut decided, that the case was brought within two of the exceptions—*first*, that the defendant had admitted the truth of the demand; and, *secondly*, that the plaintiff was prevented by the defendant's continued residence at Poonah, where the note was given, from procuring a settlement of the bond, and that he had thereby shown that by a good and sufficient cause he had been precluded from obtaining redress.

The evidence upon which the supposed admission by Roop Chund of the truth of the plaintiff's demand rests is to be found in the depositions of Koosul Chund, Tarar Chund, and of Wugt Chund, Juy Chund, taken before the Sudder Adawlut, and printed in the 23rd and 24th pages of the Appendix D. But, when this evidence is examined, it will be found to amount to no more than an offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise, an inference which is never permitted, and which in this case would be most unfair, when the action was commenced while the defendant was absent for a temporary purpose from his usual place of business, to which he was anxious to return. Their Lordships, there-

fore, are of opinion that the facts stated by those witnesses ought not to be taken as proof of any admission by the defendant of the truth of the plaintiff's demand, so as to take the case out of the prohibitory Clause of the 13th Article of the Regulation. The only other ground upon which the plaintiff seeks to be exempted from the effect of the prohibition is the continued residence of the defendant at Poonah. But no evidence is to be found in any of the proceedings to show that the plaintiff might not, by adopting proper steps, have obtained redress in the Mahratta Courts at Poonah. It was stated, indeed, in the course of the argument, that it was useless for a poor man to commence any proceedings against a wealthy opponent in the Peishwa's Court; but their Lordships cannot, in the absence of all proof, judicially assume this as a fact. It was also urged that the decision of the Sudder Adawlut might be taken as evidence of the opinion of the Judges of that Court, who must be presumed to know how Justice was administered in the Native Courts, that the plaintiff could not have procured redress there if he had attempted it. But the second Judge, who alone gives any reasons for the decree, does not assign this as the reason why the plaintiff was prevented obtaining an earlier settlement of the bond at Poonah, and we have upon this fact the opinion of the Zillah Judge the other way. Their Lordships, therefore, are of opinion that they ought not to adopt these vague surmises as a substitute for the clear and positive proof required by the Regulation in question.

If their Lordships had found that, by a train of decisions in the Courts abroad, the residence of the defendant beyond the limits of jurisdiction of the Company's Courts had been considered a good and sufficient excuse for the complainant's delay beyond the twelve years, they would have considered themselves bound by a practice upon which the plaintiff might have been fairly presumed to have relied, and the case was allowed to stand over for the purpose of enabling the Counsel of the respondent to produce any such decisions, but none can be found. In the absence, therefore, of proof and authority, their Lordships can find no principle on which they can determine that the residence of Roop Chund at Poonah afforded such an obstacle to the plaintiff's obtaining earlier redress, as to exempt him from the effect of the prohibition under discussion. The learned Counsel for the respondent relied very much upon a decision in this country, in the case of Williams *v.* Jones, 13 East R. 439. But the point argued and decided in that case was essentially different from the question now under discussion. In that case, the plaintiff's claim was clearly brought within the express exception of the Statute, but it was contended that his right of action was gone, because by the adoption of the Statute of Limitations in India, where the contract was made, his remedy had been barred there by the lapse of time, and the decision of the Court proceeded upon the ground that, as before the Statute of Limitations the plaintiff's right of action in this country had no limit, and as the circumstances of the case exempted it from the operation of that Statute, his remedy could only be barred by the extinguishment of his right; and, as the adoption of the Statute of Limitations in India could only bar his remedy there, but did not extinguish his right, his remedy in this country remained unimpaired.

Here the only question is, whether the plaintiff's case brings him within the exceptions; namely, whether he has shown, by clear and positive proof, that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress.

Their Lordships are of opinion that no such case has been made out, and will, therefore, recommend His Majesty to allow this appeal, to reverse the decree of the Sudder Adawlut, and to affirm the sentence of the Zillah Court.

The 8th February 1837.

Present:

Lord Brougham, Mr. Baron Parke, Sir J. Nicholl, T. Erskine, Sir E. Hyde East, and Sir A. Johnston.

Costs.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Madho Row Chinto Punt Golay

versus

Bhookun-Das Boolaki-Das.

Appeal by defendant against whom the suit was decreed in the Court of first instance, which decree was affirmed on appeal by the Sudder Adawlut. The Privy Council held that the plaintiff had not made out his case below, and reversed the judgment, but awarded to the defendant costs in the first Court only, and not in either of the Appellate Courts, on the ground that the plaintiff, as respondent, was defending the judgment.

Lord Brougham.—THEIR LORDSHIPS are of opinion that the plaintiff has not made

out his case below, and that the judgment must be reversed, there being no sufficient evidence to fix the defendant with the sum in question; and consequently the judgment in the first case, and the judgment in the second instance upon the appeal prosecuted to the Sudder Adawlut, must be reversed. It will also follow that the costs in both must be refunded if paid by the present appellant.

Mr. Baron Parke.—They will be reversed, of course, without the costs of the proceedings here.

Lord Brougham.—Yes, if there is any part not paid, they must be paid; if leave to appeal was given upon security, there will be no costs to be paid; but then the question will arise, whether the appellant, the defendant in the Court below in the first instance, and the appellant in the appeal here, ought not to have his costs? Now, he ought to have no costs of the appeal, but he ought to have his costs in the first Court where he ought to have prevailed; he ought to have his costs in the original Court, where there ought to have been a non-suit, or a verdict for the defendant.

Mr. Baron Parke.—There is no ground whatever for the judgment, except the observation of Mr. Lloyd, that they ought to have cross-examined the witness; but, if you look at the evidence, it is clear he knows nothing about it.

Lord Brougham.—If you look at the bottom of page 10, and take the passage, "that he was a gomastah," and separate it from what goes before and after, you would have some case; but the top of the next page shews he knows nothing about it.

Mr. Sergeant Spankie.—Yes, my Lord, that was my case; and I thought my learned friend Mr. Lloyd knew better what an examination in the Examiner's Office was, than to talk of cross-examining.

Mr. Baron Parke.—No inference is to be drawn from not putting questions on cross-examination.

Mr. Sergeant Spankie.—It is shooting in the dark. We ought to send out some people to instruct the agents there.

Lord Brougham.—The costs are considerable; one cannot help feeling that a single question put by you might have given the case an exceedingly different appearance if that account had been brought home to Chinto Punt.

Mr. Justice Bosanquet.—If Gopal had said he had communicated the receipt of the money, there would have been an end of it.

Mr. Baron Parke.—They seem to have proceeded upon the assumption that the account was sent, which is quite incorrect.

Lord Brougham.—They should have done what Mr. Baron Parke has said; but there is the report of the bankers, that he delivered in the account to Chinto Punt, that is stated in the judgment, but that is only to be found in the report of the bankers.

Mr. Miller.—Nowhere else.

Lord Brougham.—It is intended to get rid of the statement that he lived in the house.

Mr. Sergeant Spankie.—Yes.

Lord Brougham.—We reverse the judgment without cost; but any costs paid below by the appellant to the respondent to be refunded, and the costs of the appellant in the Court of first instance to be paid by the respondent, but no costs to be in the Court in which the present appellant was the appellant, and the present respondent was respondent, because the respondent was defending the judgment.

Mr. Sergeant Spankie.—The costs to be refunded in the first Court, but none in the second.

Mr. Brougham.—But the present appellant's costs in the first Court to be paid by the present respondent.

The Right Hon'ble T. Erskine.—The costs in the Zillah Court to be paid to the appellant, but no costs in the Sudder Dewanny.

The 10th February 1837.

Present:

Mr. Justice Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, T. Erskine, Sir E. Hyde East, and Sir A. Johnston.

Appeal to Privy Council—Consolidation of suits.

On Appeal from the Sudder Dewanny Adawlut in Calcutta.

Moofti Mohummud Ubdoollah and another

versus

Baboo Mootechund.

Upon the construction of the Statute 21 Geo. III. c. 70, s. 21, it was held that two suits (each for less than 50,000 rupees, but both for more than that amount), in which separate judgments were given, could not be consolidated for the purpose of permitting an appeal to the Privy Council; each judgment, when pronounced, having been final and conclusive.

Mr. Miller.—My Lords: this is a petition of appeal from Bengal. With respect to the form of this petition, there is an arrange-

ment between the parties, in consequence of which it comes before your Lordships now in this form. This petition prays that His Majesty in Council "will be pleased to take their said appeal in the said two causes into your most gracious consideration."

Right Hon'ble T. Erskine.—Are there two causes?

Mr. Miller.—Yes, my Lord.

Mr. Justice Bosanquet.—We understand that the appellant in one case is Mohummud Ubdoollah.

Mr. Miller.—Mohummud Ubdoollah and Moofti Mohummud Ismael.

Right Hon'ble T. Erskine.—There is a cross-appeal.

Mr. Miller.—No; the petitioners are the appellants in the consolidated cause.

Mr. Serjeant Spankie.—There were two causes below. There was one defendant in one, and three defendants in the other.

Mr. Baron Parke.—Are you agreed?

Mr. Serjeant Spankie.—As to that fact.

Mr. Baron Parke.—But not as to the result?

Mr. Serjeant Spankie.—No, my Lord.

Mr. Baron Parke.—There are two different cases.

Mr. Miller.—Which were consolidated in India.

Mr. Baron Parke.—What were those two different cases?

Right Hon'ble T. Erskine.—It appears to be an appeal by Moofti Mohummud Ubdoollah against Baboo Mootechund, and it appears to be an appeal now by Mootechund against Ubdoollah; that appears to be a cross-appeal.

Mr. Miller.—It does appear so.

Mr. Baron Parke.—Where are these from?

Mr. Miller.—From Bengal. The petition prays "that the same may be declared consolidated, and heard together as one appeal, and that your order of summons may be issued to the said respondent to appear and put in his answer thereto, and that service thereof upon his agents may be deemed good service, and that an early day may be appointed for hearing the said appeal, and that the said decrees of the Sudder Dewanny Adawlut, in the said two causes, may be reversed, altered, or varied, and that your petitioners may have such further and other relief in the premises as to your Majesty, in your great wisdom, may seem meet."

Mr. Baron Parke.—What is the amount of the property?

Mr. Miller.—If your Lordship will allow me, I will state the facts of the case.

Mr. Baron Parke.—Will you have the goodness to answer that question?

Mr. Miller.—The amount of the first cause is 19,046 rupees.

Mr. Wigram.—That is the principal.

Mr. Baron Parke.—What is the whole amount of the principal and interest?

Mr. Wigram.—34,476 rupees, and in the other cause it is 19,046.

Mr. Baron Parke.—They are both below the amount.

Mr. Wigram.—They are.

Mr. Baron Parke.—But can you consolidate so as to give us jurisdiction?

Mr. Miller.—We shall endeavour to satisfy your Lordship of that; each of the suits separately is below the amount required.

Sir A. Johnston.—There are two suits brought here by the Company under the Act.

Mr. Miller.—Yes, they are.

Mr. Baron Parke.—What is the Statute?

Mr. Serjeant Spankie.—The 21st of Geo. III., chapter 70, section 21.

Mr. Miller.—The petition states on the 24th of November.

Mr. Baron Parke.—There is a point of law depending entirely upon the construction of the Act, without knowing more of the facts.

Mr. Miller.—There are certain facts in this case which are somewhat material.

Right Hon'ble T. Erskine.—We must first be satisfied that we have power to hear it.

Mr. Wigram.—In our Courts you have suits, cross-suits, and supplemental suits, and at last the Court acts upon them as one suit. The words of the Act are, "in civil suits, the value of which shall be £5,000."

Mr. Baron Parke.—There can be no appeal to the King in Council except in suits the value of which is £5,000.

Mr. Miller.—I shall satisfy your Lordships that, before this case came from India, it was one suit. The petition sets forth that, on the 24th day of November 1818, Baboo Mootechund, of the city of Benares, merchant (the respondent hereto), filed his plaint in the Provincial Court of Appeal of the province of Bareilly against your petitioners, and also against Moofti Gholam Umbuyee, the father of your petitioners, and one Mohummud Hubeebood-deen, for the recovery of the sum of 19,046 rupees; that is the first suit. It then sets forth that

Mohummud Hubeebood-deen never appeared to the said plaint or any of the subsequent proceedings in this cause; and your petitioners, and their said father, duly appeared to the said plaint. It then sets forth that, on the 2nd day of October 1820, the said Provincial Court made a decree. It sets forth that the second suit took place between the parties; that on the same 24th day of November 1818, on which the said respondent filed his plaint in the said cause No. 152, he also filed another plaint against your petitioner, Moofti Mohummed Ubdoollah alone, for the recovery from him of the sum of 15,430 rupees. The petition sets forth that the said Provincial Court, on the same 2nd day of October 1820, in which they had made their decree in the said cause, No. 152, also made their decree in the said cause, No. 153, whereby they dismissed the claim of the said respondent with costs.

With respect to the second suit, it sets forth "that, on the 3rd of February 1821, the said respondent appealed from the said decrees of the said Provincial Court in both the said causes, Nos. 152 and 153, to the Court of Sudder Dewanny Adawlut at Calcutta, before which additional evidence was taken in both the said causes. That on the 23rd day of August 1823, the said Court of Sudder Dewanny Adawlut made their decree in the cause which had been numbered 152 on the file of the said Provincial Court, and was then numbered as 2106 of 1821, on the file of the said Court of Sudder Dewanny Adawlut, whereby they decreed that the said decision of the Provincial Court should be reversed, and the appellants' appeal be decreed." And the said Court proceeded in their said decree to direct, in the words and figures, or to the purport and effect following (that is to say), "The appellant aforesaid will receive the sum of Rupees 19,046-3-3, the principal amount of the bond, dated the 1st of Jamadee Vassanee, 1222. Anno Hejira, with interest thereon at the rate of one rupee per cent. per mensem." The remainder of that I need not trouble your Lordship with. It also refers to the judgment of the Court of Sudder Dewanny Adawlut, on the same 23rd of August 1823, whereby it was ordered that the decree of the Provincial Court should be reversed.

It then sets forth the Act of Parliament passed in the 21st of George III., Chapter 70. In this Act of Parliament it is stated, "That the said Court should, and lawfully might hold all such pleas and appeals in the manner and with powers as it theretofore had held the same, and should be declared in law a Court of Record, and the judgments therein given should be final and conclusive, except upon appeal to His Majesty, in civil suits only, the value of which should be £5,000 and upwards. Though for their greater certainty as to the contents of the said Act of Parliament, your petitioners refer thereto." The petition then sets forth, "That a Regulation for the administration of justice in the Presidency of Bengal, aforesaid, No. XVI. was passed on or about the 24th of November 1797."

Mr. Wigram.—They do not dispute the calculation of interest and principal.

Mr. Serjeant Spankie.—A man might charge twelve per cent. interest.

Mr. Baron Parke.—But he must appeal within a certain time.

Mr. Serjeant Spankie.—He must appeal within six months in India, and within twelve months here.

Right Hon'ble T. Erskine.—What are the facts which you say make these two suits one?

Mr. Miller.—The petition further sets forth, "That, on the 22nd day of November 1823, your petitioners presented a petition to the said Court of Sudder Dewanny Adawlut, praying that the said two causes might be re-heard, or that an appeal might be admitted from the said decrees of the said Court therein, to your Majesty in Council."

Mr. Baron Parke.—Now, we want to know what the facts are which make these two causes one.

Mr. Miller.—I was about to read the judgment of the Judges who decided the cause below: "That, on the 27th day of November 1823, the said petition of your petitioners was brought on before Courtney Smith, Esq., the Second Judge of the said Court of Sudder Dewany Adawlut who was thereupon pleased to refuse the prayer of your petitioners for a re-hearing of the said cause; but with respect to the prayer of your petitioners for the admission of an appeal to your Majesty in Council, he was pleased to express himself on the proceedings of the said Court in the following terms: "On the subject of the second wish submitted, it appears that the appellant himself, in his petition submitting the grounds of appeal in suit No. 2106, states as follows: 'At length, becoming helpless, with a view to institute legal proceedings I forwarded the bond and the *ikrarnamah*

executed by the defendants, with copies of the *razenamah* and *khata* of the *kothee* of Moradabad, to my *mokhtar*, who, with the advice of the *vakeel*, converted one suit into two suits.' From the tenor of which quotation it would appear that the appellant conceived these two suits to be in fact but one; that the appellant's object was to institute one suit, which was over-ruled by the suggestion of the vakeel. Moreover, besides this statement on the part of the appellant, it is gathered from the general scope and tenor of all the papers filed by both parties, and of the orders passed thereon by the Judges of both Courts, that the Judges of both Courts, with the parties themselves, have considered these two suits to be in fact but one. The aggregate of the principal of both suits is Rupees 30,475-3-3, and the date of the decision in both suits is one and the same, *viz.*, the 24th of November 1818 A. D., and it is clear from both the decrees of this Court which have awarded interest at the rate of one rupee per cent. per mensem on the aggregate sum of this principal, that, calculating up to the date of the decision of this Court, the aggregate amount of both suits will exceed the sum stipulated as necessary for the admission of an appeal to England by the 3rd Section of Regulation XVI. of 1797 A. D., and that, moreover, the interest runs on until the realization of the amount decreed. It therefore seems to me that the suits are appealable to England, and that the appeal should be permitted by the Court. And the said Judge, in a further part of the said proceedings, was pleased, amongst other things, to direct that the appeal to England of both suits should be permitted, and that, when the appellant should, agreeably to Regulation XXVI. of 1814 A. D., petition for the execution of both decrees, and the respondents should fulfil the conditions of an appeal to England, an order would be passed for the security being taken from the appellant, and for the execution of both decrees, and that the papers were to be brought before the Third Judge of the Court, who was a party to the issue of both decrees, with a view to affirmation."

Mr. Justice Vaughan.—They appeal to England in both suits.

Mr. Miller.—On the 23rd day of December 1828, the vakeels of your petitioner and the said respondent, being both present, the said petition of your petitioners was brought before John Shakspear, Esq., the Third Judge of the said Court of Sudder Dewanny Adawlut, and he was pleased to declare that, as the appellant himself has stated in his petition submitting the grounds of appeal that his *Mokhtarkar* ignorantly converted one suit into two, therefore the amount of both suits is, agreeably to Regulation XVI. of 1797, appealable to England; it is therefore ordered, in accordance with the opinion expressed to the Second Judge, that in case the respondents shall afford security for the costs of the appeal to England, within a period of one month after ascertaining the sufficiency of the same, an order will be issued, permitting an appeal.

Mr. Baron Parke—If his *Mokhtarkar* does that to give him some advantage, he must purchase that at the expense of another advantage.

Mr. Miller.—Those are the facts. Now, I submit to your Lordships that it is by no means unsual in Courts that suits have been consolidated.

Mr. Baron Parke.—These never were consolidated except for the purpose of being appealed; they never were consolidated during any part of their progress.

Right Hon'ble T. Erskine.—The decrees had been pronounced before they attempted to consolidate.

Mr. Miller.—I will submit to your Lordship what was to be considered the nature of the suits at that time. The prayer was in the alternative, either that the causes might be re-heard, or that there might be an appeal to England. Now, I submit that in substance the nature of the order here is a judgment upon a re-hearing. I submit that is similar to what takes place here upon further directions. Supposing this cause had been re-heard, would it not have been incompetent for your Lordships to have consolidated the two causes if such re-hearing had taken place?

Mr. Baron Parke.—They never did consolidate. In short, you have not any ground to go upon.

Mr. Miller.—I should be extremely sorry to waste your Lordship's time, but this is a point of extreme importance, inasmuch as there may be several such cases.

Mr. Baron Parke.—The Act of Parliament is positive; that we cannot entertain as a suit that which is of less value than £5,000; therefore, whatever the Judge may say, it is impossible for us to admit you.

Right Hon'ble T. Erskine.—If, in the progress of the suit, they had been consolidated, and one decree had been made in the

consolidated suit, that would have afforded a different argument.

Mr. Miller.—I am not aware that there is any rule whatever which says that the consolidation must take place at the commencement of the suit, and before any decree has been pronounced, and I think that the consolidation may take place afterwards. Supposing that, instead of the judgments being pronounced in the manner they have here been pronounced, the prayer of the petition had been granted, and that a re-hearing had actually taken place, and in that case the suit was to be consolidated, I submit that that would have been precisely the same thing as what has taken place in this case. It would have been then perfectly competent for this appeal to have been submitted to your Lordships under the Act of Parliament. Then it comes to this, whether your Lordships are now to turn us round mainly in point of form. There is an observation which was made—

Mr. Baron Parke.—A judgment for less than £5,000 is final and conclusive. There are two judgments here, each of them for less than £5,000, and therefore each of them by the words of the Act of Parliament is final and conclusive. If you had got one judgment of the Court below, possibly the Court above might have been in a different case; but you have got two judgments, and the moment those judgments are pronounced by the last Court in India, each is a final and conclusive one. Can you possibly come here after that?

Mr. Miller.—I am ready to satisfy your Lordships as far as I can, that there can be no doubt what the substance of the judgment pronounced is.

Mr. Baron Parke.—There are two transcripts and two judgments.

Mr. Justice Bosanquet.—What is the judgment that you appeal against?

Mr. Baron Parke.—The judgments they appeal against are the two judgments 152 and 153.

Mr. Miller.—I can only say, looking to the evident meaning of what the Judges expressed, that they intended to consolidate those causes.

Mr. Baron Parke.—They had no power to do it.

Mr. Miller.—Then the question is, whether your Lordships would turn us round upon what, I submit, is a mere point of form.

Sir E. H. East.—The object of the Act is to prevent enormous expense in appealing causes under a certain value. They first go into a Court in India with two causes, encumbering the parties with additional expense, all through the proceedings in India. It is you yourselves that create the difficulty. The spirit of the Act of Parliament as well as the letter is against you.

Mr. Wigram.—I will beg to call your Lordships' attention to one statement here, which is this: Supposing there were two suits, which had in fact been consolidated, then there would be no difficulty. Now, supposing two matters are comprised in one suit, which would make that suit, in common language, multifarious, so that they might have been separated, and the Court, at the hearing of the cause, should say in one of its proceedings: "We will now sever these suits." I apprehend that would also come within the rule, but I am not called upon to argue that. But here your Lordships see, though it is said in our appeal, that, when the case was appealed from the Provincial Court to the Sudder, there was an occasion to take further evidence, and the Court then made an order, by which additional evidence was taken in both the causes. Now, I am told that that was actually taken under the order of the Court, and that one order was made in both causes. When they come to speak of what they have done, in giving their reasons why they consider the two suits as one, they say that it is gathered from the general scope and tenor of all the papers filed by both parties, and of the orders passed thereon by the Judges of both Courts, that the Judges of both Courts, with the parties themselves, have considered these two suits to be in fact but one, from the beginning to the end. Now, supposing it appears that they had by that Court been so treated from the beginning to the end, then, in the result, they come to a conclusion which makes one party liable, your Lordship sees it comes to this, that in one suit there is one party suing two parties, and only one in another. The litigation involves a sum of £5,000 in the two suits. Therefore there is, in fact, a stake to that amount? But does not this further point occur, what the parties might have done is this. It appears that upon such petition of appeal to the Sudder Adawlut for leave either to re-hear the cause or to appeal, they say upon the 23rd of December 1823, "the Vakeels of your petitioners and the said respondent, being both present, the said petition of your petitioners was brought before John Shakspear, Esq."

Now, they allow the appeal to come over from the order of the Sudder Adawlut, in a form in which, according to the practice of the Court, there has been consolidation. Now, if the practice there is to treat two suits as one, on account of the position of the parties, these are, according to the practice of the Courts, but one suit.

Mr. Baron Parke.—Here it is two different people—One suit is against one, and the other against two. These are two different defendants in one suit; there is a joint debt and a several debt; we should not allow them to be joined here.

Mr. Wigram.—Within these two months, before the Lord Chancellor, we had a case where an infant had interest in three several properties, and there were different trustees appointed to each property. A bill was filed against them all, and I advised a demurrer, upon the ground of the suit being multifarious; but the Lord Chancellor decided against the demurrer, upon the ground of whether multifariousness exists or not, always depends upon circumstances. Now, here it is clear that the judgment of the Court is, that the two suits might be conducted as one.

Mr. Baron Parke.—In the case you put, were all the trustees defendants?

Mr. Wigram.—No; my demurrer was upon the ground that Lord Sligo, not being a trustee except in one suit, he had no right to be vexed with another suit. But I use it for this purpose; if, according to the practice of the Courts in India, they do deal with two suits as one, and are in the habit of making orders for examination of witnesses in both suits at once, and to treat them as one cause; if the orders passed by the Judges of both Courts have treated the suits as one; if the Judges of both Courts have considered these suits to be one, suppose that fact to be true and unquestionable, then—

Mr. Baron Parke.—In order to found your argument, you must show that there is only one judgment. If there are two judgments, then, by the express words of the Statute, they are final and conclusive. "The said Court should, and lawfully might, hold all such pleas and appeals in the manner and with powers as it theretofore had held the same, and should be deemed in law a Court of Record; and the judgments therein given should be final and conclusive, except upon appeal to His Majesty in Civil suits only, the value of which should be £5,000." Each judgment for a less sum than £5,000 is final and conclusive.

Mr. Justice Vaughan.—These are treated as separate suits.

Mr. Justice Bosanquet.—Suppose a judgment against several underwriters, all depending upon the same point, and those actions are consolidated, as we know they often are, the meaning of which is that the decision of one shall bind no other; in those cases there must be a separate judgment in each. Could a consolidation of those cases give a right to appeal under such a Statute as this?

Mr. Baron Parke.—There the consolidation is of a different kind. Here there are two decrees, and by the express words of the Statute, each of those is final and conclusive. You have two separate decrees here, each of them for less than £5,000.

Mr. Wigram.—This being an important question, I trust your Lordships will give us costs.

Mr. Serjeant Spankie—We thought it better to take this point, without going to the expense of all the proceedings.

Mr. Baron Parke.—We are now supporting the decree of the Judge below. It ought to be dismissed without costs.

The 10th February 1837.

Joint Family Property (Debt on)—Contribution.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Domun Sing and others

versus

Kaseeram and Toolseeram.

There being disputes in a joint Hindoo family with respect to the property acquired by the father, the parties agreed to refer the matter to arbitration; and, while the arbitration was still pending, certain agreements were entered into by which the parties agreed to pay their equal proportions of a joint debt effected on the common family property, and that the payment under this agreement should not be delayed by any division of the family property, or by the settlement of the debts due to the family. HELD that the parties were bound by the agreement to contribute towards payment of the debt in equal proportions according to the interest they respectively had in the family estate.

Mr. Baron Parke.—THEIR LORDSHIPS are of opinion, that the decree of the Court below ought to be affirmed. In this case the action was founded upon an agreement alleged to have been made by the appellants to pay their equal proportions of a joint debt effected on a common family property. It is clear that that common family property was divided in 1799, and it is clear that

there were then several agreements entered into, and the first question in the case turns upon the meaning of those agreements. If it was the meaning of them that the Bankers' claims were to be paid by all the five persons in equal proportions, according to the interest they respectively had in the family estate, and that that was to be done by the settlement of the accounts between the parties, it is clear that the respondents were right in bringing this action against the present appellants for four-fifths of the Bankers' account, and that question depends upon the construction of these agreements which were entered into between the parties after the reference that took place in 1799.

Now, none of their Lordships have any doubt upon the construction of those agreements. It appears that there had been disputes between the family with respect to the property acquired by the father, and that all these parties agreed to refer the matter to certain arbitrators, and while this arbitration was still pending, it appears that they entered into two agreements. One of those agreements is dated the 11th of June 1799, that is, the first of those agreements entered into between the parties, and in that agreement the five sons allege that they have made a division of the landed property, and they agree to pay the Bankers in equal shares, that is, that each should pay one-fifth of those demands. They further state that in case any one of them should be under an inability to do so, and his lands should be sold in consequence, that from their own shares they would make that good, "and that they will certainly and without fail liquidate the Bankers' demands." Therefore, those are demands which all parties agreed should at all events be liquidated.

Then there comes a separate agreement, in which, after alluding to the demands of the Bankers upon which suits were then pending, they go on to provide, that in case there should be other demands they would leave them to the decision of the arbitrators, and they agreed to abide their decision with respect to their quota. That is the provision with respect to an ulterior demand.

And then comes the third agreement, and they having again provided that though they have divided the estates among themselves, the personal property, including cash, still remains in common, agree that all the debts which are due to the estate should be equally divided among them, and they stipulate that the payment of the Bankers' demand shall on no account be delayed until the partition be effected. Therefore they as clearly as possible say, that the engagements with respect to the Bankers' demands shall be carried into immediate effect, and shall not be delayed by any division of the family property, or by the settlement of the debts which may be due to the family to be divided between them.

That is clear to their Lordships as in the agreement between the parties there is nothing to induce us to come to a different conclusion. That being so, the respondents have clearly a right to recover from the appellants four-fifths of all those Bankers' demands, unless the appellants can show some other answer to this right.

Now, their first answer is, we have a set-off against the respondents, because Madho Ram their father was indebted to his brothers upon the management of the family concerns, that he received more rents than he had applied, and that case it was competent to them to make out; but there is not a scintilla of legal evidence of their having such a claim against him, and when the Zillah Court referred the case, it is clear that they never at that time brought forward such a claim; and if they have such a claim, neither the decision of the Court below nor of this Court will prevent them from enforcing it. therefore their appeal must fail, on the ground of their not having brought legal evidence of this set-off.

Another ground which they set up is that this was referred to arbitrators. Now, there is no foundation for saying that it was so referred; there is no legal evidence of that, and that also must fail.

With respect to the last reason assigned in the case of the appellants, that the Courts below erred in directing a deduction of four-fifths of 1,912 rupees instead of directing a deduction of four-fifths of the difference between 1,912 rupees and the original sum, it is quite clear, I think, that there is a mistake in the wording of the decree in that respect, and that the sum was not meant to be reduced *to* 1,912 rupees, but reduced *by* 1,912 rupees. It was not likely that so large a demand as 8,000 rupees should be reduced to 1,912, and, therefore, we must take it that 1,912 rupees were to be struck off from 8,000, and then the decree is perfectly right in giving credit to the respondents for four-fifths of all sums, and the result will be, that the decree of the Sudder Dewanny Adawlut must be affirmed with costs.

Mr. Miller.—I trust as the Sudder Dewanny Adawlut did not give the opportunity—

Mr. Baron Parke.—You have that opportunity still; if Madho Ram is indebted to you upon the balance of the account, you may sue him.

Mr. Serjeant Spankie.—There is a judgment, on your own shewing, against you, and I allow you an opportunity of recovering that demand.

Mr. Baron Parke.—You may, notwithstanding this judgment, sue him for any balance that is due.

Judgment affirmed with costs.

The 18th February 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, Sir E. Hyde East, and Sir A. Johnston.

Sale of Land for arrears of Revenue—Kistbundy or Instalment-bond—Surety-bond.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Kirt Chunder Roy and others

versus

The Government and Mohunny Mohun Thakoor.

By Regulations XIV., 1793, and VII., 1799, the Governor-General in Council may order a sale for arrears of a monthly instalment of revenue before the close of the year; but in order to warrant that act, there must be an arrear of a previous year or of a monthly instalment.

The existence of a written engagement or kistbundy is not a condition precedent to the right to enforce the payment of the revenue by monthly instalments, provided the monthly instalments be fixed and determined.

By Regulation V., 1812, if there be an arrear of the annual assessment or of a fixed monthly kist or instalment of that assessment unpaid on the first day of the following month, the Governor-General in Council may order a sale, and the Board of Revenue may direct the *whole* estate of the defaulting zemindar to be sold.

Where the monthly instalments are fixed and determined, the Government does not forego the right of selling the zemindary on default being made to pay these instalments, by taking a bond from sureties by which the estates of the sureties also were rendered liable for the due payment.

Mr. Baron Parke.—As this case is represented to be one of great interest to a numerous class of persons in India, their Lordships were desirous of hearing both the learned Counsel for the appellants before they gave their decision. We have now had the opportunity of considering all the arguments which could be adduced in support of the appeal, and of carefully examining the pleadings and proceedings in the Native Courts; and as we feel no doubt as to the course we ought to pursue, we think it unnecessary to trouble the Counsel for the respondents. We are of opinion that we must recommend to His Majesty to affirm the decree of the Sudder Dewanny Adawlut.

The question is, whether the sale by the East India Company to the other respondents, of the zemindary of Edilpore, was *legal*. Whether, if the Company had a right to sell, they used unnecessary harshness towards the appellants in the exercise of that right, is a point on which it is not within our province to form an opinion; that question must depend upon the general state of the revenue at the time, the habits and dispositions of the people, and a variety of considerations which can have no place in a Court of Justice: our duty is to decide upon *legal* rights, and we best discharge that duty when we strictly confine ourselves to its performance.

The right of the East India Company to sell depends upon two points: *first*, whether there was in this case such an arrear of revenue as to authorize a sale; and, *secondly*, if there was, whether the entire zemindary could be sold in order to satisfy that arrear. The law on this subject is contained in the Regulations, and is very clearly and distinctly expressed.

The first of these to which it is material to advert is the 14th Regulation of the year 1793. That Regulation recites the importance of arming the Collectors with power to enforce the discharge of the annual revenue without the assistance of the Courts of Justice, making those officers responsible to the parties for the due exercise of their powers. It states that, as the Collectors have in their possession the engagements of the proprietors and farmers, specifying the amount of the annual revenue they have agreed to pay, with the monthly proportions in which it is to be discharged, the Collectors cannot suffer by unjust prosecutions, and, on the other hand, the proprietor and farmer will be able to prevent the powers of the Collectors being exercised to their detriment, by performing punctually the engagements they have entered into with the public. It then proceeds to enact that, if the whole or a portion of the kist or instalment payable in any month by a proprietor or farmer of land shall remain undischarged on the first of the following month, the sum so remaining unpaid shall be considered as *an arrear of*

revenue. The regulation then specifies the powers with which the Collectors are armed for the *recovery* of arrears, by causing the defaulter to be confined, and appointing an Amin or receiver; and by the 13th Section, at the end of the year, if an arrear shall remain due, the Collector is to communicate the amount to the Board of Revenue, who are to report to the Governor-General, and recommend the sale of such a portion of the estate of the defaulter as may be sufficient for the liquidation of the amount; but lands are not to be sold in any case without the sanction of the Governor-General in Council. By Section 23, Regulation VII., 1799, if the revenue due to Government is in arrear at the close of the year, the Collector is to report to the Board of Revenue, and to recommend the sale of lands sufficient to make good the arrear, and the interest to the time of sale. But no part of that Regulation is to be understood to preclude the Governor-General in Council from ordering a sale of land within the current revenue year, in any particular case wherein he may judge it proper to order such sale within the year.

If the sale of lands is ordered at Calcutta, security to contest the claim must be given to the Collector eight days prior to the day fixed for the sale, of which day proclamation is to be made not less than a month before.

From these Regulations it is clear that the Governor-General in Council may legally order a sale for the arrears of a monthly instalment before the close of the year, but in order to warrant that act, there must be an arrear of a previous year or of a monthly instalment.

It is said for the appellant that there can be no such monthly instalment, unless there be a written engagement, or kistbundy, signed or recognised by the zemindar, specifying such instalment, as well as some instalment agreeing for the annual amount, and much stress is now laid on this objection, although it was not brought forward in the Provincial Court.

There is no doubt that it is most desirable that the Collectors should take, in every instance, a written engagement signed by the parties to be charged. It appears by the recital in the Regulation of 1793, that it is intended that he should do so for his own protection from vexatious suits and unquestionably he ought to do it for the benefit of zemindars also; but although such an instrument was supposed by the Governor-General in Council, in enacting that Regulation to be likely to exist, its existence is not made, either expressly or by implication, a condition precedent to the right to enforce the payment of the revenue by monthly instalments. If the annual amount of revenue be fixed and agreed to by the zemindar, though not by writing, to be paid by *certain ascertained* monthly instalments, the powers given by the Regulation attach. The kist or instalment in such case is "*payable monthly*" within the provisions of the Regulation of 1793; upon this point the decrees of the Provincial Court and the Sudder Dewanny agree. The Judges of both consider that the want of a written instrument constitutes no objection, provided the monthly instalments be fixed and determined, though the Courts differed in opinion upon the facts, as to the existence, in this particular case, of that certainty in the amount of the monthly payment, which is an essential requisite in order to authorize a sale within the year.

If that requisite be complied with, and an arrear exist, the portion of the Regulations to which I have referred clearly authorizes a sale by the Governor-General in Council within the year.

Does this Regulation authorize a sale of *the whole zemindary*, or only of such a part as may be reasonably sufficient to satisfy the arrears; that is, if more than such a portion be sold, is the sale invalid, and does the purchaser acquire no title? A short consideration of other portions of the Code of Regulations will place this point beyond doubt.

We have before seen that the Collectors are to recommend a sale of such a portion only as may be sufficient to raise the arrear. By Regulation I. of 1801, Section 6, the unqualified operation of the rules as to the selection of such portion of the land of the defaulter as may appear to be sufficient, is said to have operated prejudicially to the public interests as well as those of the proprietors themselves; and where the jumma does not exceed 500 rupees, the Board is authorized to sell the entire estate, and where it exceeds that sum, they may still sell the whole when, from the best information they can obtain of the value, the surplus over the arrear is likely to be inconsiderable.

If the provisions of the Regulations had stopped here, it might well have been doubted whether the intention was not to vest a discretion in the Revenue Board not capable of being impeached, by a suit in the Courts, to set aside a sale made by them and invalidate the title of the purchaser;

though it seems to have been the opinion of the Court of Sudder Dewanny in the case cited from 3 Macnaghten, page 5, that a sale effected before 1812 could be set aside on that ground. But all doubt on this question is removed by the enactments of the Vth Regulation of 1812, which expressly declares: "That the consideration of, "and decision on the expediency of selling "the entire estate, or of disposing in the "first instance of any particular part of it, "is hereby declared to reside in the Board "of Revenue and Board of Commission-"ers respectively, subject to the control "exercised by the Government, in its exe-"cutive capacity, in matters connected with "the public revenue." Then it proceeds to enact that "no means existing by which "any certain or accurate computation can "be formed *à priori*, of the real value of "any estate, or portion of estate, which may "be exposed to sale for the recovery of "arrears of public assessment, or of the "adequacy of the price which may be offer-"ed for such estate, or portion of estate, "it is hereby declared that sales made at "public auction for that purpose are not "liable to be annulled by the Courts of "Judicature, on the ground that the proceeds "of the sales have materially exceeded the "amount of the arrears due from the pro-"prietor of the lands to Government. The "Board of Revenue and Board of Commis-"sioners will be guided in cases of that "nature by their own discretion; subject, "of course, to any instructions with which "they may, at any time, be furnished by the "Governor-General in Council."

It would be difficult to find language better calculated to do away with all objection, on the ground of excess as to the validity of sales made by order of the Revenue Board, under the sanction of the Governor-General, where an arrear existed, and it is impossible to deny that such a provision is founded, on just views of convenience and policy; for if sales were to be questioned, and conveyances annulled by Courts of Judicature, on the ground that too much had been ordered to be sold according to *their* view of the value of the estate, no title would be safe, no purchaser could be sure of holding his estate; for nothing could be more doubtful and uncertain than the determination of questions of probable value by the Judges of the Adawlut Courts. All this mischief is obviated by the Regulation of 1812, by which the discretion as to *quantum* is vested in the Board of Revenue, and sales by public auction under their authority are rendered absolutely secure from all objection as to excess.

The law therefore is clear that, if there be an arrear of the annual assessment, or of a *fixed monthly kist or instalment* of that assessment unpaid on the first day of the following month, the Governor-General in Council may order a sale, and the Board of Revenue may direct the *whole* estate of the defaulting zemindar to be sold. That this is the law, is distinctly admitted by the appellants themselves, who, in their answers to the reasons of appeal, pages 80, 81, acknowledge that, if there be a single defaulted rupee, the authorities may dispose of the estate, provided always that there be a just demand by the Government, and the zemindars refuse to answer it.

It remains for us to apply the law to the facts of this case.

And, *first*, that a sale was ordered by the Governor-General in Council is undoubted. This fact has not been questioned in either of the Courts below, nor can the point be now raised, that the Governor-General ought to have assigned some special reason for the sale. If such an objection could be tenable under any circumstances, it cannot be allowed at this late stage, inasmuch as if it had been urged in the Courts below, it might have been at once disposed of by proof of the fact that there were such reasons, and that they were assigned in the order.

The only remaining question of fact is, whether there was an arrear of a fixed annual assessment, or of a fixed monthly instalment of such assessment.

That the zemindary of Edilpore was assessed at the annual jumma of Rs. 54,996-15 is undoubted. The ancestors of the appellants, at the time of the annual settlement, gave in a durkhast for that amount. The appellants stated the same amount as annually due by a petition to the Collector in 1811, and the first fact asserted in the appellants' petition to the Governor-General is that such was the amount of assessment, and there is no contradictory evidence or question raised on that head.

Was this payable by fixed monthly instalments?

It was contended on the part of the appellants that, in the absence of a written document (which in the Sudder Dewanny, but not in the Court below, they insisted to be necessary), the custom was for six annas out of each rupee, or three-eighths of the entire annual revenues to become due in the month

of Bhadoon, and that on that supposition nothing was in arrear at the time of the sale which took place on the 16th November 1812. If we assume this mode of calculation, it appears still that there was a small arrear of revenue both at the time of the proclamation for sale, the 26th of October 1812, and on the 25th Kartik, 9th November, the last day on which, according to that proclamation, the arrears were receivable at the Collector's treasury. The sum due in Bhadoon would, on the six anna calculation, be Rupees 20,623-13-10½; and it appears by the treasury receipts that before the 25th Kartik 20,109 rupees only were actually received, which would leave a balance of Rs. 514. But on the 12th November there were paid 2,499 rupees, or, according to the extracts of books of the Collector's proceedings, Rs. 2,400, though the latter is probably a mistake, and the Collector is admitted to have had orders from the Government to receive cash for arrears, even after the day mentioned in the advertisements; and therefore, if this sum of Rs. 2,499 was received in part on account of the arrears of Bhadoon, it might be very questionable, if after that receipt, and the notification of it to the Board of Revenue, which arrived on the 16th November, the day appointed, the sale would be legal, so far as it depended upon the arrears due in Bhadoon (which, as it will subsequently appear, it does not). But if a portion of the Rs. 2,499 is to be applied to discharge the arrears of the annual revenue due in Bhadoon, then another difficulty arises; there would be an arrear of a portion of the instalment for three months, payable upon the engagement entered into by the appellants to the Government on the 14th of July 1804, and the sale of the zemindary would be lawful for this arrear, if the appellants were bound by that engagement. It was subscribed by them: it admitted the arrears then due to be 102,902 rupees 3 annas 12 gundas and 3 quarters: it specified the mode of payment from 1211 to 1219, inclusive, to be 833 rupees for all the months in the year except the last. These monthly payments were, at all events, *fixed and ascertained*, and there can be no question but that the Government did not forego the right of selling the zemindary, if default should be made in paying these instalments, by taking, as they did, a bond from sureties, by which the estates of the sureties also were rendered liable for the due payment.

But it is said, on behalf of the appellants, that they were not bound by their engagement of July 1804, because it was obtained by a sort of duress, namely, the threat of an illegal sale of the zemindary, for the whole arrear of a lac and upwards due at that time. It is unnecessary to enter into the details of that transaction. If the sale was not legal, the zemindars should have questioned it at that time in due course of law. They did not choose to do so, but entered into an engagement with the Government to pay the arrear in ten years, by which they waived all question as to the arrear being really due, in consideration of a great extension of the time of payment, unaccompanied by any charge of interest. With that engagement, they complied for seven years and upwards, and it is quite impossible for any Court of Justice to allow such a transaction to be now impeached and set aside.

But independently of these considerations, from which it appears that there must have been an arrear of revenue to authorize a sale, even supposing the six-anna custom of computation to apply, their Lordships have no doubt, but that the view taken of the case by the Sudder Dewanny Adawlut was correct. Although there were variations in the monthly instalments during the early part of the time, in which the zemindary was under the management of the appellants, namely, from 1211 to 1219 (1804 to 1812), yet for the seven last years the sum demanded up to the end of Bhadoon was always Rs. 26,319-12, and the several monthly payments composing that sum, according to the towjees, except in the year 1216, corresponded exactly, and the kistbundy in the Government office for that year agreed with the towjees for the other years, so that there was ample proof of a constant course of uniform payment by fixed monthly instalments for seven years, forming abundant evidence of an agreement between the Government and the zemindars, for the payment of these instalments.

On this view of the case, there was an arrear of the revenue of 1219 due on Bhadoon, at the date of the proclamation of sale, of upwards of 10,000 rupees, and at the time of the sale itself there was still an arrear of Rs. 6,210-12, comprising three monthly instalments of the old arrears, if those instalments are not to be taken to have been paid by the sum of Rs. 2,499 on the 12th of November, and if they were, then the whole of the arrear of Rs. 6,210-12 was for the revenue of 1219 up to that month.

The argument for the appellants that this arrear must be considered as having been paid, because the Collector received on the 12th November a security for this sum payable on the 28th, cannot avail them. The duty of the Collector was to receive in cash, and it is clear from his letter to the Board of the 12th November 1822, that he understood his duty, and took the engagement subject to the approbation of the Board. If, as suggested, he assured the zemindars that they had saved their estate, he went beyond his authority, but it is not improbable that he meant merely to hold out to them the hope that the security would be accepted, in which case no sale would have taken place. This, unfortunately for the appellants, for reasons into which we cannot enquire, the Government declined to do.

Their Lordships are therefore of opinion that the sale was in point of law valid, and the title of the purchaser unimpeached, and will therefore advise His Majesty to affirm the decree of the Sudder Dewanny Adawlut, and with costs.

Mr. Lloyd.—The East India Company do not ask for costs in this case.

Mr. Baron Parke.—You do not ask for costs.

Dr. Lushington.—But I am for the respondent, the actual purchaser, and we submit that our costs ought to be paid.

Mr. Baron Parke.—You will get nothing, as they are paupers.

Dr. Lushington.—No, but the Court of Sudder Dewanny Adawlut reversed the decree of the Provincial Court, and they condemned the present appellants both in the costs of the East India Company and of the respondent. Now, if the East India Company consent not to take the fund from us, then we shall have the means of getting our costs out of the fund, because the appellants, not being in a condition to give security out of the ordinary fund, assented to 5,000 rupees of the purchase-money being impounded as a security. Now, I think in justice the East India Company must take care that we are not damnified, inasmuch as we could not look at any question of this sort in taking the title. We could look at nothing that was done by the Company itself as a sovereign power.

Lord Brougham.—The judgment of the Zillah Court was against you with costs;—then you must have back your costs.

Mr. Baron Parke.—You have got them by the decree of the Sudder Dewanny.

Mr. Brougham.—The Sudder gave you your costs back.

Dr. Lushington.—It did.

Mr. Miller.—I believe that they also obliged us to pay their costs.

Lord Brougham.—The Sudder gave them their costs against you,—they gave them their costs of the appeal that is affirmed—my doubt is how far the Zillah Court disposed of the costs.

Mr. Miller.—The Sudder Court not only gave them the costs paid to us, but obliged us to pay to them the costs of the appeal.

Lord Brougham.—The Sudder put itself in the position of the Zillah Court, and gave the judgment which the Zillah Court should have given, which was not only that he should pay back the costs he had got from them by the first and erroneous decree, but that they should get their costs from you, because the Zillah Court ought to have given them their costs in the first instance. And then they had to dispose of the costs of the appeal, and they gave those costs against you. But they ought not to have given them those costs, because that is making the respondent pay for defending his own decree.

Dr. Lushington.—That is the constant practice in the Courts in India.

Mr. Miller.—In case of this nature, I think your Lordships would by no means think it necessary to give costs against us, contrary to your general rule.

Lord Brougham.—We do not know how that is.

Mr. Miller.—I have no doubt that it was so.

Mr. Baron Parke—This is the decree of the Sudder Dewanny, that the judgment of the Court below "be rendered null and of "no effect, that a decree be made out in "favour of the appellants, and that the whole "costs of suit in both Courts, with the ex-"ception of the charges of the additional "vakeels appointed by Mohunny Mohun "Thakoor, one of the appellants, be made "payable by the respondents."

Lord Brougham.—Then it is a very extraordinary course. It is not a colorable appeal—we will hear you upon that point of costs if you wish. If you have any cause to shew why, in a case of this sort, the respondent in the Sudder should pay the costs of defending the decree in his favor, why he should be mulcted to the amount of the appellants' costs for not totally giving up the decree that he was in possession by the Zillah Court, we will hear you.

Mr. Lloyd.—I believe your Lordship will find that it is the universal practice of the Courts in India to pursue that course.

Lord Brougham.—It is contrary to all our principles in this country.

Dr. Lushington.—I know it is contrary to the practice of the House of Lords so to do; but I know that in one Court it is the uniform practice. I know that the High Court of Delegates uniformly have given the costs from the very original Court in which the suit commenced; it is the usual practice, and it is so now up to the last time they sat.

Mr. Baron Parke.—The principle is that there has been a wrong from the beginning —that there has been a failure of justice.

Dr. Lushington.—The principle is this, that this person had the right upon his side in the first instance, and he is not to suffer in consequence of any error that has been committed by any body.

Lord Brougham.—That is the Court of Delegates. We have not adopted that practice here.

Dr. Lushington.—No, I admit that of late years the custom has not been to do so here, but it was formerly.

Lord Brougham.—Do you mean to say that the practice here resembled that in the High Court of Delegates?

Dr. Lushington.—It was frequently the case. The argument I should address to your Lordships would be, that we are purchasers at a public sale under the authority of the East India Company, having nothing in the world to do but to take the title of the property as they give it to us. They had sovereign power.

Mr. Baron Parke.—You took their guarantee for having a right to sell?

Dr. Lushington.—We had no other means, and therefore it would be exceedingly detrimental to those sales going on with advantage to all the persons concerned, if the purchaser turned out to be subject to every cost in maintaining his title.

Mr. Miller.—In a case of this nature, instead of there being anything to call upon your Lordships to depart from the rule which has been pursued, I believe, invariably, I submit to your Lords, that in a case of this extreme severity your Lordships will not visit the original claimant who had the judgment in his favour with the costs.

Mr. Baron Parke.—Nothing can be got out of the original claimant now, because he is a pauper.

Mr. Lushington.—Nothing. What I want is, as against the East India Company, to have that 5,000 rupees which has been deposited set free for my demand for costs.

Mr. Richards.—The 5,000 rupees is within your Lordship's jurisdiction. That money was impounded for the purpose of being applied in any way your Lordships might think just.

Mr. Baron Parke.—The East India Company do not claim any part of it?

Mr. Lloyd.—They do not claim any part of it; it was deposited for the costs of the appeal.

Mr. Richards.—The purchaser has been perfectly innocent of any blame.

Dr. Lushington.—All we ask is that the 5,000 rupees should go as far as it will.

Mr. Baron Parke.—The East India Company are willing to remain as they are?

Mr. Lloyd.—Yes.

Dr. Lnshington.—All that we ask is that these 5,000 rupees may go as far as they will in the payment of our costs.

Mr. Miller.—I fear that I cannot resist the proposal of Dr. Lushington with respect to these 5,000 rupees, provided that sum falls short of the sum that they should pay to us in respect of the costs in the Provincial Court, which I understand your Lordships to be of opinion should be paid to us on the common principle of set-off.

Mr. Baron Parke.—First of all we must decide that these costs are to be set off, because, if it is the common practice of the Court, we must not break in upon it. We have done so in some cases.

Mr. Miller.—With great submission to your Lordships, in almost every instance your Lordships have done so, and I submit that in this case of extreme hardship your Lordships will not visit us with the costs of the other party in opposition to the decree of the first Court.

Mr. Baron Parke.—We do not know enough of the case to pronounce any opinion about that.

Dr. Lushington.—Your Lordships will feel anxious to indemnify the purchaser as far as you can.

Lord Brougham.—Can you furnish us with a note of the cases in which we have already done that?

Mr. Miller.—I will furnish your Lordships with that.

Lord Brougham.—And whether the costs in the Zillah and in the Sudder have been paid below.

Dr. Lushington.—With deference I should say this, that whatever might be the nature of the precedent, or whatever determination you might come to, supposing you were to say that you would reverse the decree of the Sudder as regards the Company, you would not reverse it with regard to us, we stand in a different predicament. At any rate we should have it.

Mr. Baron Parke (to Mr. Clarke).—You have seen a great number of these cases. Is it the constant practice to give the costs where they reverse the decree in the Zillah Court?

Mr. Clarke.—The costs always follow the original decree; but if the judgment in appeal reverses the original decree, the costs generally go with it.

Lord Brougham.—If the Zillah Court decides for you, and you go to the Sudder, you pay the costs of the appellant in the Sudder, because the decree is reversed?

Mr. Clarke.—That is the common practice in India.

Dr. Lushington.—And in most of the Colonies, I believe.

Mr. Miller.—If your Lordships will allow me I will endeavour to furnish you with cases upon that point.

Dr. Lushington.—In the appeals from the Admiralty Courts abroad, it was the universal practice. Lord Stowell always gave the costs when he reversed the decree; I remember one very important case of a Lieutenant, who had made a seizure in the Island of Antigua, where the seizure was held to be illegal, and his claim to the forfeiture was annulled with costs. Lord Stowell reversed the whole, and gave the costs in both Courts, that is a reported case.

Lord Brougham.—Mr. Miller, when shall you be able to give a note of these cases?

Mr. Miller.—If there are any cases within a few days.

Lord Brougham.—It must be before Wednesday morning.

Mr. Baron Parke.—Then it will stand in that way, that the respondents have their costs of this appeal out of the 5,000 rupees, and that will be subject to the question, whether they are to refund the costs they have received in the Sudder Adawlut. The East India Company pay their costs. and the purchaser is to have the costs of the appeal, subject to the question whether he is to refund any part of the costs.

The 1st February 1866.

Present:

Lord Chelmsford, Sir J. T. Coleridge, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Mortgage—Law of Foreclosure in Bengal—Conditional Sale—Benamee Lease—Production of Accounts—Mesne Profits—Plaint (Error in—not to bar relief really sought)—Remand—Interlocutory order—Appeal.

On Appeal from the late Sudder Dewanny Adawlut of Calcutta.

A. J. Forbes

versus

Ameeroonissa Begum and others.

Exposition of the Law of Foreclosure as established by the Regulations and the practice of the Courts in Bengal.

Plaintiff purchased a property from defendant's late husband under a deed of conditional sale and an ikrar. On the day before the date of the Bill of Sale, defendant's husband granted a beneficial lease of the mortgaged premises benamee to the plaintiff's son, but really to plaintiff who, under color of it, obtained possession of the mortgaged premises. Plaintiff, although in possession of the mortgaged premises, sues for possession and mesne-profits.

HELD (1) that, as the real object of the suit was to perfect plaintiff's title as absolute owner of the property, he was not debarred from that relief, if he was otherwise entitled to it, because, under an erroneous view of the effect of the lease, he had asked for it by his plaint in a somewhat different form, and with something to which he was not entitled.

(2.) That, while the lease did not save the plaintiff from the liabilities, at the same time that it gave him the advantages, of a mortgagee in possession, still less could it be taken to modify the terms of the conditional sale.

(3.) That it was not necessary, either that the mortgagee's demand should be for a specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in the preliminary proceedings in which they could not be investigated, but that the obligation to produce the accounts depends on the circumstances of the case and the nature of the issues raised.

(4.) That the Sudder Court's order remanding the plaintiff's suit for retrial on the production of the accounts, was an interlocutory one, and that plaintiff's omission to appeal against it did not preclude him from now insisting that the remand for the production of the accounts was erroneous, or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts.

(5.) That the production of the accounts was not necessary in a case in which there was no plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due.

(6.) That plaintiff was entitled to possession of the mortgaged premises as absolute owner by virtue of the conditional sale which had been duly made absolute, but not to mesne-profits.

ON the 13th of March 1850, Shah Ally Reza, the late husband of the present respondent, executed an instrument which, upon the face of it, purported to be an abso-

lute bill of sale of the talook and lands therein described to the appellant, in consideration of the sum of 39,500 rupees. On the same day the appellant executed to Shah Ally Reza an ikrar or agreement, importing that, on payment of the sum of 39,500 rupees, with interest at 12 per centum per annum on the 13th March 1851, the sale should be void; but that in the event of the sellers not paying the principal and interest according to his engagement, the ikrar was to be null and void, and the purchaser (the appellant) was to become the absolute proprietor of the property.

The effect of these two instruments was simply to secure the repayment of the sums lent by the appellant to Shah Ally Reza, with interest on the day named, by means of that kind of mortgage which is known in India as bye-bil-wufa, or conditional sale.

The transaction between the parties, however, included something more. On the 12th of March, the day before the date of the bill of sale, Shah Ally Reza had granted a lease of the mortgaged premises for three years ostensibly to Mr. Alexander Demetrius Forbes, the son of the appellant, and had taken the corresponding kubooleut from him.

The latter, which is at page 45 of the record, shows that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor, by way of rent for the Bengali year 1258, the sum of 2,000 rupees; for the year 1259, 2,332 rupees 9 annas 6 pie; and for the year 1260, 2,399 rupees 2 annas 6 pie.

And it appears on the face of the ikrar, that Shah Ally Reza had given an order to the lessee to pay by instalments out of this rent to the appellant the sum of 2,101 rupees in part satisfaction of 4,740 rupees, which would become due on the 13th of March 1851, for one year's interest on the 39,500 rupees.

It has been proved as a fact, and is not now disputed, that the grant of this beneficial lease was what is called in India a benamee transaction; that, though taken in the name of his son, it was really a lease to the appellant, who, under color of it, obtained possession of the mortgaged premises.

In April 1851, the time fixed for the repayment of the mortgage-money having expired, the appellant commenced the proceedings, which must be taken in order to foreclose a mortgage of this kind, and make the conditional sale absolute.

And the question on this appeal is whether these proceedings have been effectual, or whether his suit has been properly dismissed by the decree of the Zillah Judge, confirmed by that of the Sudder Dewanny Adawlut.

So many points touching the regularity of these proceedings have been raised at the Bar that it is desirable, before going further, to state what, in their Lordships' apprehension, the law of foreclosure, as established by the Regulations and the practice of the Courts in Bengal, is.

Up to the year 1806, the rights of the holder of a bye-bil-wufa were enforceable according to the strict terms of the contract. It was necessary for the mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I. of 1798, within the stipulated period for the repayment of the loan.

Regulation XVII. of 1806, first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgagees in this country. The 7th Section of that Regulation extended the period within which the mortgagor might redeem to any time within one year from and after the application of the mortgagee to the Zillah Court under the following Section.

And that Section, being the 8th, provided that a mortgagee, desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the Zillah Judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him that, if he did not redeem the property in the manner provided by the preceding Section within one year from the date of the notification, the mortgage would be finally foreclosed, and the conditional sale made absolute.

Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take within the year the steps towards redemption which are prescribed by the 7th Section.

Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has

been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to Section 2 of Regulation I. of 1798.

That enactment, of which the object was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be: "When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed need only be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either of these cases the deposit preserves to the borrower his full right of redemption, and entitles him to immediate possession of the lender, if that is in the possession of the lender, subject to the adjustment of the accounts." A third case is then provided for as follows: "If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him. The 3rd Section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July, 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII. of 1806, Section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession.

In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone.

It has been stated that the appellant commenced his proceedings to foreclose under the Regulation on the 5th of April 1851. On the 31st of August 1852, the Principal Sudder Ameen of the Zillah, in whose Court these proceedings had been had, made an order which, after stating all that had taken place, including the claims of certain third parties, concluded thus: "Forasmuch as the term of one year has expired from the date of the issue of notice, and the mortgagor has not deposited the amount of the mortgage, and that the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore, considering that Regulation XVII. of 1806 has been complied with, it is ordered that this suit be decided, and that the papers of the case be forwarded to the Judge's Court."

Upon this, on the 28th of January 1853, the appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne-profits from the 13th of March 1851, calculated upon the rent reserved by the lease.

The answer of Shah Ally Reza, after raising a question touching the sufficiency of the stamp, which it is not necessary to consider here, alleged by way of defence that the appellant, before filing his petition for foreclosure in the Zillah Court, had

not made the demand required by law; and after stating the circumstances under which the lease was granted, insisted that by virtue thereof the appellant had fraudulently held possession of the mortgaged property in his son's name. And in order to show what was the value of this possession, the answer contains a passage which after stating the gross revenue of the various portions of the mortgaged property, amounting in all to 9,601 rupees 7 annas 2 pie, and the charges thereon amounting in all to 3,931 rupees 9 annas 4 pie, proceeds thus: "There remains 5,666 rupees 13 annas 10 pie as annual profit. Out of this amount, deducting 4,740 rupees as interest due on the principal, the remaining sum of 926 rupees 13 annas 10 pie must have been annually received by the plaintiff on account of the said amount of principal." The answer also insisted that the appellant was bound to render an account in conformity with Sections 10 and 11 of Regulation XV. of 1793, and that the bye-bil-wufa had been vitiated by the fact of his having realized the whole of the interest as well as a portion of the principal from the profits of the mortgaged property; and that the appellant was bound to render an account in order that the Court might be satisfied how much was due, and from whom.

The material issues settled by the Judge were:—

1st. Whether the plaintiff had performed the considerations prescribed by Section 8 of Regulation XVII. of 1806, and was entitled to possession.

2ndly. Whether plaintiff was or was not in possession.

3rdly. Whether the claim for mesne-profits was correct.

4thly. Whether the receipt by plaintiff of interest on the purchase money invalidated the bye-bil-wufas.

The cause was tried by Mr. Loch, the Civil Judge of Purneah, on the 18th December 1854.

The principal point contested on the first issue was whether there had been a sufficient demand, and this issue was found in the plaintiff's favor. On the third and the last issues the Judge found that the lease was, in fact, taken by the plaintiff, who must be taken to have been, under colour of it, in possession of the mortgaged property; but that inasmuch as it was not attempted to show that the collections realized by the plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under Section 8 of Regulation XVII. of 1806 was filed, a balance was due, and that there was nothing to show that the defendant had paid any part of it, the bye-bil-wufa was not invalidated, and that the plaintiff was then absolutely entitled to the property. On the fourth issue he found, erroneously and inconsistently with his finding on the question of possession, that the claim for mesne-profits was correct. The decree was for possession with the mesne-profits claimed.

The defendant, Shah Ally Reza, appealed to the Sudder Dewanny Adawlut. That Court by its order, dated the 22nd of January 1857, held that the Judge had been wrong in decreeing wassilât, or mesne-profits; and further, that as the appellant had been found to have been in possession, he was bound, before he was entitled to have his conditional sale made absolute, to render accounts, and to show that the loan had not been liquidated with interest from the usufruct of the property, and it remanded the case, in order that the Judge might call upon the plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the plaintiff produced accounts, in which, he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. Brodhurst) held that these accounts were insufficient, and that the proper accounts not having been produced he was precluded from deciding as to the balance due to the plaintiff, and accordingly by his decree, dated the 29th of March 1859, dismissed the suit.

Against this decree the appellant appealed to the Sudder Dewanny Adawlut, but that Court by its order of the 21st of April 1862, dismissed the appeal with costs; refusing to remand the cause again, in order to give the appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of January 1863.

The present appeal is from the decrees dismissing the suit.

The learned Counsel for the respondent in the course of their able argument maintained the propriety of this dismissal

upon various grounds, of which some do and some do not directly arise upon the decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. Rolt insisted that, inasmuch as it had been conclusively found that the appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne-profits, the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the Courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the respondent's appeal from Mr. Loch's decree; which, though not set out *in extenso* in the record, are noticed by the Sudder Court in its judgment of the 22nd of January 1857. The objection, if made, was certainly not treated as a valid one by the Sudder Court, which did not dismiss the suit, but remanded it for re-trial on the production of the account. That remand implied that the appellant might succeed. The real object of the suit is to perfect his title as absolute owner of the property; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it, because, under an erroneous view of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled.

It was also urged that the bye-bil-wufa, the ikrar, the lease, and the kubooleut, must be taken together as one transaction; that the effect of the two latter so qualified that of the two former that the mortgage must be taken to have been in its inception one for the term of three years, and that, until the expiration of the term, the appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The respondent cannot both repudiate the obligations of the lease, and claim the benefit of it. That transaction has been held, and properly held, not to affect that for which it was probably designed, *viz.*, to save the appellant from the liabilities, whilst it gave him the advantages of a mortgagee in possession. Still less can it be taken to do what it was never meant to do, *viz.*, modify the terms of the conditional sale.

It was further urged that the proceedings in the Sudder Ameen's Court under Section 8 of Regulation XVII. of 1806 were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause, when it was before Mr. Loch, was whether the plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favor. As far as appears from the printed record, the respondent did not appeal from that finding. He had undoubtedly raised in the Zillah Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that, upon the true construction of the Regulations, and of the Circular Order, it is not necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the decrees under appeal, and on which the determination of this appeal depends, are these:—

1st. Whether the Sudder Court was right in requiring the appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by its order of the 22nd of January 1857.

2ndly. Whether, if it were wrong in so remanding the cause, the appellant is not now bound by that decree, against which he did not appeal.

3rdly. Whether the Zillah Judge and the Sudder Court were right in dismissing the suit, because the appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing.

Their Lordships, considering the first question independently of the authority of decided cases, are of opinion that, upon the true construction of these Regulations, there was no necessity for calling for the production of the accounts, and, consequently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the order of remand it was made to depend, was whether the loan had been liqui-

dated, with interest, from the usufruct of the proeprty. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but there was an express admission on the face of the defendant's answer that, even on his mode of stating the account, the principal sum of 39,500 rupees had, when the foreclosure-proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than 927 rupees. It was therefore clear, upon the face of the proceedings, that the question to be tried could be answered only in one way, and that in favor of the appellant. And the order of remand can be supported only on the principle that, in all cases, it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd Section of Regulation I. of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are, "In all instances wherein the lender on a bye-bilwufa may have been put in possession of the land, and *an adjustment of accounts may consequently become necessary between* him and the borrower, the lender is to account," &c. Two conditions are expressed, the possession of the mortgagee, and the necessity of an account. And a comparison of this with the preceding Section, and with Regulation XVII. of 1806, shows that that necessity arises, and need only arise, *first*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; *2ndly*, when he has deposited all that he admits or alleges to be due; *3rdly*, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that the mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases.

The cases cited by the Sudder Court in its judgment, and now relied on by the respondent, are reported in the decisions of the Sudder Dewanny Adawlut of Bengal for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that, there being no averment in the answers that the plaintiff had paid himself by the usufruct of the property, the objection that the mortgagee had not produced his accounts could not be entertained on the appeal.

The question, therefore, cannot be said to have been concluded against the appellant by authority; and their Lordships have already intimated their opinion that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised.

Upon the question whether the appellant is so bound by the order of the 22nd of January 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the order was an interlocutory one; that it did not purport to dispose of the cause; and, consequently, that upon the principle laid down by this Committee in the case of Maharajah Moheshur Sing v. the Bengal Government (7 Moore's Indian Appeals, p. 283), upon which their Lordships have very recently acted in a case from Oude, the appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favour, notwithstanding the non-production of the accounts. In truth, the learned Judges of the Sudder Court, by their judgment of the 21st of April 1861 (App., p. 82, line 30), treated the latter point as still open to the appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships have taken of the questions already considered renders it unnecessary to determine whether the appellant ought to have been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say upon this point that the affidavits filed by him on the application for a review are, when contrasted with his grounds of appeal at page 77 of the record, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court.

They are therefore not prepared to say that, if the production of the accounts requir-

d had been necessary, those delivered were ufficient; or that in that case there would ave been any such improper exercise of e discretion of the Court below as their ordships would have interfered with. But ey think that the error of the Court below as in the dismissal of the suit, on the sumption that the production of any acounts was necessary in a case in which ere was neither plea nor proof that e usufruct had liquidated principal and terest, and no deposit had been made to ver the balance admitted to be due.

Their Lordships on the whole case are opinion that this appeal should be allowd, and they will humbly recommend Her ajesty to reverse the decrees appealed ainst, and also the order of remand the 22nd of January 1857, and to vary e decree of the 18th of December 1857, declaring that the appellant was entitled the possession of the mortgaged premises absolute owner by virtue of the condinal sale which had been duly made absote, but was not entitled to a decree for y mesne-profits. Their Lordships think at the appellant is entitled to the costs of is appeal, and also to all costs of the suit low, up to and including the costs of the der of the 22nd of January 1857.

Considering that he might have appealed ainst that order, and that his conduct in subsequent proceedings in the Court low has not been satisfactory, their Lordips are not disposed to recommend that should have the costs of those proceedgs against the opposite party. He will, course, be entitled to a refund of the sts (if any) which have been paid by him der any of the decrees reversed.

The 16th May 1837.

Present:

Lord Wynford, Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Sir E. Hyde East, and Sir A. Johnston.

Evidence (Alterations in instrument)—Practice of Privy Council (in cases of appeal from concurrent judgments)—Statement of a fact by a Court conclusive.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Petamber Manikjee

versus

Moteechund Manikjee

If an instrument on which a case depends should appear to have been altered, it cannot be received in evidence or be acted upon till it is most satisfactorily proved by all the subscribing witnesses at the least and other evidence that the alteration was made antecedently to the signature.

The Privy Council, in cases depending upon facts which have received the concurring judgments of two Courts in India, will not set aside the last judgment unless it can see very clearly that that judgment is wrong.

When a Court of Justice states a fact, that fact is conclusive in the case.

Lord Wynford.—This is, in fact, an appeal against two judgments: the judgment of the Zillah Court confirmed by the Sudder Adawlut, the latter Court making no observations, but merely confirming the judgment given by the Court below.

The question depends entirely upon facts, and in a case coming before this Court, depending upon facts which have received the judgments of two Courts in India, this Board ought not to set aside the last judgment, unless it can see very clearly that that judgment is wrong. It must be most completely satisfied it was wrong and inconsistent with the justice of the case, and against the facts. So far from that being the case in the present case, I believe their Lordships in general are of opinion that, if those facts had been presented to us in the first instance, we should have pronounced the same judgment pronounced by the two Courts in India. This case depends upon an instrument I will read: "I, Motee Chund Manikjee, pass this writing to you, Petamber Manikjee. In the money-transaction for the district of Petlad with the Patels Jeybhaee, Samulbhaee, and Wastabhaee Eshwandas, the persons mentioned below have shares as follows. Bhut Tricumjee Wussunjee has five and a half annas, of which Jumnadas Sunkurlal and Bechur Joeta have shares. Rutunjee Kahandas, who has a shop at Ahmedabad, two annas in the rupee. You have five and a half annas in the rupee, of which I have a fourth share with Jumnadas Sankurlal and Bechur Joeta. The remaining three annas in the rupee belong to Nursaibhaee Petamberdas's house, in which Rutunjee Kahandas has half (one and a half), and you have half, of the remaining three annas and a half, and I, the other, being threequarters of an anna each. In this house I have a fourth share. As is above stated, sixteen annas or one rupee among four persons." On the back of this agreement a paper was posted, containing an endorsement in the handwriting of the respondent: "Was divided whatever sum have been

"received, each partner taken his share. "Besides this, three thousand five hundred "rupees (3,500) is due to you by the house "at Dahoor, which you can take when the "money comes from Poona, but this money "is entered in another book. Until the "money arrives from Poona, I shall give "you interest at the same rate as I usually "do."—(Signed) Paruk Moteechund Manikjee.

It appears to be subscribed by the respondent in this case, and it appears to be witnessed by the Pundit Hurry Narain, and it is enough for us to say he has given evidence to prove the signature was formerly affixed to it.

It is further witnessed by other parties, but Hurry Narain is the only one who says he saw the defendant execute that deed; none of the other witnesses say that. It is enough to refer to the judgment of the Court below, without going through the circumstances of the case, for when a Court of Justice states a fact, that fact is conclusive in the case; if a Judge at *nisi prius* states a fact, the Court above will not suffer that fact to be enquired into, but takes it upon his statement.

Let us see what the Zilla Court says upon the subject: "On examining this pa-"per it appears that part of the original "paper has been cut off, and four lines just "above the signature written on the back "of it; these four lines and the signature "are written in a different handwriting from "the first part of the document. The "Court, in order to have this point well "ascertained, thinks it necessary to shew "it to some bankers, and a question is put to "the following bankers." But I beg to observe that the Court found that instrument had been mutilated in the manner stated upon their own view of it without the assistance of the bankers: and that, in my opinion, gets rid of the objection made to these persons being called in, for we get the fact here stated that the instrument had been mutilated in the manner mentioned, by cuting off a part of the paper, and writing upon it, the paper containing the four lines as it is stated at the back; but as it is printed at the bottom of this paper, it is most material that we should take notice that only one subscribing witness saw this signed, the other three witnesses did not. I put the Pundit Hurry Narain out of the question. If you attend to his statement, it is clear he did not see it. But I do not give much effect to that, as it is not on oath; but of the four witnesses only one of them saw this paper signed, and putting that witness out of the question, why may not some very important lines have been cut off from the original document? cutting the paper off entirely, so that the signature which was at the bottom of the first paper might be added by introducing another paper with those four lines upon it, and the genuine signature applicable to a different transaction is appended to this paper, which is in this state, and but for the evidence of this one witness there is no testimony in this cause which goes the length of disproving that circumstance. Now, is there any Court in the world that would receive such an instrument cut in the manner that this is without more satisfactory evidence than has been produced? If a plaintiff produces a bond in this country, or any other instrument which appears to have been altered the Court will not receive it or act upon it till it is most satisfactorily proved by at the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature; there is no such evidence here, and this is the whole of the case of the plaintiff below.

There is a circumstance I ought to take notice of: an Ameen of Police says the defendant admitted he was a partner in the house, but I cannot admit that that is sufficient to buoy up an instrument that is beaten down by all the facts that appear.

Under these circumstances, the Court so far from thinking they have that satisfactory evidence that will enable them to reverse two judgments in India, where the Judges had an opportunity, not only of hearing the witnesses, which is a great advantage they have over us in that respect and where they had an opportunity of seeing this instrument, for though an English Judge might not have understood the writing, the manner in which these alterations were made might have given us strong reasons for forming a conclusion with respect to this matter, but under these circumstances the Court is of opinion that the appeal must be dismissed, and as this case on the view we have taken of it is founded in forgery at least, and most likely forgery supported by perjury, we think it ought to be dismissed with costs.

Appeal dismissed with costs.

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The 10th February 1866.

Present:

Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Multifariousness—Misjoinder of causes of action—Suit for possession and rent, and confirmation of title—Birt—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Maharajah Rajendur Kishwar Sing

versus

Sheopurshun Missur.

A suit by a zemindar for possession of lands and for arrears of rent of those lands under a kubooleut given by the defendant, and to set aside a summary award of a Deputy Collector, and to have it declared that a *bhakee birt* tenure set up by the defendant is a fabrication and void, is not multifarious or bad on the ground of misjoinder of causes of action. In such a case all the distinct portions of the plaintiff's claim flow from, support, and have a relation to and connexion with his proprietary title, which he seeks to confirm, and which, *primâ facie*, entitles him to the collections.

The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleadings, and tardy production of important portions of a claim or defence, be viewed in connexion with the oral or documentary proof which *per se* might suffice to establish it.

THIS is an appeal from a decision of the late Sudder Dewanny Adawlut of Bengal, which reversed a decision of the Zillah Court in favor of the appellant, the plaintiff in the suit. The decision of the Sudder Court proceeded solely on the ground of misjoinder of causes of action in the plaintiff's suit. That objection had been raised in and overruled by the Court below. It is necessary for the due consideration of this objection to ascertain carefully what are the causes of action which are stated in the plaint. The plaint states them with sufficient precision in the first paragraph. It alleges that the plaintiff sues, not summarily, but in due form, for possession of certain mouzahs, which it describes by names and boundaries, and which it alleges to be his hereditary property; and also to recover certain arrears of rent, amounting to 1,030 rupees 9½ annas for 1260 Fuslee, for which a summary suit was pending; and 2,305 rupees 13 annas 2 pice, the rent for 1261 Fuslee inserted in the kubooleut, dated 5th of the month of Assin 1258 Fuslee, by the annulment of a summary award of the Deputy Collector of the district of Chumparun, dated 29th May 1854, and by the cancellation of a letter affirming the bhakee birt tenure, dated 17th of the month of Assin 1232. This specification of the causes of suit is accompanied with statements of the falseness of the claim to the birt tenure, of the danger which the plaintiff apprehends to his proprietary title from the summary decision above mentioned, that its annulment is impossible without a regular suit, and he concludes the paragraph by stating that he sues, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the defendant respecting the bhakee birt.

The case, then, as alleged in the plaint, if the plaint be regular, must be brought within the principles stated in Mr. Macpherson's book on Civil Procedure, page 111, third edition, where he says: "A plaint may have an appearance of doubleness when it prays not only for possession, but that the transactions upon which the defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and in fact forms part of, the former, because possession cannot be given without first removing the existing impediments." This question is distinct from any that relates merely to defect of proof or error in law, in a plaintiff's view of his case in the whole or part. That may warrant a dismissal at the hearing wholly or in part. The question here relates to unity of title, and connection and dependence between the claims of the plaintiff. In this suit the plaintiff's title is one; it is his proprietary right as zemindar. We must look to the plaintiff's admitted title as zemindar, and to the interference with such title by an established tenure of this kind, to learn what is meant by the term "possession." The mouzahs are part of the plaintiff's zemindary; the plaintiff is the assessed proprietor under the Decennial Settlement. The dependent claims that which would, if established, be a dependent tenure, the zemindar being his immediate superior in the holding. It is not a ryotwary tenure at all, and no question as to ryots' titles to occupancy can arise in this dispute. All the distinct portions of the plaintiff's claim flow from, support, and have relation to, and connexion with, his proprietary title, which *primâ facie* entitles him to the collections. The farming lease supports it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it.

If this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists;

but if it be interposed, the zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jumma from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a zemindar, and may materially interfere with his successful management of his zemindary. Such an intermediate tenure cuts off the possession, that is, the zemindar's title to the rents and profits immediately derived from the cultivators. In this sense, the term possession is used in this plaint. Now, this injury, supposing the claim to the birt tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right derived from the zemindar; as, for instance, by a farmer of a portion of the zemindary. If such a claim were preferred by a person having such an interest, it would certainly be competent to the zemindar, if the claim amounted to a repudiation, or worked a forfeiture of the existing interest, to sue for the restoration of possession and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

A zemindar or landlord may waive a forfeiture, and may treat a tenancy or interest as continuing, which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture.

If the birt tenure be valid, the plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract, or estoppel, even from a birt tenant, if the latter accepted a lease; but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a birt tenure, therefore, be removed, the plaintiff cannot have the "possession" which he seeks, since, in some way or other, the defendant stands between the plaintiff, as owner of the *primâ facie* proprietary right and the cultivators. Had the defendant admitted the tenancy under the kubooleut, the plaintiff's title to the rent would have been established; but that admission, unless qualified, would also have removed those impediments to the plaintiff's proprietary title which he desires to have removed; but as the defendant repudiates that tenancy altogether, he, at least, when the plaintiff fails to prove it, cannot urge it against the plaintiff's title. See, in the case of Rajah Oodit Purkash Singh against Martindell and another (4 Moore's Indian Appeals, p. 444). Lord Kingsdown's judgment in affirmance of the general principle.

This lease being removed (the plaintiff having failed to prove it, and the defendant renouncing it), what bar is there to the assertion of the proprietary right to the collections, unless the birt tenure interpose one? On that bar the defendant does rely, and unless it be removed, the plaintiff can scarcely expect to lease or otherwise manage his zemindary with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the Sudder Ameen's Court for overruling the objection seem to be unsatisfactory; for as the title to mesne-profits supposes a wrong, and the title to rent proceeds on contract, the union of such causes of action would be contrary to principle. But as these Courts have the divided jurisdiction of a Court of Law and a Court of Equity substantially united in one Court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth, the claim to rent under the farming lease supports the proprietary title.

No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent in fact raised them all, and they were dealt with without confusion or difficulty.

Their Lordships think, therefore, that the Sudder Court should have heard the appeal upon the merits. Their Lordships ought, upon general principles, to give now the decision which the Sudder Court should have given; but a difficulty has been interposed in the Court of the Sudder Ameen, which renders a decision on the birt tenure impossible by this Board. The question of this birt tenure has not been adjudicated upon in the Court below. The Sudder Ameen should have allowed the defendant to get his documents stamped, and, if necessary, should have adjourned the hearing for that purpose. The Court, however, excluded them from evidence, as unstamped, and as documents which were inadmissible unless stamped. The plaintiff ought not in any way to be prejudiced by this neglect of the

defendant: and to allow the defendant to re-agitate these questions as to the birt tenure in another suit would be a serious injustice and wrong to the plaintiff. The proper course, then, to be adopted is to reverse the decisions of the Sudder Court and of the Sudder Ameen, and to remand the cause to the Lower Court, not for the purpose of taking further evidence, or of hearing the casue on fresh materials other than the stamped documents, but to enable the defendant to get the instruments stamped. The Inferior Court should then decide on the evidence already taken in the cause, and on those documents, if stamped, with reference to all the issues raised on the cause, giving a complete decision on them all. Their Lordships will forbear from expressing any opinion upon the validity of the birt tenures, on the evidence in its present imperfect state; but they think it proper to observe that, if the birt tenure be displaced, that displacement will tend considerably to fortify the plaintiff's proof of the kubooleut; for the defendant's possession would then have no apparent title, unless one derived from a lease from the zemindar, the sole proprietor; no person (on that hypothesis) intervening between the cultivators and the proprietary title of the zemindar.

This order, for remanding the cause to be thus re-heard, will entitle the plaintiff to have the matter of his appeal to the Sudder on the kubooleut re-opened. It is in favor of his appeal so far as to subject the decision against the kubooleut to review upon the re-consideration of the whole case upon the merits. The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim or defence, be viewed in connexion with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted.

Their Lordships will recommend to Her Majesty that the decrees of the Sudder Court and of the Sudder Ameen be reversed; that the appellant should have the costs of the appeal; that the cause be remanded to the High Court, with directions to send the cause back to the Zillah Court for re-trial on the issue of the existence of the birt tenure, giving the respondent an opportunity of having the unstamped documents stamped if he shall be so advised, but making him liable for the costs of the first trial, which his omission to have those documents stamped has made abortive.

The 23rd June 1837.

Present:

Lord Wynford, Lord Brougham, Mr. Justice Bosanquet, Mr. Baron Parke, Mr. Justice Erskine, Sir E. Hyde East, and Sir A. Johnston.

Practice of Privy Council (in case of appeal from concurrent Judgments).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Khoorshedjee Manikjee

versus

Mehrwanjee Khoorshedjee and another.

The rule upon which the Privy Council universally acts in the case of an appeal from concurring judgments of the Courts below is to affirm the last judgment, unless they see that it is clearly wrong.

Mr. Baron Parke.—This case comes before their Lordships on an appeal against a decree of the Sudder Adawlut, affirming a decree of the Provincial Court, which decree of the Provincial Court affirmed the decree of the Zillah Court. We have therefore three concurring judgments of the Courts below, upon which we are called upon to advise Her Majesty.

The rule upon which the Board has universally acted is to affirm the judgment, unless they see that the judgment is clearly wrong. In this case, their Lordships, after looking at the evidence, and taking great pains upon the subject, cannot pronounce an opinion that these decrees are wrong; and the result will be that these decrees are to be affirmed.

One question made in the argument today was, whether the will or codicil, or either of them, were sufficiently proved. Upon that, their Lordships pronounce no opinion; they do not know that they are agreed upon that part of the case; and, if the question was to depend upon this, whether there was proof of the will, it would be necessary to take a little time to

consider that part of the case. The ground upon which the Courts have proceeded is that, taking the will and codicil to be proved, the plaintiff has no right to institute a suit to be let into possession of the unadministered effects of the testator; and the ground upon which they appear to have proceeded is that, according to their notion, when the sons were let into possession, there was an end of the right of the executors to interfere. That appears to have been the ground upon which the Court proceeded, that it was not a power of control, to be exercised by the executors from time to time, according to the conduct of the children; but, if they shewed a disposition to amend, it was for them to consider whether they would let them into the shop; and if they did let them into the shop, all their powers ended; and that seems not to have been an inconvenient notion, that their admission to the management was to be dependent upon the conduct of the children; but, if they were once let into the possession of the concern, the power of the vakeel was at an end; and the Court of Sudder Adawlut did not see any sufficient reason to differ from the opinion of the Zillah Court, but followed the decree of the Provincial Court in that respect.

If that be the true construction of the will, it becomes a mere question of fact, whether this executor did let the sons into possession of the shop and the management of the concern. There appears on the part of the defendants a certain quantity of proof given of their having continued to act as in the administration of the estate of the testator; that they continued to manage the concern; that they sued for debts and paid debts; that is the positive evidence given by the defendants; and then Hormuzjee is examined by the plaintiff, and gives not very clear or satisfactory evidence upon that subject. According to the account he gives, he appears to have said that the plaintiff so far continued in the management of the concern that he would not suffer access to the chest except in his presence; and when he is examined as to the part that the defendants took, and whether the plaintiff himself really acted as vakeel or executor, he answers "No." "You and the plaintiff became Koorshedjee's vakeels; did you then pay his debts, recover his claims, and manage his affairs?"—and he says, "No;" and that shews that the sons were permitted by the executor to do it. Then, in another part of the same examination, in answer to a question put by the Court—"Was the business which Dada Bhaee and Mehrwanjee managed for a period of four years right and proper?"—he cannot deny that they were in the actual management of the business—he gives an evasive answer: "They do not at present manage business properly." The result that the Zillah Court came to was that the sons had been admitted completely to the management of the concern; that is one of the grounds they allege for their judgment; and this Court cannot see that the Zillah Court, who were the proper Judges of the matter of fact upon the testimony produced, have come to a wrong conclusion in that respect. On that ground, their Lordships are prepared to advise Her Majesty that the decree of the Zillah Court, and the other decrees that follow it, should be affirmed. This becomes a mere question of fact, whether the vakeels named in the will, admitting it to have been properly proved, admitted the sons to take the actual management; and on that we are of opinion that permission was given; and if they have once given that permission, their control becomes at an end.

Upon these grounds, their Lordships think the judgment below should be affirmed; but in consequence of the difficulties in the case, and the great obscurity of the will itself, they think the decree should be affirmed without costs.

Decree affirmed without costs.

The 5th December 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and Mr. Justice Erskine.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Judgment for part of claim—Acknowledgment of Defendant.

Eduljee Framjee, Representative of Fyz-oolla Khan Azum Khan, deceased,

versus

Abdoolla Hajee Cherak.

Where an action is brought for a certain sum, on failure of plaintiff to prove his entire claim, judgment may be given for a smaller amount in accordance with the acknowledgment of the defendant.

Bosanquet, J.—This suit was commenced for the purpose of recovering Rupees 3,481. A judgment has been given for a smaller

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sum. The judgment given by the Zillah Court, which has been subsequently confirmed, was for Rupees 2,207, with interest upon it. The plaint begins by saying: "I "have claim against Fyzoolla Khan, "amounting to Rupees 3,481, principal and "interest, on an account the particulars of "which are written below." And after stating several circumstances, the particulars are stated below in seven items, amounting to the sum claimed, to Rupees 3,481. The whole of that was not proved, and there was a defect of proof of the circumstances that are mentioned in the plaint, but there was proof of the acknowledgment on the part of the defendant, that a sum amounting to Rupees 2,701 was due from the defendant to the plaintiff, provided the evidence that was given of a paper that was brought to the Moofti, and on which he gave evidence, and of which he said he made a copy, and of which he professed afterwards to produce a copy, was evidence in the case.

Now, with respect to the testimony of the Moofti itself, there does not appear to be any ground for imputing any discredit to it. The only real objection which is now made in this case is an objection that was not taken at all in any of the Courts below. It was assumed, apparently upon those proceedings, from the beginning to the end, by the parties, and by all the Courts through which this cause has passed, that the paper which is set out in the Appendix is the paper that was spoken to in the evidence of the Moofti, when he stated that the parties came before him, and agreed that a paper should be drawn up, and acknowledged that he was entitled to the amount in question. There is not one word in any one of those petitions of appeal, or any observations of any one of the Judges, that throws any doubt upon the identity of that paper. It does therefore appear to their Lordships, that being the case, it being quite clear that the parties have taken this paper to be the paper spoken to, that we must consider that, as the paper which was acted upon in the cause, and which was the paper spoken to by the Moofti in his evidence. Then, if so, that is an acknowledgment that the amount of Rupees 2,701 was due by the present appellant, upon which, of course, interest follows. One Judge thought it was necessary that there should be a deed amounting to a compromise for the sum in question, and, that being incomplete, it was not able to be supported as such; but the Superior Court appears to have treated it as I think they were bound to treat it, namely, as an acknowledgment by the party who agreed to the contents of that paper, that he did owe the present respondent that amount; and it is a common and ordinary course that an action is brought for a certain sum, and judgment is given for a smaller amount. As this is a case in which the judgment of the Sudder Adawlut must be affirmed, and as this judgment has already been affirmed by two Courts, their Lordships are of opinion that it must be affirmed with costs.

Judgment affirmed with costs.

The 5th December 1837.

Practice of Privy Council—Costs—Appeal—Section 7, Regulation II., 1800, Bombay Code.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Mussumat Keemee Baee

versus

Luchmun Das Narain Das.

Where a discretion is vested in a Court as to costs, the Privy Council will not allow any appeal against the exercise of that discretion, because no appeal lies against a mere decree as to costs.

But where a Court has no discretion to exercise in the matter (as where a suit was instituted by parties who had no right to institute it, as the person on whose name and on whose behalf they instituted it was dead at the time), costs must follow the decree, according to Section 7, Regulation II., 1800, of the Bombay Code.

The Right Hon'ble T. Erskine.—It will not be necessary to hear the Counsel on the part of the respondents in this case after what has been said with respect to the amount of costs; the main question arises upon the registration of 1800; the IInd Regulation, Section 7, which enacts "that, after the parties in a suit have been "heard, and witnesses and exhibits examin-"ed and considered, the Judge is to give "judgment according to justice and right, "and is to order costs to be paid to the "party in whose favor the decree should "be made." There are subsequent Regulations which are applicable to cases where the parties may elect to proceed in their cause, or where the defendant absconds and does not appear.

In this case, the action was brought by two of the clerks of a person of the name of Permanunddas, for injury supposed to have been sustained to the reputation and the

trade of their master by the conduct of the defendant. But it appeared in the course of the cause that the master had died before this action had been commenced, and therefore, although there appeared to have been some injury sustained by the plaintiffs themselves, inasmuch as they rejected that as the ground of their suit, but rested it entirely upon the right that their master had to recover damages for injury sustained by him, the Court thought that the suit would not be further proceeded in, and proceeded to adjudge the costs of the suit, and then, considering, upon looking into the proceedings, that the defendants had misconducted themselves, instead of following the terms of this Regulation, they proceeded to direct that the defendants should pay their own costs, and the plaintiffs their costs; that is, that each party should pay their own costs.

Now, if there had been a discretion vested in the Zillah Court, their Lordships would not, I think, have allowed an appeal against the exercise of that discretion, because no appeal against a mere decree as to costs would be allowed; but the question here is, whether the Zillah Court had any discretion to exercise or not, and whether they were not bound by the terms of this Regulation. Upon the appeal by one of the defendants against their decision, the Provincial Court and the Sudder Dewanny Adawlut Court were both of opinion that the Zillah Court had no discretion to exercise, and therefore that they ought to have awarded the costs to be paid by the plaintiffs in that suit to both the defendants; but, inasmuch as the appeal there was only by one of the defendants, they could not reverse the sentence against the other defendant who had not appealed, but gave the costs which had been incurred by the appeal to the defendant, to be paid to him by the plaintiff. Their Lordships are of opinion that the judgment of the Provincial and Sudder Dewanny Adawlut Court is correct; that the Zillah Court had no discretion to exercise upon the subject, because the ground of the decision of the Zillah Court appears to have been that this was a suit instituted by parties who had no right to institute it, for the person in whose name and on whose behalf they instituted it was dead at the time, and therefore, having no right to institute it, the judgment was upon the merits, and therefore that, the whole case being before them according to this provision in the Regulation, they must give the costs according to the result of the suit.

A case has been cited from Borradaile's Reports, in which the Court appears, in an action under very peculiar circumstances, to have given a most extraordinary decision. First of all, in deciding that the defendant should pay the costs to a plaintiff who did not succeed, and then, when, that failing, plaintiff appealed, in two stages, to other Courts, and failed also in appeal, in giving the costs in like manner against the respondents, who in all three of the proceedings had succeeded. This is rather too strong a case, their Lordships think, to be cited as an authority; and there appears to have been no objection made by the parties, no appeal from the decision of the Court below as to costs, and therefore the point, never having been raised, cannot be cited as an authority.

Again, it has been said that there has been a Regulation passed in the year 1827, after the decree in question was made, and that we must look at that Regulation, not merely as declaring what should take place from the year 1827, but as recognizing the practice of the Courts, which is supposed to have prevailed from the time of the passing of the Regulation of 1800 down to that day; but there is nothing in the Regulation of 1827 which is declaratory, or which shows any recognition of any such practice in their form; they are evidently prospective only; and, inasmuch as this decree was pronounced before that Regulation was made, we must decide this case without any reference to those provisions. Their Lordships, therefore, are of opinion that the judgment of the Court of Sudder Dewanny Adawlut must be affirmed, as far as the same applies to the appellant's own proportion of the costs, which amount to 1,298 rupees in the Zillah Court, and the whole of the costs in the Courts of Appeal from the Zillah Court.

Mr. Miller.—My Lords, I dare say we shall agree; if your Lordships will permit us, we shall enter into communication with respect to the amount if your Lordships desire to fix them.

Lord Brougham.—There is no difficulty about that; it is 1,298 rupees in the Zillah Court and the costs of the Appeal Courts, and if any costs are to be deducted, they must be refunded, and also there will be the costs of this appeal.

Mr. Miller.—I hope.

The Hon'ble T. Erskine.—The judgment must be affirmed, with costs, of course.

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Lord Brougham.—If the respondent have been paid enough to repay it, then he will refund the costs in the Zillah Court which have been improperly paid him.

Mr. Miller.—I hope your Lordships will not decree costs of the appeal against us, because, when we come here, we shew that there is an error in the decree of the Court below with respect to these very costs.

Mr. Baron Parke.—That is not the ground upon which you appeal.

The Right Hon'ble T. Erskine.—That appears to have been an evident mistake.

Mr. Serjeant Spankie.—Yes, my Lord.

Lord Brougham.—And, if you have been paid enough to repay, you will deduct in order to make repayment.

Mr. Serjeant Spankie.—The 12,000 rupees is carried forward improperly; it is the difference between 1,298 and 4,000 rupees and odd, which we have to repay.

The Right Hon'ble T. Erskine.—The decree will be affirmed as to all the appellant's own costs, the decree being confined to the appellant's own costs.

Mr. Justice Bosanquet.—There is 1,298 rupees in the Zillah Court; all the rest is right.

Mr. Serjeant Spankie.—There is the sum of 4,000 rupees carried forward, and that is carried forward as the sum of 4,000 instead of being 1,298 rupees.

The Right Hon'ble T. Erskine.—Reducing the costs in the Zillah Court to 1,298 rupees.

Mr. Serjeant Spankie.—The respondent to be entitled to any costs subsequent to that period, including the costs of this appeal. That is the substance of it.

The 7th December 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir J. Nicholl, Mr. Justice Erskine, and Sir E. Hyde East.

Sale of Mogulan Dues (by Mahomedan Widow).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Bomanjee Muncherjee

versus

Syud Hossain Abdoollah.

A sale of Mogulan dues by a Mahomedan widow annulled as made without proof of power to sell.

Lord Brougham.—THIS suit was brought by a party whose title, if it cannot be displaced by the title assumed to be given to the purchaser, stands unimpeached and admitted, but the suit is for the purpose of setting aside that title, which was given, or pretended to be given, by the Headji Begum to the purchaser, the then defendant, that is, the defendant below in the first instance before the Native Court; and the appellant here originally brought the suit for only 227 rupees, for the one year's income of the moghulall dues; it afterwards, by an order allowing a supplemental petition to be presented, became a suit for the purpose of disposing of the whole question as to the right to sell, that is, as to the title obtained by the purchaser, and the validity of the sale so pretended to be made by the Headji Begum to the appellant; we are therefore now assuming—(and the parties will attend to this for a moment to see whether there is any mistake in our assumption)—we are assuming that this decree below, reversing the judgment of the Zillah Court, which judgment reversed the judgment of the Court of the first instance, in which the decree had originally been given against the sale, and for the present respondent, that the decree of the Zillah Court disposes, not merely of the question which was first brought before the Court of the first instance, touching the one year's income of the mogulan dues, but that it disposes of the other question, of the validity of the sale, as well as the right to those 227 rupees for the one year's dues; we are assuming it disposes of that question by the decree, containing a declaration that the Headji Begum had no power to sell, and further, annulling the sale contended for below.

Mr. Lloyd.—It leaves that open.

Lord Brougham.—The stamp having been increased from 40 rupees, which would have been sufficient, had the amount sought to be recovered been the value of one year's income to 100 rupees, the amount required, if it had been the 10 years' income, calculated in order to protect the revenue, in case of the whole value of the estate being in suit, and not the year's dues, we assume that—

Mr. Lewis.—We assume that to be the case.

Mr. Lloyd.—It leaves the question open as against the widow.

Lord Brougham.—It leaves the question open, in what way one does not exactly see, except that not having covenanted for title, yet nevertheless it is understood; it seems to be taken for granted that the purchaser who has obtained a bad title has a right to sue

her at law for damages for having conveyed that bad title, or for recovering the purchase-money; we are assuming that—

Mr. Serjeant Spankie.—All those questions have been reserved.

Lord Brougham.—We have considered this case very minutely during the long and most able argument on both sides, and (so far as an argument can be satisfactory upon questions involving great difficulty) the very satisfactory argument on both sides; we have also considered the matter since the close of that argument, and we are of opinion that, though the case on neither side is free from doubt, and though it is very probable the evidence produced on both sides is not entitled to entire credit, and though there appears certainly to be the production of one document, respecting the authenticity of which there is much doubt upon the minds of the Court, I mean the copy of the power of attorney in page 9, produced by the present respondent, the plaintiff below, nevertheless we do not see sufficient grounds for reversing the decision come to in the first instance by the Native Commissioner's Court, declaring that the Headji Begum was not armed with sufficient power to deal with this property by way of sale after the death of her husband, and that the sale must be annulled which she assumed to make.

It is unnecessary to go into the particulars of this case further than to state that such is our opinion that we cannot, under these circumstances, reverse the decree of the Sudder Adawlut Court; and upon the whole of the case, we think the judgment come to by that Court, reversing the decree of the Zillah Court, must be affirmed, and the consequence will be that the sale will be annulled. The only observation arising upon that decree is, that there is a certain inaccuracy of expression in the reason assigned for the reversal, which is stated to be, not the want of power by the Headji Begum to make the sale, not the non-existence *de facto* of a sufficient power of attorney to enable her to sell the absent brother's property, the share of the moghulall dues, but the non-production of that power of attorney; that is inaccurately stated. It is not the non-production of the power that is the ground of the decision against the validity of the sale, or against the Headji Begum's power to make that sale, but it is the non-production of that power, or of any circumstances proved which might have enabled the Court to presume the existence of that power. It follows that the Zillah Court was not right in the second instance, in holding that the Headji Begum had that power, and obliges the Court of the last resort, the Sudder Adawlut Court, to decree that she, not having that power, had sold property she had no right to convey, and, therefore, annulled the same; therefore the decree must be affirmed, and the decree having given the plaintiff below, the present respondent, his costs in all the three stages, that is, affirmed like the rest, and is parcel of this affirmance; but under the circumstances of the case, and with reference to the conduct of the parties, we are not of opinion that the respondent should have his costs of this appeal; we think it quite right that he should have his costs in all the stages below, and, among other reasons, for this, that before the Native Commissioner, after the point had been made and stated by the Court, and distinctly brought to the knowledge of the present appellant's vakeel, that the production of the power of attorney under which the sale was made, or assumed to be made, was necessary for this case; that time after time the Court of the first instance adjourned first for seven days, then for three days, and then for two days; in addition to those, twenty days' time was afforded for the production of that instrument, and not only was it not produced, which might be because he had not got it to produce, but that no statement was ever made by him (when thus pressed by the Court so frequently) of the fact, which he now asserts, that he had not got it, until on the 27th of July, two days after the 25th (upon which 25th it is to be observed Headji Begum's evidence had been open to the Court), notice was given that she was entitled to be examined, and an order for her examination, she being a Mahomedan woman, at her own residence, having been obtained, then, and then only, it was that the vakeel of the present appellant for the first time stated that he had not got possession of that instrument, which of itself would justify the Court below in our opinion in giving the costs of all those proceedings; but, when we take into consideration the conduct, in other respects, of the respondent, particularly with respect to the production of that instrument, the alleged copy of which is in page 9, we are of opinion he is not entitled to his costs of this appeal.

Judgment of the Sudder Adawlut Court confirmed.

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The 26th February 1866.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Remand for trial on proper issues on the merits—Duty of Lower Courts to pronounce their opinion on all important points—Estoppel (unsuccessful application to intervene)—Costs of Appeal to Privy Council—Inclusion of unnecessary documents in printed transcripts sent from India.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Tarakant Bannerjee

versus

Puddomoney Dossee and others.

Case remanded for trial on the proper issues on the merits, the merits not having been entered into in the Courts below so as to enable the Privy Council to dispose of the suit. In appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points; whereas by forbearing from deciding on all the issues joined, they not unfrequently obliged the Privy Council to remand a case which might otherwise be finally decided on appeal.

A party whose application to intervene in a suit has been refused is not bound by the decree in that suit.

In taxing the costs of an appeal from India, the Privy Council will disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from India of matters which have been improperly introduced therein.

The attention of the Courts in India drawn to the frequent inclusion of voluminous papers, accounts, and receipts, in the transcripts printed in India, and sent over in that form to the Privy Council.

This is an appeal from a decree of the late Sudder Dewanny Adawlut of Bengal, affirming a decision of the Zillah Court at Dacca, which dismissed the plaintiff's suit. The suit of the plaintiff was instituted on the 28th day of August 1856. It was brought to recover 1,384 beegahs 14 cottahs of land, described as jote, set out by fixed boundaries, and situate in certain mouzahs or kismuts called respectively Narainpore, Khoondkarkandee, Goonerkandee, and Kuddumpoor; and also to reverse a summary order of the Sudder Dewanny Adawlut, bearing date 18th November 1845, and made in a miscellaneous or summary suit in that Court. The Zillah Court dismissed this suit of the plaintiff on two grounds: *first*, that it was barred by the Law of Limitation, and, *secondly*, that the matter had been decided adversely to the plaintiff's claim in a former suit, by which the Court adjudged him to be bound. The Sudder Court, on appeal by the present appellant, decided the case against him on the Law of Limitation only, and expressed no opinion on any other point. The decision of the Sudder Court on the Law of Limitation proceeded on a different ground from that on which the Lower Court had founded its decree, dating possession under the adverse title from a time later than that which the Zillah Court had fixed for its commencement. The appellant reckoned the time of his dispossession from the 18th November 1845, the date of the decree for the reversal of which his suit is brought. If he is right in this view of the subject, his suit was brought in time. The Sudder Court carried the adverse possession back to an earlier order of the Court, bearing date the 11th April 1844; and counting the time of adverse possession from that last date, it held the suit to be barred by effluxion of time. The Zillah Court, in their judgment, had carried the time still further back to the year 1841, considering that the plaintiff's dispossession was effected by possession, having, as the Court considered, been at that time delivered to the plaintiff in another suit, to which we shall presently refer, by one Ramgotee Rae, the Ameen delegated by the Court to execute the decree in that suit. The case is somewhat complicated by reason of the long continuance of litigation between different parties, and the conflict of claims in two different concurrent suits. It is necessary, therefore, to state the nature of this litigation and the titles of the appellant and of the principal original respondent Rasmoney Dossee, in order to clear the subject of possession from some confusion in which it has become involved.

The jote tenure is a dependent tenure within and part of a zemindary called Pergunnah Taleehate Ameerabad. In the month of February in the year 1814, a litigation commenced between the zemindar and three persons named Reazooddeen Mahomed, Fyzooddeen Mahomed, and Mahomed Cossim, termed the moonshees (a description which for the sake of brevity it will be convenient to adopt). The moonshees complained that they had been dispossessed by the zemindar of their jote tenure, including the lands claimed in this suit; the zemindar denied that inclusion, and claimed them as part of his zemindary. At this time, the moonshees were possessed of a talook called Ooturnarainpore, paying revenue direct to Government; and throughout their litigation

with the zemindar, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their jote tenure, and made no claim to them as included in the talook; proof of this inclusion in the talook would have been a complete answer to the claim of the zemindar, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The moonshees succeeded in that litigation, and the decree in their suit declared the lands to be part of the jote tenure, and limited the zemindar's claim to a title to assess them for rent. The zemindar appealed against this decree, which was however affirmed, and Byrubchunder Banerjee, an Ameen, was ordered to give possession of the lands to the moonshees. This was done in conformity to the decree, and possession was given in the usual way by the Ameen, by taking kubooleuts from the cultivators, and by fixing bamboos to mark the boundaries. The Ameens report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the moonshees, of this tenure so pleaded, proved, and adjudged, nor of any attempt to withdraw any part of the lands from the jote tenure, on the ground of mistake or otherwise, and to ascribe them to the talook title before the time of the judicial sale which is now about to be stated. The rent of the jote tenure fell into arrear, the zemindar sued the moonshees for rent, recovered in the suit, and caused the jote tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th June in the year 1836, and one Juggutchunder Rae was the purchaser. The appellant's title is derived from him under two intervening private sales, one by Juggutchunder to one Ramdhone Sircar, and the other by the sons and heirs of Ramdhone to the appellant. By this purchase, Juggutchunder obtained the right, title, and interest of the moonshees in the jote tenure. He became, by force of this purchase, in the same relation to the zemindar in which the moonshees before stood. As against the moonshees themselves and the zemindar, the title of the purchaser was that which the moonshees had had adjudged to them in their suit against the zemindar. The possession given to the purchaser was co-extensive with that given to the moonshees, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep the origin of the possession clearly in view.

The moonshees appear to have disputed at that time, the title of the auction-purchaser to have these lands included in his purchase; they claimed them then as included in their talook. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bonâ fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court, therefore, leaves the purchaser to assert his title by regular suit. In this case, however, the moonshees, the debtors under the decree, were themselves in possession. The decree was for rent of the jote tenure; the zemindar caused the tenure, including these lands, to be put up to sale; the moonshees, in claiming these lands, had pleaded this tenure, and it was adjudged in their favor by a suit which bound both them and the zemindar. The suit for rent was against them as jote tenants, for rent due under that very tenure, and the demand included the rent of these lands; consequently, the Court which directed the execution of the decree was perfectly justified in acting on their own pleaded and by them admitted title, and by putting the decree-purchaser in possession. This was done in the regular mode by taking kubooleuts except as to one small part, as to which however possession was also given, and the purchaser was thus put in complete possession of these lands under the jote tenure. This appears from the report of the Ameen, pp. 105-109 of the Record. Unless this possession was changed at some intermediate period between the 5th August 1839, the date of the delivery of the possession above stated and the 18th November 1845, the date of the order of the Sudder Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger, or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the Ameen Ramgottee

on which the Zillah Court relied. That Ameen was acting in the execution of a decree in another suit which had been pending between the moonshees and their mortgagee of their talook. A dispute had arisen between them of this nature: the mortgagor had mortgaged the talook, but, as he contended, excepting these lands from it, as to which he was carrying on a litigation with the purchaser of the jote tenure. The mortgagee, on the other hand, insisted that these lands were included in the mortgage. The suit was decided in favor of the mortgagee, and, as between him and the moonshees, these disputed lands were adjudged to be within the talook; but as the jote tenant was not a party to that suit, the decision in it did not bind him. The mortgagee obtained execution of that decree, and it was under this proceeding the Zillah Court considered that the appellant was dispossessed and the possession given to the mortgagee in the year 1841. The proceedings and the decree, however, are not in evidence in this cause. In the execution of that decree a conflict arose between the purchaser of the jote tenure and the mortgagee as decree-holder, each party claiming the same lands, but the jote tenant being in possession.

If this title of the mortgagee could be successfully asserted against the purchaser of the jote tenure, it could be asserted legally in no other mode than by a regular suit instituted for that purpose, for such a possession as that of the jote tenant could not be changed merely in proceedings to execute a decree. This appears to have been entirely overlooked, both by the Ameen Ramgottee and by the Zillah Court in the consideration of his acts. It appears that Ramgottee did, in effect, attempt to disturb the possession of the jote tenant, and that he took fresh kubooleuts from the cultivators who had before attorned to the jote tenant under the direction of the Court. The Court, however, on the complaint of the jote tenant, set that matter right, and directed in substance the cancellation of the new kubooleuts. The legal effect of this order of the Court was to set up the original kubooleuts, and to restore or confirm the jote tenant's possession. Now, there is not only no evidence of any subsequent change of possession before the decree of the Sudder Court of the 18th of November 1845 pronounced by Mr. Reid, but the very language of that judgment conflicts with such a supposition, for by that judgment, which was adverse to the jote tenant, the possession was ordered to be restored by him to the talookdars. It is plain that there is no error in the language of the judgment; it is language perfectly consistent with the order of the Court directing the second set of kubooleuts to be brought in, and it is also consistent with the course of practice in executing decrees. It is plain, therefore, that both Courts have fallen into error on the point of possession, and that the appellant is perfectly correct in maintaining that he was dispossessed only by virtue of the decision which he seeks to reverse. The act of the Court which directs the cultivators to attorn is, of course, not designed to expose them to risk of forfeiture; their simple obedience to the act of the Court, in pursuance of the mode in which it executes a decree, could not be attended with that consequence; and when the Court corrected its error, it meant to restore, and did in law restore, the old possession. As their Lordships think that the possession was not in fact disturbed until within the period of twelve years from the institution of this suit, it becomes unnecessary to consider whether the claim would have been kept alive through the whole time by the litigation as to the execution of the decree.

The other point on which the Zillah Court decided against the appellant was that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser at the auction-sale of the jote tenure sold to one Ramdhone Sircar. Before this sale, he had instituted proceedings against the decree-holders under the title of the talook. Ramdhone Sircar purchased, therefore, *pendente lite*. He applied to be substituted in the suit in lieu of Juggutchunder, which application was granted. This litigation terminated in the Zillah Court in favour of Ramdhone, the jote tenant. From that decision Rasmoney Dossee appealed. On her appeal the Sudder reversed the decision. This was the decree of Mr. Reid of the 18th of November 1845, which this suit seeks to set aside.

On this, Ramdhone Sircar instituted a regular suit against Rasmoney Dossee and others, claiming in substance the same relief which is sought by this suit. Pending that suit Ramdhone died, and his three sons, Mohemachunder Sircar, Anundchunder Sircar, and Greeshchunder Sircar, were substituted in his place on the record. Pending

with the zemindar, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their jote tenure, and made no claim to them as included in the talook; proof of this inclusion in the talook would have been a complete answer to the claim of the zemindar, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The moonshees succeeded in that litigation, and the decree in their suit declared the lands to be part of the jote tenure, and limited the zemindar's claim to a title to assess them for rent. The zemindar appealed against this decree, which was however affirmed, and Byrubchunder Banerjee, an Ameen, was ordered to give possession of the lands to the moonshees. This was done in conformity to the decree, and possession was given in the usual way by the Ameen, by taking kubooleuts from the cultivators, and by fixing bamboos to mark the boundaries. The Ameens report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the moonshees, of this tenure so pleaded, proved, and adjudged, nor of any attempt to withdraw any part of the lands from the jote tenure, on the ground of mistake or otherwise, and to ascribe them to the talook title before the time of the judicial sale which is now about to be stated. The rent of the jote tenure fell into arrear, the zemindar sued the moonshees for rent, recovered in the suit, and caused the jote tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th June in the year 1836, and one Juggutchunder Rae was the purchaser. The appellant's title is derived from him under two intervening private sales, one by Juggutchunder to one Ramdhone Sircar, and the other by the sons and heirs of Ramdhone to the appellant. By this purchase, Juggutchunder obtained the right, title, and interest of the moonshees in the jote tenure. He became, by force of this purchase, in the same relation to the zemindar in which the moonshees before stood. As against the moonshees themselves and the zemindar, the title of the purchaser was that which the moonshees had had adjudged to them in their suit against the zemindar. The possession given to the purchaser was co-extensive with that given to the moonshees, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep the origin of the possession clearly in view.

The moonshees appear to have disputed at that time, the title of the auction-purchaser to have these lands included in his purchase; they claimed them then as included in their talook. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bond fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court, therefore, leaves the purchaser to assert his title by regular suit. In this case, however, the moonshees, the debtors under the decree, were themselves in possession. The decree was for rent of the jote tenure; the zemindar caused the tenure, including these lands, to be put up to sale; the moonshees, in claiming these lands, had pleaded this tenure, and it was adjudged in their favor by a suit which bound both them and the zemindar. The suit for rent was against them as jote tenants, for rent due under that very tenure, and the demand included the rent of these lands; consequently, the Court which directed the execution of the decree was perfectly justified in acting on their own pleaded and by them admitted title, and by putting the decree-purchaser in possession. This was done in the regular mode by taking kubooleuts except as to one small part, as to which however possession was also given, and the purchaser was thus put in complete possession of these lands under the jote tenure. This appears from the report of the Ameen, pp. 105-109 of the Record. Unless this possession was changed at some intermediate period between the 5th August 1839, the date of the delivery of the possession above stated and the 18th November 1845, the date of the order of the Sudder Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger, or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the Ameen Ramgopee

The 21st May 1831.

Onus probandi—Partition—Hindoo Law.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Luximon Row Sadasew

versus

Mullar Row Bajee.

The *onus* of proof is on the party seeking to except any property from the general rule of partition according to Hindoo Law.

The Lord Chancellor.—THEIR Lordships having taken this case into their full consideration, in the course of the argument yesterday as well as to-day, do not see any ground upon which they can reverse or interfere with the decision come to below. They desire it, however, to be distinctly understood, on account of the importance of the question, if it had ever been raised, which it does not appear to have been, with respect to the general principle of adoption and the consequences following from that principle, that they give no opinion whatever, in the slightest degree interfering with the acknowledged principles of the Hindoo Law as regards that relationship.

There is a passage in a letter from the Chief Secretary, Mr. Chaplin, dated Poonah, April the 11th, 1821, which looks as if he, in an untechnical and somewhat popular view of the merits of the decision which he is then discussing, had taken into his consideration the circumstance of the party having stood in the relation merely of an adopted son, and not being a lineal descendant of the deceased Bhow Munkeswur. He says, "It must also be considered that "he is merely an adopted son, and not the "lineal descendant of the deceased Bhow, "and that his own immediate ancestor con-"tributed in no respect to the acquisition of "the property."

The relationship of adoption, the rights belonging to that relationship when established, and the law that gives the right to the adopted son, independent of his being a stranger in blood, and independent of the fact of his own ancestor having had no share in the acquisition of the property, are by no means touched by the decision that Mr. Mountstuart Elphinstone came to that is now appealed from, and which alone is affirmed by their Lordships' present decision.

The grounds upon which Mr. Elphinstone appears to have come to his decision are, that the proof lies upon the party seeking to except any property from that principle of partition known to the Hindoo Law, and that the appellant not having sufficiently proved that it is unnecessary to go further; that he not having brought forward proof that this property is within those exceptions, the general rule of partition must prevail.

It appears from a case thrown out in the course of the argument that the exceptions themselves form a case thrown out in the course of the argument, that the exceptions themselves form a sufficient ground for assuming that the proof is upon the party who would seek to bring himself within it. They are very minute in their conditions; and in one instance, that inference appears to be furnished by the rules of the Court restoring property to the operation of the principle after it shall have been brought within the exceptions. For instance, learning is one of the undeniable exceptions; and, if that shall be proved, it brings the property within the exception. But it is added, if it shall be shewn there was equal learning possessed by the other parts of the family, that gives them a claim to it notwithstanding the circumstance of its being brought within the exception. So that here one proof brings it within the rule, and another throws it back, notwithstanding the exception. This is one illustration, among many others, which might be given. I mentioned another in the course of the argument, as to the clothes of a party incapacitated by nature or by accident from procreating children, which appear by the Hindoo Law to be excepted. All these details shew that the proof must be upon the party seeking to bring it within the excepted case.

Now, it appears here very doubtful in what way, and indeed there is no evidence in what way, this man, though we may suspect it from what is stated—there is no proof in the cause that shews how this property was acquired; but it is perfectly clear, as it appears to their Lordships, that there was some family property in which the Bhow shared, although not large, and that that property was never abandoned, but taken to by the Bhow, who was enjoying the more splendid fortune of the Durbar at Poonah; and he left his brother, it appears by the correspondence between him and Bajee Row Mankeswur, in the 82nd and 83rd folios of the Appendix, in some sort of charge of the property, and always appeared to take an interest in it, and to report respecting the management of it, though his agent complains of not having received any orders from the Bhow. His brother says, when he

was getting ready to proceed to the appointment which had been provided for him, "You have quite suddenly provided this for me, as for six years you have merely employed me in the charge of the fields, &c., at home;" and there are other letters from Row Mankeswur, which show that the Bhow was still connected with the property. It cannot, therefore, be said, there is no property, though it is very small; nor can it be said he gave it up. He maintains a more immediate connection with it than would be supposed natural to a man placed in a much higher situation and separated from it by local circumstances.

Upon the whole, viewing this as a question of Hindoo Law, upon which it is impossible to speak with any great confidence, and the question appearing to their Lordships to be decided upon right grounds, throwing the proof upon the right party, and that proof not being given, it is the opinion of their Lordships that this decree appealed from must be affirmed.

With respect to the costs, we take for granted that the respondent, in a large property of this kind, will make no application for costs; and it would not be an unfit thing (I do not know what the Court below have done) to suggest that it would be proper that the costs of the whole proceeding should be paid out of the estate. It is a very large property.

Mr. Adam.—We make no objection, if that is the impression of your Lordship's mind.

The Lord Chancellor.—It is a very large property. The question is whether it is £200,000 or a larger sum.

Mr. Miller.—There may be difficulties in it.

The Lord Chancellor.—We shall hear no more of it. We call your attention to it.

The 4th January 1

Limitation—Maintenance.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

George James Gordon, Executor of Futteh Yab Khan,

versus

Khajeh Aboo Mahomed Khan.

The *nullum tempus* Clause of Section 3, Regulation II., 1805, does not apply to a case where the occupant was not a mortgagor or depositary otherwise than as he was subject to pay a portion of the proceeds of the property to another during her life-time.

The Vice-Chancellor.—In this case their Lordships are of opinion that it is not necessary to hear Counsel for the respondents. Their Lordships are all of opinion that, in any way of putting the case, the appellants are barred by length of time, having regard to those Regulations. If the appellants think that their claim has been made out by virtue of what is called the Mahomedan law of inheritance, independently of the decree of 1777, then it appears that Nadira Begum died in the year 1798, and there is no reason whatever why they might not, as the heirs of Nadira Begum, have brought their suit prior to the year 1777. But, if it is put upon the circumstance, that by the decree of 1777 she is to be considered as having acquired a right to a fourth part, you must look to the terms of the decree of 1777.

Now, the decree of 1777, as it is set forth in the printed papers, directs that, "as to the altumgha mehals, Behadur Khan "shall, on the part of Aulem Beg, hold and "keep possession and occupation of them, "and shall annually give to Mussumat "Nadira Begum, during her natural life, "three shares of twelve, as aforesaid, from "the produce of them." And it is remarkable that, in looking at the report by Macnaghten of the suit between Omar Khan and Aboo Mahomed Khan and others, which was a cause between the heirs of Aulem Beg, there seems to be a translation of that very proceeding of 1777, which represents that the altumgha, according to custom, was to be delivered over to the charge of Behadur Khan, who was to hold and keep possession for her maintenance.

Their Lordships are therefore of opinion that, upon the true construction of this decree of 1777, Behadur Khan was to be considered merely as the depositary or agent for Aulem Beg, who was the heir of the deceased party, the husband of Nadira Begum, liable only, to the obligation to pay to her, for her life only, the produce of one-fourth of the inheritance; and it is plain, upon looking to what took place in the case of the dispute between the heirs of Aulem Beg, that any right on the part of Aulem Beg or her heirs to inherit after the expiration of her life never was in any way acknowledged.

Their Lordships are of opinion, therefore, that the Regulation of 1793 directly applies

to this case; and it is impossible to say that this case can be brought within the third Section of the Government Regulation II. of 1805, because it cannot be truly said that Behadur Khan was a mortgagor or depositary only for Nadira Begum, otherwise than as he was subject to pay to her one-fourth of the proceeds during her life: and their Lordships being of that opinion, the consequence is that the decree of the Court below must be affirmed. But, inasmuch as it does appear that there was some variance as to the opinions and the reasons upon which the judgment proceeded, I think it should be affirmed without costs.

Mr. Serjeant Spankie.—Your Lordships are aware that in this case the East India Company came forward upon the application of the respondent.

The *Vice-Chancellor.*—Yes, we are aware of that.

Mr. Serjeant Spankie.—The reason of my mentioning it is, that I am not sure whether this case falls under the Act of Parliament. The East India Company came in upon the desire of the party, in obedience to the wish of the Privy Council; so that there seems reason for saying that they ought to be paid their costs by the respondent.

The *Vice-Chancellor.*—Then I think you had better present a petition, stating the circumstances.

Mr. Serjeant Spankie.—We will do so.

The 6th January 1834.

Long possession prima facie evidence of title—Adoption in Bareilly—Title of third person.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rajah Haimun Chull Sing

versus

Koomer Gunsheam Sing.

Uninterrupted and undisputed possession for a long period of time constitutes sufficient *primâ facie* evidence of title; but, if this possession is admitted to be under an adoption, it will avail nothing if the adoption fails.

In the district of Bareilly the authority of the husband is essential to the validity of an adoption.

So much of the Sudder Court's decision as determined the question of title of a third person, which was not the question in the cause, was reversed.

Mr. Justice J. Parke.—This case comes before their Lordships on an appeal from a decree of the Sudder Dewanny Adawlut of Bengal, in a suit originally brought by the appellant, in the month of December 1810, in the Provincial Court of Bareilly, against Rany Bhuddorun, for the recovery of the zemindary or talooka of Rohroh. The appellant claimed as the adopted son of the deceased Rajah Koosul Sing, proprietor of that talooka, who died about 1775. He claimed by virtue of an adoption which was made about 1778 or 1779, when the appellant was two years old, by one or both of the deceased Rajah's widows, Rany Chunder Bunse and Rany Bhuddorun. He also alleged that he had been in possession of the zemindary, and acknowledged as the Rajah or zemindar, from that time till the occupation by the British Government, in 1801 or 1802, of the Ceded Provinces, of which this formed a part. He stated that the first triennial settlement was formed with him in that character in 1803, and that on its expiration the original defendant, the Rany, fraudulently acquired possession and obtained the subsequent settlements.

The defendant disputed the fact of the alleged adoption, and denied its validity if true, and insisted that the appellant never had the possession of the zemindary in his own right.

Evidence was given on both sides in the Provincial Court as to the facts (but none in support of the fraud suggested by the claimant), and the opinion of the Pundit of the Zillah Court was obtained upon the law; and on the 12th of April 1813 a decree was pronounced against the claim of the appellant. From that decree an appeal took place to the Sudder Dewanny Adawlut in January 1815. Pending the proceedings in that Court, and in the course of the same year, the original defendant died, and a proclamation was made for her heirs to come in and defend the suit.

On the 8th July 1817, the present respondent who claimed to be the heir of the deceased Rajah as his son by a Gundarpy marriage to a seventh wife, and Ruttun Sing who claimed as the son of the daughter of Rany Chunder Bunse, were admitted as acting for the deceased respondent. In the meantime, the Collectors of the district appear to have put the appellant into possession of a moiety of the malikana rights of the zemindary in question during the life of the Rany Bhuddorun, and after her death, in October 1815, into the exclusive possession of the whole; and this possession

appears to have continued until the determination of the suit.

The Pundits of the Sudder Court, and also the Pundit of the Provincial Court of Bareilly, were afterwards consulted. Some precedents were referred to, which form a part of the printed Appendix, and the Court pronounced its final decree on the 12th August 1817, by which, in the first place, the decision of the Provincial Court disallowing the claims of the appellant was confirmed, and in the second it was finally and fully ordered that the property in dispute should, in right of succession, descend to Gunsheam Sing, the son of the Rajah Koosul Sing, as the proprietor; that the claim of Ruttun Sing should be disallowed, and Gunsheam Sing is, in effect, directed to be put into possession of the disputed zemindary.

From this decree an appeal has been made to the King in Council, and the case has been argued with great talent on both sides.

The two parts of this decree require a distinct consideration. As to the first, the only question is, whether, upon the evidence adduced by the appellant and the Rany, he has established a right to the zemindary as against her; and in deciding that question, the alleged title of the now respondent (which, if true, would have prevented the adoption altogether) must be wholly omitted. It has never been proved as a fact in the cause for decision, as between the appellant and the Rany, nor indeed for any purpose, that the deceased Rajah had a child, the present respondent.

Upon the evidence, the whole question turns on the fact of the alleged adoption, and its validity according to the Hindoo law.

Their Lordships by no means question the doctrine contended for by the learned Counsel for the appellant, that uninterrupted and undisputed possession for a long period of time constitutes sufficient *primâ facie* evidence of title. That is a recognized rule of our law, and upon general principles, for the sake of the security of property, seems to be applicable to that of other countries, where the law-giver has not specially established a different provision. Nor is it disputed that such a possession, even for a less period than that which elapsed between the years 1778 or 1779, when the alleged adoption took place, and 1805 or 1806, when the Rany obtained the settlement of the talooka, would have been sufficient to have thrown the burthen of disproving the title of the claimant on the opposite party.

Whether, in this case, such a possession has been proved on the part of Haimur Chull Sing is very doubtful; but their Lordships think it wholly unnecessary to examine the evidence of it in detail, because, assuming that the possession was proved, it is perfectly clear, upon the plaintiff's own shewing, that such possession is referable to his alleged title by adoption, and to that alone. If there was no title by adoption, the possession avails nothing.

Of the fact of an adoption by the senior widow no reasonable doubt can be entertained; and therefore the question is reduced, upon this branch of this case, to this single point: Whether that adoption was valid in point of law, or not?

It may also be admitted, on the assumption of the proof of undisputed possession for a long space of time, that every presumption of fact should be made in favor of the validity of the act by virtue of which it took place, and that the *onus* of proving those circumstances which render it invalid in point of law, if the nature of the case requires such proof, ought to lie on the other side.

Does it then appear that this adoption was, by the Hindoo law in force in this district, invalid? It must be first determined what the provisions of that law are.

On the part of the appellant it is insisted that a widow (and, if there be more than one, the senior widow) may make a valid adoption of a relative of the deceased husband, provided it be done with the consent of the nearest relatives of that husband, who are the widow's natural guardians; and that, if an only or eldest son be given, such gift may be made without guilt in the giver, if made in the particular form called *dawya-mushyayana*, and, if not, is nevertheless valid when made.

On the part of the respondent it is insisted that the authority of the husband is absolutely essential to the validity of the adoption, and that a gift of an only or eldest son, unless in the above-mentioned form, is not merely a violation of the law in the giver, but is absolutely void.

The Court of Bareilly pronounced against the appellant, on the ground that, though the widow might make an adoption, she could not do so without the consent of her own relations, which was not given. The Sudder Dewanny Adawlut confirmed that decision on a different ground; namely, that by law the authority of the husband was

essential, and that such authority was wanting in this case.

Their Lordships are now to decide whether that position is correct; and they must decide with the means of information with which their Lordships have been supplied, partly from the Native authorities in the several Courts below, and partly from the text-books which have been cited in the course of the argument. They are bound to act according to the usual practice, and not to advise the reversal of the decree of the Court, unless they are satisfied that the decree is wrong; and more especially, in a case in which the Judge of that Court, from his education and habits, must necessarily have more information on the subject than most of their Lordships now present can be supposed to possess.

Upon a full consideration of these authorities, their Lordships are of opinion that they cannot come to the conclusion that the decision of the Court below is wrong. According to the Native text-writers it seems to be clear that the ancient law of Hindoostan required the authority of the husband; but it is also clear that the strictness of that law has been in many districts relaxed or modified by local usage; and the opinion of the Sastries, as published in Mr. Borradaile's Bombay Reports, is very strong to shew that in the Mahratta States to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not, in their Lordships' judgment, established; on the contrary, the weight of the authority is in favor of the opposite conclusion. The opinion of the Pundits of the Sudder Court, both in this case and the case of Shumshere Mull (Appendix, p. 83), and that of the Pundit of the Provincial Court of Appeal of Benares in the latter, appearing to be entitled to more credit than those of the Pundits of the Zillah and Provincial Courts of Etawah and Bareilly and of the City Court of Benares.

Without pretending to decide what is the law in other districts of India, their Lordships feel bound to say, that in this particular district, upon the authorities brought forward in this particular case, they must pronounce that the law requires the direction of the husband in order to the validity of an adoption: at all events, they cannot say that it does not; which they must do in order to reverse the judgment in this case.

Then, was there such an authority given in this case? It is clear from all the evidence that it was not. There is no evidence of any kind leading to the supposition that it was. The interval of four years which elapsed between the Raja's death and the adoption raises a strong presumption that his authority was not given; for, if it had been, a direction so important in a religious point of view would naturally have been carried into effect much sooner after his death; and besides, no one pleading or document on the part of appellant, at any stage of the case, suggests that such an authority was given.

Their Lordships, therefore, think, upon this view of the law, that upon the evidence in this case it clearly appears that the adoption was invalid, and the title which rests on that adoption, and was the foundation of the suit, being for this reason invalid, the appellant must fail in that suit, and so much of the judgment as affirms the decree of the Court below must be itself affirmed.

It is unnecessary to determine whether the other objections to the adoption were well founded: probably they were not.

The second part of the decree, which establishes the right of the respondent, and in effect directs him to be put in possession of the zemindary, cannot, in the judgment of their Lordships, be supported.

It was contended that the appellant had no interest in that part of the decision, and could not be heard to complain of it. But, in truth, he had an interest; at least, it is not clear that he had not some interest. If he had acquired no right to the possession subsequent to that right upon which he founded his plaint, he could perhaps have had no ground to complain of a decision which, after negativing his claim, affirmed that of another: but, as he certainly acquired a possession of some sort by lawful authority, if the Collector's statement in evidence in the cause be correct, by a grant by the Executive Government after the Rany's death, that title should not have been disturbed by the decree of the Sudder Court establishing the right of another, who was not for this purpose a party to the cause, but the appellant should have been allowed to retain possession, as far as that Court was concerned, and the Executive Government, which gave the title, should have been left free to allow it to continue or to be taken away, as it thought fit.

That title was not given upon the footing of any preceding decree which was reversed, but probably was bestowed because the appellant was supposed by the Government to be the adopted heir; and the language of the Collector's report is in favor of that supposition. It may possibly have been given, because the zemindary was deemed a *bonam vacans,* and the appellant was thought a fit person to receive the grant. In the former case, it was for the Government to rectify the mistake, by withdrawing the grant after the affirmance of the decree of the Provincial Court, and granting to whom it pleased. In the latter, the appellant ought to have been permitted to continue in possession, subject to be dispossessed by any one shewing a title not barred by lapse of time. But the Court of Sudder Dewanny Adawlut has no right at all to determine the question of title of a third person, for it was not the question in the cause, and that part of their decree which has this effect their Lordships will recommend to His Majesty to reverse, and after that reversal the Executive Government will deal with the possession as it thinks fit.

Mr. Miller.—Do your Lordships intend that reversal to be with costs?

Mr. Justice J. Parke.—No, without costs. It is partly affirmed and partly reversed, without costs.

Mr. Miller.—And we are to be put in possession, as we were at the time of the grant?

Mr. Justice J. Parke.—We leave it to the Executive Government to deal as they think fit with the possession.

The *Vice-Chancellor.*—On the part of the East India Company, do you make any application as to costs? The Company have brought forward the case.

Mr. Serjeant Spankie.—Yes, my Lord.

The *Vice-Chancellor.*—There is a sum raised by the zemindar and deposited in the hands of the Company for the costs.

Mr. Serjeant Spankie.—That was in lieu of security.

Mr. Justice Bosanquet.—As to the costs disbursed on account of the appellant, the appellant is personally liable to repay the Company such costs as have been incurred by them in carrying on the cause.

Mr. Serjeant Spankie.—Will your Lordships make that a separate order, or will it accompany the other?

Mr. Justice Bosanquet.—It will accompany the other. You have seen the order of the King in Council.

Mr. Serjeant Spankie.—Yes, my Lord. That one made at Brighton I have [illegible] It directs that the costs are to be [illegible] such persons, and in such manner, and the Company should have such liens [illegible] Judicial Committee should direct. [illegible] terms must be inserted in the order. [illegible] is the first case of the kind, and it is [illegible] sirable it should be drawn up with care.

Mr. Miller.—If your Lordships see [illegible] objection to it, the order can be drawn [illegible] with liberty for the parties to except [illegible] it is finally passed.

Mr. Justice J. Parke.—There is no [illegible] culty in drawing up the order if [illegible] understand the principle.

The *Vice-Chancellor.*—If you will [illegible] the trouble of drawing up between [illegible] selves some order regarding the costs, [illegible] then let their Lordships see it, they [illegible] make such alterations as they think [illegible] pedient.

Mr. Justice J. Parke.—The prin[illegible] upon which it will be to be settled is [illegible] that the East India Company must [illegible] their remedy against the respondent for [illegible] costs, and take their remedy against the [illegible] pellant for such costs as they have incu[illegible] upon his part upon the sum deposited?

Mr. Serjeant Spankie.—We shall [illegible] a lien upon the sum deposited.

Mr. Justice J. Parke.—Yes; and if [illegible] sum remains, that is to be returned.

Mr. Lloyd.—The way your Lordsh[illegible] dealt with it in the cases compromised [illegible] this: that the costs of the Company [illegible] paid out of the fund deposited, and th[illegible] a remedy over on behalf of the respondent [illegible] against the appellant. Whether you think [illegible] that should be carried into effect in this case, your Lordships will say.

Mr. Justice J. Parke—No; it would be hard to make the appellant pay the costs of the respondent in this case.

The 8th January 1834.

Loan for Zemindary—Suit against Zemindar for Debt—Regulations of 1781 and 1787.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Gopee Mohun Thakoor and others

versus

Raja Radhanat.

Where money was borrowed to pay the revenue [illegible] from a zemindary and paid to the Government on that account, the bond given by the Vakeels and Mu[illegible]

of the zemindary to the trustee for the lenders in English form for the purpose of enabling them to ce the personal engagements of the Vakeels and agers in the Supreme Court, was held not to deprive lenders of their right, under the law prevailing ng the natives, in matters of contract, to sue the ndar in the Courts of the Mofussil.

ELD also that the laws of 1781 and 1787 were repeal- by the laws of 1796, when this action was brought, there was nothing in those two former Regulations ch made it illegal for the zemindar to contract a t, or for any other native to take an obligation from mindar, without the consent of the Officers of Reve- ; but that such an obligation, if founded on a valuable sideration, would be equally binding upon the con- ce of the zemindar, and the demand and the pay- nt would be equally legal, as if such consent had been ained and registered, though no Court of Justice ht have jurisdiction to enforce the right.

Mr. Justice Bosanquet.—In this case a it was commenced in the year 1796 in the lah Court of Dinagepore by the appel- ts, representing Durp Narain Takoor and narassey Ghose, who were money-lenders Calcutta, against the zemindar, Rajah dhanat, to recover a large sum of money, ounting to 80,150 rupees, alleged to have en advanced by them in 1780 for the use of e zemindary, during the minority of the mindar, to two persons named Janikiram ng and Sudanund Sirkar, who were the wfully appointed managers and vakeels of e zemindary.

The principal part of this sum was said have been advanced for the purpose of nabling those persons to pay the kist then e from the zemindar to Government, and have been actually received by Govern- ent, in discharge of the kist.

To secure the money thus advanced, in 786 a bond in the English form was given y Sudanund Sircar, the Vakeel at Calcutta, an English gentleman, as a trustee for the nders; and, the amount not being paid, nother bond was given for the same amount, with interest, in 1787, by Janikiram Sing nd Sudanund Sircar, to the same trustee, who in each case signed a declaration of trust in favor of the lenders. The first bond was not put in suit, having been given up; but, the money not being paid, the two obligors in the last bond were sued upon it in the Supreme Court and taken in execution, and Janikiram Sing died in jail.

The Zillah Court dismissed the suit against the zemindar. On an appeal from the decree of the Zillah Court to the Provincial Court, much evidence was given which had not been laid before the Zillah Court. The former decree was reversed with costs, and the Provincial Court determined that the zemindar was liable to pay the sum of 60,300 rupees, the amount for which the bond was given, together with interest equal to the whole principal, making together 1,20,600 rupees, the amount of the penalty of the bond, that Court being of opinion that whatever loan borrowed in the time of Janikiram Sing or of any other Surburakar of the zemindary should be proved to have been actually paid into the Treasury, was payable by the zemindar from the zemindary; and being also clearly of opinion that 60,300 rupees paid by the money-lenders was received into the treasury on account of the zemindary. The sum of 300 rupees, in addition to the 60,000 rupees, the amount of the loan, appear to have been the expenses attending the transaction, being just one-half per cent. upon the loan; and the Provincial Court seems to have treated the account of the obligee upon the zemindar as commensurate with the penalty of the bond.

On appeal to the Sudder Dewanny Adawlut, the decree of the Provincial Court was reversed, and that of the Zillah Court affirmed.

The only reason for this reversal, which is distinctly expressed by the Judges of the Sudder Dewanny Adawlut, is founded upon the latter part of Article 20 of the Regulations of July 1781 and 1787, which, they say, was overlooked by the Provincial Court when referring to that Article, which, after prohibiting the Courts of Justice from determining any suit against any zemindar, talookdar, chowdry, or other holder of land being malguzary, unless it should be proved to the satisfaction of the Court that the money originally lent, arising from such other valuable consideration, was for the service of the zemindary, talookdary, chowdry, or other land, and actually paid to the Government as part of the revenues thereof, proceeds expressly to prohibit the Courts of Justice from passing any decree in any suit against a zemindar or other landholder of malguzary lands, concerning any debt, contract, bond, or other engagement, concluded by them after the 1st of August 1781, unless proved to have been contracted with the previous sanction and consent of the Committee of Revenue, and that a note or memorandum, specifying such consent, has been registered in the Sudder Kanoongoe's office.

The Judges of the Sudder Dewanny Adawlut do not express any opinion upon the effect of the evidence, or any dissatisfaction with the conclusion drawn from it by the Provincial Court, but formed their decree of reversal upon the Clause of the Regula-

tions which had not been noticed by the Provincial Court; and they state no particular objection to the principle of the decision of the Provincial Court, but they simply add a remark (possibly, and I think most probably, in allusion to the effect of the Clause supposed to offer an insuperable impediment to the suit) that the suit was not instituted until Janikiram Sing had died in jail, where he was confined on account of a decree obtained against him in the Supreme Court for the amount of the bond, the subject of the present action; and that the natural inference to be drawn from this fact is, that the respondents in that Court did not at that time conceive that they could maintain any suit at law on account thereof against the appellant. The case has been argued, both upon the effect of the evidence and upon the law. The evidence is alleged by the respondent to be insufficient to support the conclusion of the Provincial Court, and the appellants insist that the Clause of the Regulations relied upon by the Sudder Dewanny Adawlut was rescinded at the time when the suit was commenced, and, consequently, that the appellants were at liberty to pursue their remedy as if the Clause never had existed.

Their Lordships are of opinion that the evidence laid before the Provincial Court sufficiently established that the sum of 60,000 rupees was advanced by the persons whom the appellants represent, by means of a hoondy, or bill of exchange, drawn on the house of Gunness Doss of Calcutta in favor of the Collector at Moorshedabad, and received into the treasury of the Government on account of the kist due from the zemindary of Raja Radhanat, and paid when due; and they are also of opinion that, upon the evidence, this sum must be taken to have been advanced, not to Janikiram and Sudanund Sircar, or either of them, in their individual characters or upon their own account, but advanced to them as manager and vakeel of the zemindary, and consequently according to the law prevailing among the natives of India, became the subject of demand upon the zemindar for whose benefit it was advanced. The hoondy was given by the Shroffs or money-lenders at Calcutta to Sudanund Sircar, who was the Vakeel of the zemindary. Both the money-lenders went with him to the Khalsa or Treasury to see the hoondy delivered to the proper officer of the revenue, and the Vakeel alone, in the first instance, gave any bond by way of security to the lenders. The payee in the bond was an English gentleman, a mere trustee to the money-lenders, whose name was introduced for the purpose of enabling the parties interested to sue in the Supreme Court, and the omission of the Rajah's name, and of any mention of the zemindary in the bond, as well as the omission to obtain and register the consent of the Committee or Board of Revenue, may well be accounted for, from the apprehension that the introduction of any matter, apparently relating to the revenue, might prejudice the right to sue in that Court, and consequently retard the remedy there of a judgment on the bond.

It has not been suggested that the money was advanced on the personal account of Sudanund Sircar, the Vakeel, nor is it likely that it should be so advanced; and if it was to be so advanced for the personal benefit of Janikiram, it is very improbable that the bond should have been taken from the Vakeel of the zemindary only. The bond not having been discharged, another bond was required in the following year, from both Janikiram and Sudanund Sircar. But the question to be determined relates to the money advanced in 1786; for if the money then supplied was advanced on account of the zemindary, the joint and several bond given as a security in the ensuing year, will not vary the nature of the loan or discharge the liability of the zemindar.

No evidence was adduced on the part of the respondent to rebut the inference, that the money so advanced to the Vakeel, with which the kist of the zemindary was actually discharged, was advanced for the benefit and on account of the zemindary, and, though it has been remarked that the delay of the money-lenders to commence any suit against the zemindar after the death of Janikiram affords reason to suppose that they thought that they had no right to do so, we do not know when the Rajah came of age, or what was the condition of the zemindary, from that time to the commencement of the suit by the appellants in 1796, about four years after the death of Janikiram, or what was the state of the families of the lenders, who died between the time of the loan and the commencement of the suit, or how soon the parties were apprised that they might sue the zemindar with a prospect of success, in consequence of the impediment to their suit, which existed at the time of the transaction, being removed. The real question is, whether the money was expressly advanced for the use of the zemindary, or generally for the use of those

who received it, to be applied as they might think fit; and their Lordships are of opinion that the circumstances which accompanied the loan, in the first instance, when the only security required was that of the Vakeel of the zemindary, a person of very inferior station compared with that of Janikiram, the uncle of the zemindar, and the precaution taken by the money-lenders of accompanying Sudanund Sircar to the Khalsa to see the hoondy delivered to the proper officer of Revenue, are sufficient to decide this question, and to shew the transaction to have been of the former character.

If, then, the circumstances of the case establish that the money was borrowed on account of the zemindary, and was paid to the Government on that account, the bond given by Sudanund Sircar to a purchaser for the lenders in the English form, for the purpose of enabling them to enforce the personal engagement of the Vakeel in the Supreme Court, will not deprive the lenders of their right, under the law prevailing among the Natives in matters of contract, to sue the zemindar in the Courts of the Mofussil.

The remaining point to be considered is, whether the Government Regulation of 1781, which was in force at the date of the loan, and that of 1787, by which it was continued until 1790, had the effect of depriving the appellants of their right to sue the respondent in 1796.

If, according to the true intent and meaning of the Regulation of 1781, it operated as a prohibition of any such loan as that upon which the suit is founded, without the consent of the Committee or Board of Revenue registered as therein mentioned, the loan itself was illegal, and the subsequent repeal of the Regulation would not give a right to sue upon it; but, if it amounted to nothing more than a restriction upon the jurisdiction of the Court over transactions of this description, unless sanctioned and registered as above mentioned, the repeal of the restriction will open to the parties the right to seek any remedy in the Court, which, according to the general principles of the law, would be applicable to their case.

There is nothing in the Regulations of 1781 or 1787 which, either in the terms or the spirit of them, appear to their Lordships to make it illegal for a zemindar to contract a debt, or for any other native to take an obligation from a zemindar, without the consent of the officers of Revenue; such an obligation, if founded on a valuable consideration, would be equally binding upon the conscience of the zemindar, and the demand and the payment would be equally legal, as if such consent had been obtained and registered, though no Court of Justice might have jurisdiction to enforce the right. Whatever may have been the notions of public policy, upon which the Native Courts were for some time restrained from taking cognizance of such transactions, those notions have not been deemed upon experience to be well founded, since that part of the 20th Article of the Regulation of 1781 and 1787 upon which the Court of Sudder Dewanny Adawlut rely have been expressly rescinded by the Regulation of the 29th October 1796.

The title of a Regulation passed in 1793 (No. XXXVIII.) has been referred to, which commences in the terms: "A Regulation "for re-enacting, with modifications, such "part of the rule passed on the 27th June "1787, as prohibits Covenanted Civil Ser-"vants of the Company employed in the ad-"ministration of justice or the collection of "the public revenue, lending money to ze-"mindars, independent talookdars, or other "actual proprietors of land." The language of this title appears to treat the restrictions contained in the Regulation of the 27th June 1783 as amounting to prohibitions; and, in a popular sense, the law which deprives a creditor of his remedy may be considered as prohibiting him from taking an obligation to pay him; but, unless such be the true construction of the Regulation itself, that sense cannot be imposed upon it by the language of a subsequent Regulation not expressly declaratory; much less by the title of a Regulation only. The Regulation of 1793, in modifying that of 1787, prohibits in express terms whatever is intended to be forbidden: then, if 1781 and 1787 are only restrictive of jurisdiction, and if they were construed as amounting to prohibitions, the extent of transactions which they embrace would lead to consequences highly inconvenient and unjust.

Their Lordships, therefore, are of opinion, that a report should be made to His Majesty by the Judicial Committee, recommending that the decree of the Sudder Dewanny Adawlut Court be reversed, and that the Court of Sudder Dewanny Adawlut be directed to affirm the decision of the Provincial Court; but without costs, as a difference of opinion has prevailed among the Courts below; and that, for the same reason, each

party should bear his own costs of this appeal. The order must provide for the reimbursement of the costs incurred by the East India Company in prosecuting and defending the appeal.

The 8th February 1834.

Balance of Partnership accounts—Evidence—Section 16, Regulation VI., 1793.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Mussamut Seetul Bahoo

versus

Baboo Hurkishen Doss.

A suit having been brought in Benares for a sum alleged to be due on the balance of partnership-accounts, the parties agreed by bond to refer the accounts to arbitrators, according to whose award a given sum was found due on balance of accounts to the plaintiff subject to certain objections which could not be settled without the inspection of the joint-concern papers of the Calcutta kothee. The Provincial Court ought to have postponed making its decree until either the copies had been verified or the originals had been produced, unless it could have been satisfied that there was no validity in the objections. But the Court was not satisfied that there was no validity in the objections, for, by its decree, it reserved a right to the defendant to recover what she could upon the objections. Whether the Provincial Court could have admitted the use of the original books upon a review of the decree, it was held that the Sudder Court ought, under Section 16, Regulation VI., 1793, to have used the evidence to be supplied by the original books, or to have ascertained that the sum mentioned as the balance due, subject to the objections, was a balance due without objection, instead of merely affirming the decree of the Provincial Court.

The Vice-Chancellor.—It appears in this case that a partnership had been carried on between Hurkishen Doss, Dwarika Doss, and another person, as bankers at Calcutta, which had transactions in various parts of India. The partnership was dissolved about 1797. Dwarika Doss died before 1806, and on the 2nd of October 1806 an action was commenced in the City Court, which was afterwards removed to the Provincial Court of Benares, by Hurkishen Doss against the widow of Dwarika Doss, who seems to have been then resident at Benares, and to have represented her deceased husband, for a sum alleged to be due on the balance of the partnership-accounts. On the 24th of May 1808, the parties agreed by bond to refer the accounts to arbitrators. After some intermediate proceedings, the arbitrators made their final report about March 1814, which in effect stated a given sum to be due on balance of accounts to the plaintiffs, subject to certain objections, which, it was stated, could not be settled without an inspection of the joint-concern papers of the Calcutta kothee. There was some dispute on the question whether the original books should be brought from Calcutta; and shortly before the Provincial Court pronounced its decree, copies of the books were sent from Calcutta to Benares, but they were not proved to be correct copies. The Court, without allowing time to verify the copies or directing that the originals should be brought, proceeded to make its decree Supplemental (Appendix, p. 40): "Ordered, &c. The defendant has "the option of suing the plaintiff on the "four objections she has advanced in this "cause." The defendant, after the decree had been pronounced, procured the original books to be brought to Benares, and on the 5th December 1817 presented a petition for a review, stating the fact that the original papers had arrived, but the Court declared there was no ground on which to allow a review of the case. On the 5th May 1831 the defendant presented a petition of appeal to the Court of Sudder Dewanny Adawlut, calling the attention of the Court to the fact that the arbitrators' report noticed the objections, and that the original papers had been sent to Benares before the petition of review was presented, and pointing out that, by the decree, liberty was given to the defendant to sue the plaintiff in respect of the four items which constituted the objection; but the Court of Sudder Dewanny Adawlut, on the 4th of July 1821, affirmed the decree, and on the 17th of November 1821 rejected the defendant's petition of review.

Upon the face of the report of the arbitrators, it appears that the accounts had not been fully taken, and could only be taken by inspecting the original books which were at Calcutta, or verified copies of them. The Provincial Court ought to have postponed making its decree, until either the copies had been verified or the originals had been produced, unless by some means it could have been satisfied that there was no validity whatever in the objections. But the Court was not satisfied there was no validity in the objections, for, by its decree, it reserves a right to the defendant to recover what she could upon the objections. It did, therefore, in effect, decide that a sum should be paid as the balance of accounts, although it admitted that the sum to be paid might not be the balance, and that, in substance, no part of it might be due at all. Whether the Provincial Court could have admitted the use

of the original books upon a review of the decree, it is not necessary to determine; but it is clear, from the Regulation VI. of 1793, Section 16, that the Court of Sudder Dewanny Adawlut might have used the evidence to be supplied by the original books. But it did not do so; nor did it ascertain that the sum mentioned as the balance due, subject to the objections, was a balance due without objection, but affirmed the decree as it originally stood.

Their Lordships are therefore of opinion that the decree must be reversed, and that the Court of Sudder Dewanny Adawlut must proceed to ascertain what, if anything, was really due from the defendant to the plaintiff, having regard to the objections noticed by the arbitrators.

The 11th February 1834.

Suit by Mahajun or Native Banker—Practice of Privy Council (as to judgments from Courts in India)—Costs.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Baboo Ulruk Sing

versus

Beny Persad.

Suit by Mahajun or Native Banker. The Sudder Court, after having examined all the accounts and evidence, having come ultimately to the same conclusion that the Provincial Court had done, and the Privy Council being unable to see any clear distinct point upon which it could be said that the decision of the Courts below was wrong, affirmed the decision of the Sudder Court. As, however, there was delay in suing, and as the case was attended with a considerable degree of suspicion, the Privy Council refused to the respondent before it all costs, and decreed further that the costs of the appeal to the Sudder Court should also be disallowed.

Mr. Justice Bosanquet.—In this case their Lordships are of opinion that the decree of the Sudder Dewanny Adawlut should be affirmed.

The case has been put upon two grounds: *first*, upon the merits of the case; and, *secondly*, upon the law. The point of law which was taken upon the original appeal, that the demand of the plaintiff did not fall within the time limited, has been given up as a matter of law; but the delay which occurred before the commencement of the suit has been insisted upon as an ingredient in the merits of the case; and it is impossible to look at this case without seeing that it is attended with a considerable degree of suspicion. At the same time, though it is attended with a considerable degree of suspicion, as well owing to the length of time as the death of a number of parties in the case, and the difficulty of making out this transaction which took place between Soobunslal, the agent of Roop Sing, the zemindar, and the banker employed on his behalf, still, upon the whole, the Provincial Court, as well as the Court of Sudder Dewanny Adawlut, having had the evidence before them that appears upon these papers, have come to the conclusion, in point of fact, that the demand of the plaintiff has been satisfactorily established.

Now, the question does not rest only upon the written accounts, but there is parol testimony, by which the demand of the plaintiff is in some material points supported.

The Court of Sudder Dewanny Adawlut, in giving their judgment, state this: "It "appears to the Court that, although no "books of any Mahajun can be considered "good and sufficient to prove the claim of "a Mahajun bringing an action, without "the genuineness of them be established by "the testimony of him who kept the books, "or by that of the Accountant to the kothee, "or without there are strong presumptions "in their favor, yet as, upon a perusal of "the extract from the books of the kothee of "Gokool Doss and Golaub Doss for the "Sumvit year 1856, whose proprietor was "Mooteechund, it is in proof that dakhila "transactions on account of the pergunnahs "Zuhoorabad, Shadeeabad, &c., did exist in the "said kothee of Soobunslal and Muthra Doss. "It is clear that the sum of 2,51,071 rupees "4 annas, on account of the dakhila of the "pergunnahs in question, was paid from the "kothee of Seeta Ram, the father of the "respondent, and that of that amount the "sum of 1,95,275 rupees 2 annas and 9 "pies was recovered; also that the sum of "55,796 rupees 1 anna and 3 pies (which "agrees with the principal claimed by the "respondent) is due. Hence no suspicion or "doubt can attach to the books exhibited "by the respondent." The Court of Sudder Dewanny Adawlut therefore proceeded, not simply upon the books of the plaintiff himself, but upon a comparison of those books with the books of Soobunslal, the agent of the defendant, Roop Sing, and also with the books of Mooteehund; and it appears also in another part of the case that the books of

the treasurer of the Rajah of Benares were also examined, to see how far they corresponded, and therefore an opportunity was afforded of looking into all those books, to see if they made out that these were fair transactions.

Now, taking the account as it appears in the books of the plaintiff, there appear to be "Debtor" and "Creditor" on the one side and the other; and the result of that debtor and creditor account, supposing it to be fair, brings out the balance claimed in this suit. And nobody can doubt, if they look at the two sides and compare the two, that they show the balance the plaintiff has recovered in this case, and upon which, according to the Regulation in Bengal, interest has been given equal in amount to the principal.

But, in corroboration of this account, independent of its agreement with the other accounts, there are certain circumstances deposed to in the parol evidence that all very materially tend to corroborate the case, notwithstanding the suspicion that it excited, notwithstanding the delay in bringing forward the transaction, and its not having been brought forward till after the death of certain parties.

In the first place, it appears that Soobunslal was the agent for money transactions of the zemindar: he was what you may call his general steward. It appears, before these transactions took place with Seeta Ram's house, a banker was always employed to pay the money due to the Rajah of Benares. The banker immediately preceding Seeta Ram was Mooteechund, and there are two other bankers mentioned as preceding him. The transactions were carried on by paying these assessments into the treasury of Benares, through the medium of a banker, notwithstanding the Rajah had his steward or agent whose duty it was to conduct his money-affairs. It then appears, at the time when Mooteechund ceased to be the banker of the zemindar Roop Sing, by the parol evidence, though not very precisely that there was a sum of between forty and fifty thousand rupees, corresponding, therefore, in that respect, with the sum paid to Mooteechund, and the debt that was due from Roop Sing to Mooteechund. Further than that, it appears that there was that conversation deposed to in the Courts below, who had much better opportunities than we have of deciding upon the credit due to these witnesses, though there are circumstances in the parol evidence much open to comment; but it appears, upon the evidence laid before them, there was a conversation, according to that testimony, in which Roop Sing applies to Seeta Ram, and requests that he will pay the debt to Mooteechund.

Then the allegation on the part of the appellant is to account for these sums, or rather the principal sum; that, in order to pay that sum, he produced twenty thousand dollars, and, I think, 49,000 rupees in specie. This sum in dollars was produced at two different times (the sum of 10,000 and 10,000) and then the sum for which those dollars were sold is stated; and the allegation is, that he gave those dollars to a person who was the agent of Roop Sing, to sell those dollars in order that the produce of those dollars, together with the sum of rupees in specie which he had advanced, should be paid into the Treasury of the Rajah of Benares. Of those two sums of 10,000 dollars, one was sold for the sum of 21,431 rupees 4 annas, which, with the 4,900 rupees being added, will make 26,330 rupees and a fraction: the other 10,000 dollars produced the same sum, which altogether amounted to 47,762 rupees; and that is said to have been paid into the Treasury of the Rajah of Benares. Now, that that sum was paid in, appears from the accounts of the Treasury. But was it paid in by Soobunslal, the agent of Roop Sing, he being the creditor of Roop Sing, or was it paid in by Seeta Ram, he being the creditor of Roop Sing? That appears to be the substantial question between the parties.

It is alleged by the plaintiff that he furnished that money. Now, that he furnished the money in dollars, appears to be made out by the parol evidence upon that subject also; because the parol evidence states, not only an application made to Seeta Ram to do it, but it states that sums of money were brought in bags, apparently corresponding to this amount, from the kothee of Seeta Ram. That, of course, is considered as corroborative evidence upon the subject. It appears clearly that Seeta Ram continued to be the banker of the Raja. It appears that there were accounts between them, debtor and creditor; and it is not denied that the dakhilas were made on the part of this house of Seeta Ram, and the Raja is answerable for those.

Then it is alleged that it in fact has been paid off, We have, upon that subject, the evidence, in addition to that which was laid before the Provincial Court, of Sree Kishen Doss. His attention was directed

o these accounts, and no doubt he does ake upon himself to say, looking at these ccounts, upon the result of these accounts, hat the debt has been paid off. But is hat evidence that Sree Kishen Doss has iven, evidence of facts to which he speaks; r is it not a commentary upon the accounts hich are laid before him, from which he raws the inference that the money has een reimbursed to Seeta Ram? This evilence of Sree Kishen Doss, as well as all he accounts from these different houses and ll the parol evidence, was brought up nd laid before the Court of Sudder Deanny Adawlut. I am not prepared to say hat there may not be doubts in this case, r that there may not be suspicions, but the ourt of Sudder Dewanny Adawlut, after aving examined all these accounts and all his evidence, came ultimately to the same onclusion that the Provincial Court had one; and we ought to be able to say that e can see clearly there is some point in hich that Court was wrong, before we can ke upon ourselves to reverse that decree. heir Lordships are of opinion that they re not able to see, in the circumstances rought before them, that there is any clear stinct point upon the merits (and it is a uestion turning upon the facts and merits) pon which they can lay their hands, and y that the decision of the Court below is rong; because, after examining all that vidence, the Court of Sudder Dewanny dawlut has come to that conclusion, and eir Lordships see nothing to induce them reverse it. Great stress has been laid the admission of Soobunslal and Muthra oss to participate in the profits of these nsactions; but they were not partners in e house of Seeta Ram; and, if that house was employed by Roop Sing as his bankers, an agreement between the house and certain other persons, that the profits of particular transactions should be shared between them, would not form an objection to a suit by Seeta Ram to recover the balance due from Roop Sing to his house.

The opinion of their Lordships therefore is, that the decree of the Court of Sudder Dewanny should be affirmed, as far as regards the principal and interest which they have decreed to be due to the plaintiff in the suit, but without the costs of the appeal to the Sudder Dewanny, and it should also be without the costs of the present appeal.

Judgment below affirmed, but without costs.

The 11th February 1834.

Practice of Privy Council (as to judgments from Courts in India).

On Appeal from the Sudder Dewanny Adawlut of Madras.

Raja Row Vencata Niladry Row

versus

Enoogoonty Sooriah and Ramaniah.

The Privy Council will not interfere with a judgment given by the Courts in India in a case where the circumstances are extraordinary, and where, by reason of the contradictory evidence on both sides, it is difficult to come to a satisfactory conclusion one way or the other, and where the party appealing was the party upon whom the *onus* of proof lay, and who has failed to make out his case to the satisfaction of those who had to decide it, and who could have, if he liked, produced fresh evidence before the Appellate Court, or at least the evidence of those witnesses he had himself dispensed with in the Court of first instance.

Sir Thomas Erskine.—The question that has been raised in this case appears to be one entirely of fact, depending not upon inferences to be drawn from circumstances, upon which the judgments of men may vary, and from which a person at a distance may draw a different conclusion from the person who hears the cause, but it is a question depending upon the testimony of witnesses, upon facts to which they positively depose.

The plaintiff sought to recover property which he said was abstracted by the defendants. He called nine witnesses to prove his case; some of which actually asserted that they saw each individual article carried away by the defendants themselves. Other witnesses were called for the defendants, who positively swore that they saw the defendants go away, and that they did not carry away with them the things they are charged with carrying away. The whole question must depend upon the credit given to these witnesses, the known character of those witnesses, and the mode in which they gave their testimony. Upon these circumstances a tribunal sitting at a distance cannot be so competent to decide as the tribunal who heard the evidence and saw the witnesses.

Now, here the Provincial Court Judges, who must be taken to have had these circumstances in view, gave no credit to the witnesses who deposed on the part of the plaintiff, and gave credit to the witnesses on the part of the defendants.

When the case was so determined, the plaintiff took it by appeal to the Court of Sudder Dewanny Adawlut. He knew the ground of the decision in the Provincial Court, for the ground upon which the case had been decided against him is given in

very minute detail by the Judge. He knew there were two other witnesses whom he had not examined, with whose examination he had himself dispensed; and he might, when he took his appeal to the Court of Adawlut, have said, "I am not satisfied with the case "I made before the Provincial Court. I "have other witnesses. I will satisfy you "my case was true." When he went before the Sudder Dewanny Adawlut, his case might have received fresh evidence; he was not concluded by the case made before the Provincial Court. It is not like the Courts in this country, where a case is called on at *Nisi Prius*, and the whole cause is tried in a few hours. The party says, "I had no idea "my witnesses would have answered as "they did;" or "I was taken by surprise, "and I wish to have a new trial." But the case was depending three years before the Provincial Court, and afterwards carried before the Sudder Dewanny Adawlut; but still the case was left as originally proposed to the Provincial Court, and two years after the judgment of the Court of Adawlut was pronounced upon the same witnesses and the same documents.

The circumstances are very extraordinary, and it is difficult to come to a satisfactory conclusion one way or the other. But that is a reason why this Court should be cautious of disturbing the judgment given by the Courts in India, where the party now appealing was the party upon whom the *onus* of proof lay, and who has failed to make out his case to the satisfaction of those who had to decide.

On these grounds their Lordships are of opinion they ought not to disturb the judgment given below; the judgment, therefore, will be affirmed *with* costs.

By an arrangement between the parties in the subsequent appeal, it was agreed that the judgment below in this case should be affirmed *without* costs.

The 27th June 1834.

Onus Probandi—Suit by purchaser at sale for arrears of Revenue for rents and profits of uncultivated land brought into cultivation.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Sree Raja Row Vencata Niladry Row

versus

Vutchavoy Vencataputty Raz.

Suit by purchaser of a mootah at a sale for arrears of revenue for the rents and profits of a hamlet consisting of lands which, when uncultivated, was given by the then zemindar to the defendant (respondent). Plaintiff alleged, and defendant denied, that the lands were included in the assets upon which the permanent assessment was fixed. Plaintiff being unable to prove that the hamlet in question was included in the Permanent Settlement, his suit was dismissed.

The Chief Judge of the Bankruptcy Court (Mr. Erskine).—THIS was an appeal by Sree Rajah Row Vencata Niladry Row, against a decree of the Sudder Dewanny Adawlut at Madras, confirming a decree of the Provincial Courts of the Northern Division.

The subject in dispute is the title to the rents and profits of a hamlet called Juggaputty-nagarum, consisting of one hundred and seventy-seven vissums of land, locally situated within the mootah of Kirlumpody, which was formerly part of the zemindary of Peddapoor, within the zillah of Rajamundry.

In the year 1818 the revenue payable by the zemindar of Peddapoor having fallen in arrear, the mootah of Kirlumpoody was sold by the Collector to satisfy the arrears. The appellant became the purchaser, but in 1819 re-sold the mootah to his nephew, Cotaghery Niladry Row, who thereby, as correctly stated in the appellant's case, was substituted for the zemindar of Peddapoor: he would be liable to the Government for all future assessments upon the mootah, and would be entitled to receive from the ryots all the rents which at the time of the sale were payable to the zemindar of Peddapoor. The mootah originally consisted of two villages only, Kirlumpoody and Chillungy. About the year 1784, a jungle lying between the two villages, partly situated in one and partly in the other, was cleared and brought into cultivation, and formed into a distinct hamlet, under the name of Juggaputty-nagarum. This hamlet was at the time of the sale, and had been for some time (but for how long was a matter of dispute), in the occupation of the respondent (Vutchavoy Vencataputty Raz), who had received and appropriated to his own use the rents and profits of the land. Cotaghery Niladry Row conceiving that he was entitled to the rents of this hamlet as parcel of the mootah of Kirlumpoody, which he had purchased, filed his plaint in the Provincial Courts in the Northern Division against the respondent, and claimed the rents received since the date of the sale, amounting to 6,466 sicca rupees and 1 anna and 3 pies. The respondent resisted the claim, and defended his right to the rents

by virtue of a grant made in 1778 by Rajah Sree Vutchavoy Juggaputty Raz, the then zemindar of Peddapoor, by which the Rajah declared that he had given to the respondent, as manyam, one hundred and eighty vissums of land which had never been cultivated, and which was overrun with wood, situated between the two villages of Chillungy and Kirlumpoody, appertaining to the talook of Kirnmoor, and that the respondent was to cut down the jungle on that ground, and build thereon a village bearing the Rajah's name. The plaintiff insisted that the zemindar had no right to alienate, as manyam, any land upon which the permanent assessment of the revenue to Government had been fixed, and that, as the permanent settlement had been fixed on the talook of Peddapoor on the basis of the Circuit Committee accounts, and as these lands were included in those accounts, the respondent had no right to the rents of lands which formed part of the mootah, and had been conveyed to him by virtue of the public sale of the zemindar's rights therein.

Upon the hearing of the pleadings read, the Provincial Court required that, amongst other things, the plaintiff should prove that the lands he claimed were strictly jeroyetty lands at the period of the permanent settlement with the zemindar of Peddapoor.

The plaintiff accordingly produced extracts from the accounts of the Circuit Committee for the villages of Kirlumpoody and Chillungy, and other documents, with a view to establish that fact, and to shew that the revenue had been actually collected from the hamlets of Juggaputty-nagarum as part of the mootah of Kirlumpoody: and he also examined several witnesses with a view to prove the same fact, and also to shew that the revenue had been collected from the lands in Juggaputty-nagarum for the Government, and that, till within a very few years, the zemindar, and not the respondent, had received the rents of the hamlet.

The respondent, in his defence, produced the pottah, or deed, of 1778, the substance of which I have already stated, by which, as he alleged, the Rajah, Juggaputty Raz, conveyed to him the land in dispute, purporting to be signed by the Rajah, but without any attestation. And he examined several witnesses, one of whom deposed to his having himself written the pottah in the year 1778, and seen Rajah Juggaputty Raz sign and seal it; and two other witnesses swore that they were also present and saw it executed. Some of his witnesses also swore to the land having been jungle and uncultivated at the time of the grant, and that the respondent brought it into cultivation and built a tank, and had enjoyed the profits of it ever since. Some of them also swore that the land of Juggaputty-nagarum was not included in the accounts of the Circuit Committee, and that it had never paid any rent or revenue to the zemindar or the Government; and for the purpose of satisfying the Court that the land in dispute was not included in the admeasurement specified in the accounts of the Circuit Committee, the respondent petitioned the Court to have the lands measured, and to compare the actual admeasurements with the quantities specified in the accounts of the Circuit Committee. The Court declined to delay the judgment for the purpose of admeasurement, and, on the 18th day of November 1822, pronounced its decree in favour of the respondent, dismissing the plaintiff's suit with costs, upon the ground that the pottah set up by the defendant was sufficiently proved by his witnesses, and was not impeached by the evidence on the other side; and that it was clearly proved by all the evidence that the respondent had been in possession of the land some years before the sale, and that the plaintiff had failed to make out that the lands in question were either included in the Circuit Committee accounts, or that it formed part of the jeroyetty land of the Peddapoor zemindary when the permanent assessment was fixed, and, therefore, that, if the lands were held by an invalid title, it was for the Collector, and not the zemindar, to call it in question.

Pending the proceedings, the plaintiff, Cotaghery Niladry Row, died, and an appeal having been preferred by his widow before the Sudder Dewanny Adawlut, the present appellant was admitted as joint appellant with her, and on the 5th of May 1825, the Sudder Dewanny Adawlut pronounced its decree, concurring in the judgment of the Provincial Court and dismissing the appeal. Against these decrees the present appeal has been made to His Majesty in Council; and the appellant contends that those decrees should be reversed, for the reasons stated in his case of appeal. And it was pressed with great ability in the argument that, as lands *primâ facie* are subject to the payment of revenue to the Government, and as these lands were admitted to be locally situated within the mootah of Kirlumpoody, and to have appertained to the villages of Kirlumpoody and

Chillungy, the land must be assumed to have been included in the permanent assessment until the contrary be proved. That the Provincial Court, therefore, was wrong in casting the *onus* of proof on the plaintiff below, and that. as the defendants had not made out any legal exemption, the plaintiff was entitled to recover the rents he claimed, or, at all events, to have his case reconsidered; but that, if the burthen of proof had been properly cast on the plaintiff, that evidence proved that the lands in question were included in the permanent assessment as jeroyetty lands in 1818.

Without entering into the question whether the Provincial Court was right in calling upon the plaintiff to prove that the land in question was jeroyetty land included in the permanent assessment of 1802, or whether the plaintiff below might have been justified in resting his claim upon the *primâ facie* case, which he now contends would have been sufficient to cast upon the defendant the burthen of making out his exemption, it is enough to remark that the plaintiff, in his plaint, rested his case upon the fact that the lands in question were included in the permanent settlement as jeroyetty lands; that, when the Provincial Court required him to establish that fact in proof, he made no objection to the course prescribed, but produced documentary and oral testimony to establish the fact alleged in his plaint, which was met by contradictory evidence on the other side; and that, although the decree of the Provincial Court rested mainly upon the negative ground that the plaintiff had failed to prove the fact alleged, yet that the objection now taken formed no part of the complaint upon appeal to the Sudder Dewanny Adawlut, but that the ground relied upon was that the plaintiff below had clearly proved that the lands in question were included in the Circuit Committee accounts. But the most conclusive answer to this objection is found in the judgment of the Sudder Dewanny Adawlut, which proceeded upon the opinion of that Court, that, upon the whole of the evidence before them, the hamlet of Juggaputty-nagarum was not included in the permanent settlement, and that the defendant had made out in proof his title to the rents which the plaintiff might recover. Unless, therefore, it can be shown that the Sudder Dewanny Adawlut formed an erroneous judgment upon that head, it will be unnecessary to enquire whether the burthen of proof rested upon the plaintiff or defendant.

The pottah under which the defendants claimed was sworn to by three witnesses present at its execution, and was only impeached by inference drawn from disputed facts, and both the Provincial Court and the Sudder Dewanny Adawlut considered the instrument satisfactorily proved to be genuine. That the defendant had been in possession of the disputed land for some time prior to the sale, was admitted even by the evidence produced by the plaintiff himself: that he had occupied it from the date of the pottah in 1778, had cleared it and brought it into cultivation, and had always held it clear of rent and revenue, was directly sworn to by several witnesses, whose evidence, though opposed by conflicting testimony, was credited by the Court below.

Now, although the date of the pottah would be an answer at once to any claim set up against the Government, whose right to set aside the grant is clearly reserved by the Regulations of 1802, yet, as, at the date of the grant, the lands are admitted to have been waste and uncultivated, it was perfectly competent for the zemindar to alienate them; and in the letter from the Board of Revenue, upon which the plaintiff relied in his plaint, it is admitted that the zemindar has no interest in any lands excluded from the assets upon which the permanent assessment was fixed.

The permanent revenue was assessed upon the lands included in the accounts of the Circuit Committee. The respondent alleges that the lands in question are not included in those accounts, and therefore that they were not included in the permanent settlement. The accounts are produced: the hamlet is not specified by name, but an explanation is given and evidence produced to shew that these lands were included in the jeroyetty lands of the villages of Kirlumpoody and Chillungy. The Provincial Court thought that the evidence did not make out that fact: the Sudder Dewanny Adawlut were of opinion that, upon the whole evidence, they were not included in the settlement.

And their Lordships are of opinion that they ought not to disturb the judgment of the Court below, unless they are satisfied that their conclusion upon this fact is erroneous. They have examined the evidence on both sides with much attention, and have applied to it the observations urged during the argument; and, although I am not authorized to say that the evidence convinces their Lordships that the lands in question were excluded from the Circuit Committee

accounts, I am directed to express their Lordships' unanimous opinion that there is nothing in the case which enables them to decide that the Sudder Dewanny Adawlut was wrong in coming to that conclusion.

Their Lordships therefore feel it to be their duty to advise His Majesty to dismiss the appeal with costs.

The 17th March 1866.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. Colvile, Sir E. V. Williams, and Sir L. Peel.

Mortgage—Sale for arrears of Government Revenue—Section 24, Act I. of 1845—Fraud of mortgagee—Redemption—Pleading.

Nawab Sidhee Nazir Ali Khan

versus

Ojoodhyaram Khan.

The effect of a Foreclosure Decree in the Supreme Court in a mortgage suit between Hindoos is equivalent to a decree establishing proprietary right in the Mofussil Courts, on similar suits on the like instruments.

The mortgagee in possession and another having sought to deprive the mortgagor of his title to redeem by means of a secret purchase of the mortgaged estate between them, including the fraudulent device of a sale by auction for arrears of revenue, such arrears being designedly incurred by the mortgagee in possession, it was held that a suit for redemption and for possession instituted many years after the sale for arrears was not barred by Section 24 of Act I. of 1845.

If a mortgagee in possession fraudulently allows the Government revenue to fall into arrears with a view to the land being put up to sale and his buying it in for himself, and he does in fact become the purchaser of it at the Government sale for arrears, such a purchase will not defeat the equity of redemption.

The mere pendency of a suit in the Supreme Court does not operate as a bar to the prosecution of a suit in a Zillah Court intended to be simply in furtherance of, and supplemental to, the suit in the Supreme Court.

Where a plaintiff on certain alleged facts seeks relief, and is unable to obtain a trial of the facts by reason of certain conclusions of law which the Judge forms on the case in its then condition, the Courts are bound to proceed upon the facts as they are stated by the plaint and upon the assumption of the truth of those facts.

THIS is an appeal from two decrees of the High Court of Judicature at Fort William in Bengal, bearing date respectively the 1st January 1863, and the 12th January 1864, made by Mr. Justice Bayley and Mr. Justice Campbell in a Divisional Branch of the Court. The last of these decrees, which was made on a review of the former, affirmed it with some slight variation which it is unnecessary to specify. The first decree reversed a decision of the Court of first instance, the Zillah Court of Midnapore, made in a suit in which the present respondent was the sole plaintiff. It was a suit for redemption and possession brought by him as mortgagor against the defendants, who were, *1stly*, the representatives of the original mortgagees, deceased, *viz.*, Aushootosh Deb and Promothonauth Deb respectively; *2ndly*, a receiver of the estate of Promothonauth Deb; *3rdly*, the executors of one John Compton Abbott, deceased; *4thly*, one Alexander M'Arthur; *5thly*, the Nawab Nazim; *6thly*, the executrix of a deceased Mahomedan servant of the Nawab Nazim; and, *lastly*, the appellant. The connection of these parties respectively with the redemption-suit of the plaintiff will be more particularly explained hereafter.

The decision of the Judge of the Zillah Court dismissed the suit of the plaintiff, the now respondent, with costs, on certain objections on points of law which will be subsequently stated, and which, in the opinion of the Judge of that Court, interposed a bar to the further prosecution of the suit. The plaintiff was not permitted to go into proof of his case on the merits. From this decision the plaintiff appealed to the High Court; and that Court, differing in opinion from the Court below on the legal points on which it had proceeded, reversed the decision, and remanded the cause for trial. The present appeal is brought from that decision.

The suit in the Zillah Court was brought for redemption and possession consequent on redemption of certain valuable estates, particularly described in the plaint, constituting the plaintiff's ancestral zemindary. The title asserted was that of a mortgagor seeking to redeem against mortgagees represented by their representatives in estate, and against subsequent alienees of the zemindary taking subsequently to the mortgagees, and, as the plaintiff contended, taking derivatively from them, and subject to his title to redeem them.

One of the points which was urged upon the argument, and which will be considered hereafter in its order, is whether the plaint sufficiently connects the present appellant, whom it states to be in possession of the property, with that mortgage-title originally in the Debs, the mortgagees, so as to show a *primâ facie* case for including him in this redemption-suit.

The suit was stated by the respondent's Counsel to be supplemental, in its nature and objects, to one in the Supreme Court for redemption of the same property, brought by the same plaintiff against the Debs originally, and by amendment against John

Compton Abbott. It was further stated by the respondent's Counsel on this appeal that, as some of the defendants against whom relief was asked in this suit, *viz.*, the parties above enumerated after Alexander M'Arthur, were not subject to the jurisdiction of the Supreme Court, the plaintiff had sued in the Zillah Court of Midnapore by reason of that defect alone.

The plaintiff, as the eldest son, was the head of a Hindoo family of distinction. A litigation had arisen between him and other members of his family to provide funds, for which he had become a borrower from the Debs. Their advances were secured by mortgages taken at different times, one of which is stated to have been a Bengalee mortgage; the nature of the others does not appear. The mortgagor and the mortgagees were Hindoos. The mortgagees obtained on the 25th May 1847 a decree of foreclosure in the Supreme Court against the mortgagor. This decree was irregularly obtained, and was subsequently set aside. Whilst this decree for foreclosure was in force, *viz.*, on the 10th June 1847, the Debs sold the zemindary to John Compton Abbott. He, after his purchase, in execution of the decree of forcelosure, which he had also purchased, dispossessed the plaintiff. It does not appear that the mortgagees had been in possession. The contrary may be inferred. The possession, then, was first acquired, whilst the foreclosure-decree was in force, by John Compton Abbott as owner, and not in privity with the mortgage-title.

The effect of a foreclosure-decree in the Supreme Court in a mortgage-suit between Hindoos is equivalent to a decree establishing proprietary right, in the Company's Courts, on similar suits on the like instruments.

On the 2nd February 1848, the plaintiff filed his Bill of Complaint on the Equity side of the Supreme Court, to set aside this foreclosure-decree, and to redeem the zemindary. The Bill was originally filed against the Debs only; but on its appearing, by their answer, that they had sold to Abbott, he was made a party to the suit. After he was made a party to the suit, he entered into an agreement, bearing date the 15th April 1848, with Alexander M'Arthur, which agreement was filed with the plaint, in the suit now under appeal, and is set out at page 5 of the Appendix. This agreement, after reciting that Abbott is well seized of or otherwise entitled to the zemindary, that the same was in arrear for revenue, and was advertised for sale of arrears of revenue, proceeds to stipulate, as between these two persons, that M'Arthur shall purchase the zemindary for the sum of three lacs, in case the estate does not sell for more at the revenue-sale; that he will pay to the Government, if he be declared the purchaser, the sum for which the estate may be sold; and that he will, within a certain time after he shall be declared the purchaser, and shall have obtained the usual and due certificate of title, pay to Mr. Abbott the difference between three lacs and the sum for which the estate shall have been sold. At this time the suit of the plaintiff in the Supreme Court for setting aside the foreclosure-decree, and for redemption, was pending. The Court, by its decree, dated the 16th November 1852, set aside the decree of foreclosure, and thereby made the zemindary in the possession of Abbott, under his title from the Debs, subject to the right of redemption by the plaintiff. This right was expressly declared by the judgment in the following passage: "We think, therefore, that there must be some decree for redemption against Mr. Abbott, who, if the objections arising upon the form of the record be answered (which objections the Court had overruled), can stand upon no better footing than the Debs, whose title he purchased."

This judgment, then, in effect placed the possession of Abbott upon the footing of that of a mortgagee in possession, and from that time his above declared title and his possession were in privity with the mortgage-title, and no longer constituted an adverse possession. By the reversal of the irregular foreclosure-decree, the mortgagor was restored to his original and legal relation to the mortgage-title.

After Abbott had been made a party to the redemption-suit, Promothonauth Deb, one of the defendants, died, and the suit was revived, and other parties were made defendants by a Bill of Revivor and Supplement. The personal representatives of Promothonauth Deb were made parties, together with the said M'Arthur and one George Lindsay Young, and the Nawab Nazim and the representatives of Sauduck Ally Khan out of the jurisdiction of the Court were also named as defendants. These parties were stated by Mr. Leith to have been introduced as defendants in consequence of some discovery which had been obtained by the answers previously put in. The agreement, however, between Abbott and M'Ar-

thur previously mentioned, of the 15th April 1848, was then unknown to the plaintiff, and the new defendants above mentioned were made parties upon allegations that at the sale for the arrears of revenue referred to in the agreement, M'Arthur had purchased *benamee* for Abbott and the Debs, and that they had sold to Sauduck Ally Khan, who had purchased *benamee* for the Nawab Nazim. It would swell the narrative of the facts of the case which preceded the present suit to an unnecessary length, if the precedent litigation were followed minutely through all its stages. It will suffice for the purpose of explanation to state that Sauduck Ally Khan and the Nawab Nazim did not appear to the Bill, and that, upon M'Arthur's answer coming in, and it appearing by it that he had conveyed to Sauduck Ally Khan *benamee* for the Nawab Nazim, he was dismissed from the suit, and a decree for redemption was made against the other parties who had appeared in the suit. This decree bears date the 6th November 1852.

It is set out *in extenso* in the Appendix. This decree, together with the agreement of the 15th of April 1848, and another document, are annexed by the plaintiff to his plaint in the suit now under appeal. The decree declared that the "plaintiff, as between himself and the defendant in those suits, was entitled to redeem the mortgaged premises in the bill mentioned, notwithstanding the said final foreclosure order." The title to redeem was declared as to all the mortgaged premises, and not simply as to those which could be recovered in that suit, though the decree would of course bind those only who were parties to the suit at the time when it was pronounced, and at that time M'Arthur had ceased to be a party to the suit. In a subsequent part of the decree it was further ordered "that the Master should enquire and state to the Court what portions of the mortgaged premises had been sold since the same came into the possession of John Compton Abbott for arrears of Government revenue, or otherwise, and to whom the same respectively had been sold; and if he should find that any had been so sold, he was to take an account of all moneys which had been received by or come into the hands of the said defendant, John Compton Abbott, or any person or persons by his order or for his use in respect of the purchase-money arising from such sales, or of the surplus proceeds of such Government sales, if any, or which, but for his or their wilful default, might have been received." This portion of the decree furnishes one of the grounds on which the Judge of the Zillah Court proceeded in his dismissal of the plaintiff's suit.

The decree also directed certain enquiries in the Master's office; and in the due prosecution of those enquiries, M'Arthur was subsequently, *viz.*, on the 17th of August 1854, examined before the Master. His examination is stated at length at pp. 18 and 19 of the Appendix. This examination first disclosed to the plaintiff the existence and contents of the agreement between M'Arthur and Abbott of the 15th of April 1848. M'Arthur's examination further disclosed that there was an agreement between him and Abbott, that the latter should suffer the revenue to fall into arrear, in order that the estate might be sold for arrears of revenue; and further that he, Abbott, should not bid for the estate. M'Arthur explained that his reason for wishing Abbott not to bid was to prevent its going above the three lacs.

This discovery seems to have led to the institution of the present suit. The plaint in this suit was filed on the 30th of May 1860. In the plaint it is stated that possession was given to M'Arthur under the certificate of title, consequent on the sale for arrears of revenue, on the 1st of June 1848. The expression is somewhat confused, but this seems to be the sense of the plaint.

The plaint is for redemption and possession, that is, for possession consequent upon redemption. The relation to this suit of the several parties whom we have above mentioned to have been made defendants to it, sufficiently appears by what has been already stated, except that it must be added that the defendant Sidhee Nuzzur Ally Khan Bahadoor, the appellant, is described as in possession, collusively with the Nawab. The plaintiff in his plaint alleges with respect to all the parties whose interests arose upon and after the sale for arrears of revenue, that is, from the Nawab Nazim inclusively down to and including the present appellant, that they took fraudulently and collusively. It was objected for the appellant, that the plaint does not connect him with that charge of fraud and collusion, but the following words in the plaint, *viz.*, "the collusive, fraudulent, and fictitious auction-sale like a private sale," evidently refer to that sale which the plaintiff treats as the fraudulently interposed bar to his redemption, *viz.*, that at which M'Arthur was declared the purchaser; for in a subse-

engrafts on that general rule this exception, that a fraudulent purchase at such auction-sale by a mortgagee will not defeat the equity of redemption. The subject is treated in Mr. Arthur Macpherson's book on Mortgages, at page 91, who there quotes a prior decision, *Kellsall* v. *Freeman*, of the same Supreme Court to the same effect. The author, now a Judge of the High Court at Calcutta, expresses a similar opinion, and as his book is one well known and frequently consulted in India; the decision under review cannot be regarded as unsettling a previously-settled state of the law, and as raising for the first time an exception to the general protection which this legislative title affords to purchasers. In support of this view we may refer to other authorities In the celebrated opinion of C. J. De Grey in the House of Lords in the *Duchess of Kingston's case*, he says, 'But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were mislead." "Fraud," his Lordship proceeds to state, is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal." The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins* v. *Blantern*, 2 Wils. 341, is an authority to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In addition to these authorities, it may be observed that the principle embodying this distinction pervades the law. Under sales in market overt, the purchaser acquired a title against all the world; but this protection did not extend to a fraudulent buyer who knew that the seller had no real authority to sell. If the thief who sold in market overt repurchased the article, the defrauded owner could then assert his title against such re-acquisition. See Viner's Abridg. tit. Market Overt. In Bacon's Abridgment, tit. Fraud. p. 768, Gwillim and Dodd's edition, it is said, "If goods are sold in market overt by covin between two, on purpose to bar him that has right, this shall not bar him thereof. 2 Inst. 713. Cro. Eliz. 86." The same principle applies to bills of exchange and other negotiable instruments, made or which become payable to bearer, and pass by delivery.

Again, a title by estoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice Bayley to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming, as we must, the agreement to be proved. was this sale, as between Abbott and M'Arthur, really meant to be a sale under the revenue-laws for arrears of revenue, or was it a device—part of the machinery, as it were—to effect a fraud? Under a private conveyance, in the state of the title and of these parties, the estate, if conveyed by Abbott to M'Arthur, would have been redeemable by the plaintiff. If the sale were intended to have been a real sale under the Revenue Laws, what would have been Abbott's interest? His estate would have been extinguished, and all that he would have been entitled to would have been a mortgagee's interest in the surplus of the money realized by the sale over the arrears. Would a real vendor seek to reduce that surplus? The price was a fixed sum of three lacs; the parties contemplated a sale under that sum by the auction-proceeding: and it may be well to repeat that it was Abbott's interest to cause, as far as he could cause it. that the auction-price should be low, since, though the auction-sale was public, his agreement was not known to the mortgagor. What, then, if the sale were to be real, could be the consideration which M'Arthur was to receive for the excess of the three lacs over the auction-price? The estate would have passed to him for the lesser sum. This suffices to show that, as between them, the sale was meant to be under the terms of the agreement in the case that has happened, which was a case contemplated by Abbott at least. These parties, therefore, are estopped or precluded by their acts from setting up, as against a third person, the mortgagor, the object of their fraud and a stranger to the agreement, the illegality of the agreement itself. The plaintiff is entitled to say, this agreement is the real contract. Two cases decided by the House of Lords upon the effect of the Encumbered Estates Act for Ireland, *Rooke* v. *Errington*, 7 Ho. Lds. 617, and *Power* v. *Reeves*, 10 Ho. Lds. 645, were referred to by the appellant's Counsel, in support of the appellant's case, but it is sufficien

to say that these were not cases of a fraudulent use of the provisions of an Act of Parliament for effecting a fraudulent purpose. They do not appear to their Lordships in any way to affect the present case.

The various questions that have been put in the course of the argument—of notice, of knowledge, of purchase by an innocent principal through a fraudulent agent—need not here be answered. They do not arise on the facts before us. Those facts may not be the real facts. Any opinion expressed upon these points would be not merely an *obiter dictum*, it would be by anticipation an opinion hazarded on supposed facts, and evidence, if the cause be still untried might be made to fit them.

This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interest derived under a real auction-sale. The opinion of their Lordships upon this point disposes of the first bar of limitation by effluxion of time under Act I. of 1845.

The questions remaining for consideration are, whether the pendency of the suit in the Supreme Court, or the nature of the decree, or any acting under that decree, present a bar to the prosecution of the suit, which the decree under appeal has remanded for trial on the facts. The mere pendency of the suit cannot operate as a bar, since the suit in the Zillah Court was intended to be simply in furtherance of and supplemental to it. The nature of the decree requires more consideration. Had that decree been one which could not have been modified or varied by further proceedings in the Supreme Court itself, in the nature of a supplemental suit on the new matter discovered since the decree, the objection might have been tenable; but the law of the Court is otherwise. Had the Nawab and the parties defendants subsequent to him been subject to the jurisdiction of the Supreme Court, the relief which is now sought to be obtained against them in the Zillah Court might have been prosecuted by a further suit, in the nature of the supplemental suit, properly constituted in the Supreme Court. The decree, as to the account and the enquiries directed as to alienated lands, might upon the new facts have been varied there, and the same relief may be obtained in this suit. The defendant in possession is charged in substance as assignee of the mortgage, and in that character redemption is prayed against him. The relief is subject to the same conditions and equities which would have attached to it in the Supreme Court.

It would be unjust to exclude the relief by reason of mere personal exemption from the jurisdiction of the Supreme Court. To rely on this bar would be to plead impediment against a suit instituted to remove it. The direction to enquire as to the alienated lands and the relief consequent on that enquiry are introduced for the benefit of the mortgagor in case the pledge should turn out to be irrecoverable through the fault of the pledgee. Such relief in this case is in the nature of compensation for a wrong. If it be subsequently discovered that the pledge can be restored or recovered, the mortgagor may waive that benefit, and prosecute his right as to the thing itself. Lastly, with reference to the dealing under the decree, it is to be observed that the mere prosecution of an enquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose that, at the time of the decree, the estate was supposed to be irrecoverable, and that the Court, in directing the enquiries which it directed,

acted on that impression. They do not disclose what has been done in the way of satisfaction under the decree. The case alleged in this suit is one of fraudulent misdealing with the property pledged. The case of *Hope* v. *Liddell*, 21 Bevan, p. 183, quoted by the Attorney-General, was not a case of fraud. The observations of Lord St. Leonards, quoted by the Master of the Rolls, relate to a *bonâ fide* purchaser for value, and to the proper mode of working out his equity against that of a plaintiff whose property has been alienated by mistake.

The facts in the case of *Hope* v. *Liddell* differ widely from the alleged facts in the case under appeal; and the grounds on which that decision proceeded do not exist in this case, as it now appears. In the case of *Hope* v. *Liddell*, the original testator, Dr. Spencer, devised the lands in dispute to one Thompson, a trustee, on certain trusts. Thompson devised all his estates, by general words, to his sister, Grace Thompson. This devise was erroneously supposed to pass the trust estate, which really went by descent to the heir at law of the trustee. One of the *cestui que trusts* contracted to sell the estate to the defendant Liddell. The sale was perfectly *bonâ fide* on both sides. The price was adequate, and was paid. It was paid by the purchaser into the hand of the *cestui que trust* by the direction of the supposed trustee, Grace Thompson. The purchaser was by the trust-deed not required to see to the application of the purchase-money. The Court said that, if Grace Thompson had really been the devisee in trust, as she was supposed by all to be, the transaction could not have been impeached. The defect was the want of the legal estate. On the second question in the cause, the Court found that the children, the objects of the trust, had, with full knowledge of all the circumstances and of their rights, taken to the purchase-money in lieu of the land. In this case, however, at the time of the decree in the Supreme Court, it was supposed that the land was gone irredeemably. In that state of belief there could have been no matters between which to choose. Afterwards, when it was discovered that the auction-sale had been contrived under the agreement of the 15th April 1848, a new state of facts appeared. The matters between which to elect would then have been the land, and the full price the three lacs, not simply the auction-price. Nothing appears further on the alleged facts, except that the enquiry before the Master went on; but that it might well do, subject to final correction and due adjustment. There is no ground, therefore, for applying the decision of *Hope* v. *Liddell* as an authority to govern this case in the present state of the facts.

This same cause which has induced their Lordships to refrain, in the earlier part of this judgment, from expressing an opinion upon the law applicable to an unascertained state of facts, operates also here to induce reserve. Distinctions may exist between claims of this nature, founded on actual fraud by a combination between several wrong-doers, all liable to make satisfaction up to one complete satisfaction for the injury done, between whom there may be, *inter se*, no right to contribution and remedies founded on contract, or converted by the choice of the sufferer into claims *ex contractu*; but, for the reasons already given, this subject cannot now be pursued further. Their Lordships will humbly recommend to Her Majesty that this appeal be dismissed with costs.

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The 17th March 1866.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. Colvile, Sir E. V. Williams, and Sir L. Peel.

Unlawful attachment—Resistance—Damages—Costs.

On Appeal from the Sudder Dewanny Adawlut at Agra.

Mohun Doss

versus

Gokul Doss.

A, having a right to sell an Indigo Factory pledged to him subject to the rights of *B* under his prior mortgage, has no right to invade or disturb the possession of the prior mortgagee by placing peons upon the property in order to attach the Factory as a step towards the judicial sale. *B's* resistance of *A's* unlawful attachment does not bar *B's* claim to damages for loss sustained by him consequent on the attachment. A man whose possession is unlawfully invaded is not bound to give effect to that invasion because it is made under colour of legal process.

In actions of *tort*, a plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage laid, unless the special damage is the *gist* of the action; and as in the present case the gist of the action was, not the special damage, but the unlawful attachment, the plaintiff was declared not precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

No case having been made for taking fresh evidence with a view to the assessment of damages in India, the Privy Council assessed the damages themselves; and although the amount so awarded (Rupees 500) fell far short of the appealable sum of Rupees 10,000, yet as, unless the claim had been thus unduly magnified, the appellant could not have appealed to Her Majesty, the Privy Council directed the costs of the Courts in India to be apportioned according to the ordinary practice of those Courts, leaving the costs of the appeal to the Privy Council to be borne by each party.

THIS is an appeal against a decree of the Sudder Court of Agra, which confirmed a decree of the Civil Court of Mirzapore, dismissing the appellant's suit with costs.

The suit was brought to recover the damages alleged to have been sustained by the nominal plaintiff's employer, Dwarka Doss, in consequence of an attachment made at the instance of the respondent as the holder of a decree.

Dwarka Doss and the respondent had conflicting claims upon an indigo factory lying between the villages of Putteetah and Sirswabur, and called in the record sometimes by the one and sometimes by the other name. This factory, with three others, belonged to two persons named Chunder Churun and Esserchund Neoghy.

At the beginning of the year 1856 the Neoghys were indebted to Mussumat Ooman Soondree, the wife of Tara Pershun Bagjee, in the sum of Rupees 17,701, partly for moneys advanced by her, and partly for moneys advanced by Dwarka Doss on her husband's guarantee, for the purpose of carrying on the factories; and those advances were secured by certain instruments of mortgage dated the 20th of January 1852, the 18th of April 1853, and the 1st of January 1856. These securities embraced the block of all the factories and their crops at least for the year 1856-57.

On the 1st of January 1856, Mussumat Ooman Soondree, by an instrument called a deed of re-mortgage, assigned all her interest in the factories under the before-mentioned securities of Dwarka Doss, in order to secure the sum of Rupees 9,761, being the balance then due in respect of his former advances, together with the future advances to be made by him for carrying on the factories. And it was thereby provided that he should take the factories under his control and management during the year 1263 Fuslee, or 1856-1857; thereby giving him the first charge or lien on the crop.

It does not very clearly appear whether under this stipulation he took possession of the factories; or, if he did so, how long he continued in possession. But on the 7th of July 1859 he obtained a decree in the Civil Court of Benares against Mussumat Ooman Soondree and the Neoghys, for the sum of Rupees 23,672 as then due to him upon his mortgage; and on the 15th of the same month he and the Neoghys filed in Court a petition embodying the terms of a compromise into which they had entered. The effect of this was that Dwarka Doss was to suspend the execution which he had taken out under the decree for Rupees 23,672; was to advance further sums for manufacturing indigo from the stumps then on the ground; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one Balgobind Doss Seith, whom the Neoghys had nominated as their agent for that purpose. The rights of Dwarka Doss under the execution for any balance that might remain to him after the sale of indigo were expressly reserved to him both against the factories and against all the defendants to his suit. This arrangement was carried out by placing a servant or agent of Dwarka Doss in charge of the factories.

On the day on which this instrument of compromise was filed in the Benares Court (the 15th of July 1859), the respondent obtained a decree in the Court of the Principal Sudder Ameen of Mirzapore

against the Neoghys for the sum of Rupees 764 alleged to be due to him upon a mortgage of the Putteetah factory, dated in Phalgoon Budee 1st, Sumbut 1911 (being sometime in A.D. 1855). Dwarka Doss intervened in this suit as an objector, insisting that the factory had been attached for money due to him, and that the claim was fraudulent. But the Principal Sudder Ameen held that the objection could not be tried in that suit, and was no bar to the making of the usual decree in a suit based upon a simple mortgage-bond. He, accordingly, passed the ordinary decree against the defendants (the Neoghys) and the mortgaged property for the sum found due.

The respondent took out execution on this decree for Rupees 878-10. He first obtained an order for the attachment of both the Putteetah factory and another factory known as the Soorma factory, with the appurtenances of each, and of fifty maunds of indigo alleged to be at the former, and of thirty maunds of indigo or thereabouts alleged to be at the latter factory.

But on the 17th of September he made a further application to the Court, wherein he expressed his desire to abandon the execution against the Soorma factory, and submitted a more detailed list of the property at the Putteetah factory. He limited also the quantity of indigo to be attached at his suit to eight maunds. The order of the Court was that the attachment should be limited to the property comprised in this last list.

On the 23rd of September, the Ameen, accompanied by two servants of the respondent who went to point out the property, proceeded to attach the factory and other property detailed in the application of the 17th of September. He made an actual entry upon the lands, and took an inventory of the property attached. He could not, however, complete the attachment of the eight maunds of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse which was under lock and key; and the servants of Dwarka Doss refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two peons in charge of the property attached.

The appellant, having heard of the applications for the attachment, had on the 22nd of September applied to stay it. But, as the Dusserah holidays, during which the Courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation; and the same cause prevented any further application touching the actual attachment.

In October, the Ameen, armed with a Magistrate's order, and accompanied by a blacksmith, went to the storehouse for the purpose of breaking Dwarka Doss's lock, but appears to have desisted on the threat of the people in charge of the factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there.

On the 5th of November, these circumstances having been brought to the notice of the Principal Sudder Ameen, he passed an order to the effect that, if the defendants to the respondent's suit, or their agents, should fail to appear in Court within a week and substantiate their objection to the opening of their lock, it should be broken, and the eight maunds of indigo be forcibly attached.

On the same day he required the respondent, as the decree-holder, to answer the appellant's objection of the 22nd of September within four days.

On the 25th of November, the Ameen having in the meantime received no order to suspend the attachment of the indigo, proceeded, under the order of the 5th November, to remove the lock; attached eight maunds of indigo pointed out to him by a servant of the respondent; and made two inventories, one of the eight maunds of indigo attached, the other of the other property found in the storehouse, which was not attached. Owing, however, to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under lock of the Ameen, or in charge of his peons, until the 8th of December, when the eight maunds were finally weighed and removed to a separate place, and the other contents of the storehouse were left at the disposal of Dwarka Doss's people.

On the 12th of December, the Ameen submitted to the Court a further report of his proceedings, and stated that he had, according to the respondent's request, attached no property belonging to the factory except the eight maunds of indigo. The objection filed by the appellant on the 22nd of September appears to have been thenceforward confined to these; and it was finally disposed of by an order of the 3rd of January 1860, which, on the ground of the preferential claim of Dwarka Doss

directed the release of the eight maunds of indigo from attachment.

Some difficulty in carrying out this order was occasioned by the refusal of Dwarka Doss's agents to receive back this indigo except on terms with which the Ameen would not comply; but ultimately the eight maunds, and whatever else had been under attachment, were, by order of the Court, left at the disposal of those who were in possession and charge of the factory; and peons were withdrawn from the premises on the 28th of February 1860.

Upon this statement of admitted facts it appears clear to their Lordships that Dwarka Doss had, by reason of the attachment of the 23rd of September and subsequent proceedings, sustained an injury for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the respondent, under his decree, was to sell the factory pledged to him, subject to the rights of Dwarka Doss under his prior mortgage. He had no right to invade or disturb the possession of the prior mortgagee by placing peons upon the property, in order to attach the factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done. The attachment must have been constructive. But under the new Code of Procedure, which had come into force on the 1st of July 1859, the proper course was to issue and publish a written notice under the 235th and 239th Sections of Act VIII. of 1859. For the actual seizure of the eight maunds of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the respondent's mortgage. And that it was not part of the general property in the possession of the Neoghys, that Dwarka Doss had or claimed a lien upon it, the respondent had had ample notice in his own suit, wherein Dwarka Doss had intervened as objector, and by the proceedings of the 12th of May 1859, touching a distress for rent which has been put in evidence in the cause. And the manner in which this wrongful attachment was carried out, the placing by the Ameen of his lock upon the door, subjected Dwarka Doss to the additional wrong of having the contents of the godown, to which *ultra* the eight maunds of indigo the respondent made no claim, taken out of his control and dominion from the 23rd of September until the 8th of December. It is idle to say that his people ought, in the first instance, to have given the Ameen access to the godown, and delivered the eight maunds of indigo, or that they ought to have acted according to the directions of the Ameen concerning the use of the two locks, supposing those directions to have been given to the peons. The case cited by Mr. Leith from Bingham's Reports shows that in this country a plaintiff, in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it be said that in this case there is no evidence of the malicious character which the plaint imputes to the trespass.

The plaint in this case was filed on the 25th of February 1860. The damages claimed were all in the nature of special damages, and consisted of three items, *viz.*, 14,000 rupees "on account of loss of 70 maunds of indigo at 200 rupees per maund;" 5,545 rupees on account of indigo which it was alleged Dwarka Doss was prevented from manufacturing from indigo-plants; and 2,250 rupees on account of indigo which it was alleged he was prevented from manufacturing from indigo-stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo-plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of September; and whether if any had then remained to be used in the manufacture of indigo, the attachment would have prevented them from being so used. The two last items of damage may, therefore, be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo was disposed of by the Courts below in a different way. The Principal Sudder Ameen held that, though the plaintiff did probably, as stated by the European indigo-factors, sustain some trifling loss owing to the storehouse having remained locked up, this was due "to the refusal of his agent to unlock the door on the Ameen's application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the plaintiff." And the Sudder Court con-

sidered that no good proof had been furnished that the plaintiff's agents were ever prevented from having free access to the godown for the purpose of turning and drying the indigo-cakes; but that, on the other hand, the plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his agents, contumaciously obstruct the Ameen employed to distrain. The learned Judges seem to rest the first of their conclusions partly on the ground that the plaintiff ought not to have kept his lock on the godown; partly on the evidence given by the Ameen of his instructions to the peons to open his lock whenever the plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the Court during the Dusserah vacation, he could neither follow up that objection, nor make any further objection to the acts of the Ameen until the holidays were over. Again, the case of *Bayliss* v. *Fisher*, 7 Bing., already referred to, shows that, even if the instructions said to have been given by the Ameen to the peons were really given (as to which there is a conflict of evidence), the plaintiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would have lost his right of action. It appears, therefore, to their Lordships that the plaintiff's suit has been improperly dismissed with costs; and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in India to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the respondent that the suit was properly dismissed, inasmuch as the appellant was, by the form of his plaint, limited to the three heads of special damage therein laid; and, having failed to prove any such special damage, was precluded from recovering general damages for the trespass.

Their Lordships, however, are of opinion that there was evidence in the cause on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that, if this had not been the case, the plaintiff could have recovered nothing. The plaint might have been more accurately drawn, but substantially it seeks damages generally, as consequent on the wrongful attachment of the factory. The principle ordinarily applied to actions of *tort* is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the *gist* of the action. Thus in an action of slander for words actionable *per se*, when the plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the Jury think right to give him. It would be otherwise if the words were not actionable *per se*. In the present case the *gist* of the action is not the special damage, but the unlawful attachment; and the plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

Taking this view of the case, their Lordships feel that it is not desirable to remit the cause for the assessment of damages in India, since no case has been made for taking fresh evidence, and the Judge below would have only those materials for a judgment which are now before their Lordships.

They have, therefore, determined to take the course which was taken by this Committee in the case of *Le Breton* v. *Ennis*, 4 Moore's P. C. Reports, p. 323, and to assess the damages themselves. It must be confessed that the appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at Rupees 500.

Their Lordships have felt some difficulty about the costs in the Courts below, and those of this appeal. The costs of an

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action in India, particularly the stamp-duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case, there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of Rupees 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the appellant could not have appealed to Her Majesty.

In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that they ought not to give to either party the costs of this appeal. In making the apportionment, the appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.

The order, therefore, which their Lordships will humbly recommend Her Majesty to make is, that the decrees both of the Sudder Court and of the Civil Court of Mirzapore be reversed; that the appellant be declared entitled to recover damages to the amount of Rupees 500; that the cause be sent back to the Sudder Court, with directions to enter judgment for the plaintiff for that sum, and to deal with the costs in both the Courts below according to the practice of those Courts in like cases; and that each party do bear his own costs of this appeal.

The 3rd February 1835.

Limitation—Regulations II., 1803, Section 18, and II., 1805.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Lall Dokul Sing, son and successor of Bickreemajut Sing, deceased,

versus

Lall Rooder Purtab Sing, son and successor of Lall Isruj Sing, deceased.

This case, which was originally instituted in the Zillah Court at the time when no Regulation for the limitation of suits applicable to the suit existed but Section 18, Regulation II., 1803, but which, having been appealed from the Zillah Court, was pending at the time that Regulation II., 1805, which corrected the Regulation of 1803, was passed, was held to be subject to the Regulation of 1805, as regards the forcible and violent possession taken by the defendants, who could not be allowed to plead their wrong in support of the plea of limitation.

Mr. Justice Bosanquet.—Their Lordships are of opinion in this case that the decree of the Sudder Dewanny Adawlut ought to be reversed.

This case involves two questions. The first of them regards the construction and effect of the Regulations of limitation in the years 1803 and 1805. This suit was commenced in the year 1803. In the month of August the plaint was field in the Zillah Court, and at the time there was a Regulation in operation passed in that year, passed very shortly after this territory had come under the Government of the East India Company. By that Regulation it was generally provided that the suits of which the cause of action had accrued more than twelve years could not be supported in the Courts to which that Regulation applied; and upon the foundation of that Regulation the Zillah Court decide, and decide very properly, that this suit could not be entertained. From that decision of the Zillah Court, the plaintiff below thought it proper to appeal, and he appealed, to the Provincial Court; and at that time it is perfectly true that there was no other Regulation in operation but that of the year 1803, and that has occasioned certainly a singularity in the circumstances of this case, that, at the time when this appeal was instituted, if that cause had come on for immediate hearing, the effect of that would have been that the Provincial Court, upon appeal, would have been bound to confirm the opinion of the Zillah Court. But even then it must be remembered that an appeal was taken from the Provincial Court to the Sudder Dewanny Adawlut, and, therefore, that argument goes no farther, for the same course would have prevailed exactly if the Regulation of 1805 had happened to have passed between the decision of the Provincial Court which took place in the year 1806 and the appeal to the Sudder Dewanny Adawlut. We have therefore to consider, what is the true construction to be put upon the Regulation of 1805.

Their Lordships do not think it necessary to enter into the consideration of the general question that has been raised. Whether, where an Act of limitation has been re-

pealed, that repeal taking place at a period in a suit between its commencement and its final determination, is or is not to affect the decision upon appeal, either confirming or reversing the original decree in the suit which took place at the time when that repeal had not been made? because their Lordships are of opinion that this case turns upon the particular words of this Regulation. The Regulation itself provides that the limitation of twelve years fixed by Section 14, Regulation III., 1793, and Section 8, Regulation VII., 1795, and Section 18, Regulation II., 1803, which is the Regulation in question, shall also not be considered applicable to any private "claims "of right to any lands, houses, or other per-"manent immoveable property, if the person "or persons in possession of such property, "when the claim of right thereto may be pre-"ferred in a competent Court of Judicature, "shall have acquired possession thereof by "violence, fraud, or by any other unjust "dishonest means whatever." That is the first case. "Or if such property shall have "been so acquired by any other person or "persons from whom the actual occupant or "occupants may have derived his or their "title, and shall not have been subsequently "held under a just and honest title (such "as inheritance, purchase, fair donation, "or any other fair title believed to have con-"veyed a right of possession and property) "during a period of twelve years antecedent "to the time of preferring a claim of "right thereto in a competent Court, pro-"vided that such violent, fraudulent, unjust, "or dishonest acquisition be established to "the satisfaction of the Court in which the "claim may be preferred." Throwing, therefore, the burden of that proof upon the party who claims the benefit of the exception from the general provision in the Regulation; and then it goes on to say: "Or if the suit be appealable to the "satisfaction of the proper Court of Appeal." Now, in construing those words, we must have some reference to the state of things at the time, or shortly before the time, when this Regulation passed. It has already been observed that the territory to which the property relates had very shortly before come under the Government of the East India Company, at the time the first of those Regulations passed in 1803. Previous to that time there were no Courts established of such a description as the regular Courts which have been established by the Company. I do not mean to say that there were no Courts of some kind, at least under the Government of the Sircar, or whatever the Government of the country might be at the time, but there were not Courts established of the description which have since been established in this territory. The first Regulation is made almost immediately after those parties came into possession of the property, and then, within two years, it is found necessary to correct that Regulation, because it was found that the Regulation was much too general, and a very short period elapsed during which suits could be commenced in any of those Courts; and I conceive, therefore, that the meaning of those words is this (and I believe their Lordships entertain no doubt upon it), that, if the suit had been instituted and in the course of appeal in the interval, the benefit of this correction which was made of the original Regulation should be given to parties who availed themselves of that; and, therefore, it is that their Lordships think that this case, which was originally instituted in the Zillah Court at the time when no Regulation existed applicable to the case but that of 1803, but which having been appealed from the Zillah Court, was still pending at the time this Regulation of 1805 passed, is still subject to the Regulation of 1805, and that Regulation is to be taken cognizance of by the Court of Appeal.

If that be the true construction of the Act, the question is whether that Regulation, so corrected, does or does not apply to the present case? With respect to that there is no question; nor is it a matter of dispute that this property, which is the subject of the present suit, was taken possession of by force and violence. On one side it is said, by the illegal force and violence of the person who was the ancestor of the present respondent; and on the other side it is said, though true it is it was taken possession of by force and violence, yet it was by act of the reigning Government, and he was put in possession of it by the reigning Government. That certainly, if it was so, would be fairly within the meaning of this exception.

The facts of the case, then, are these. Lall Oodwunt Sing took possession of this property about twenty-six years before the time when this suit was instituted, or before the Regulation passed; he continued in possession of that property for a considerable length of time; he died ten years before the suit was instituted; and after

his death, the person who was the immediate respondent, Lall Isruj Sing, succeeded him.

It is contended, however, that although the father had not died more than ten years before the institution of the suit, yet that there was evidence from which we are called upon to draw the conclusion that he was in possession previous to the death of his father for some years. And certainly there are some witnesses, on the part of the respondent, who speak to that circumstance; and therefore it is said that he would come within the second provision of this Act, even supposing the father to have not been *bonâ fide* in possession himself; that he would be the person succeeding under a title which he might suppose to be a fair title. With respect to that fact, it is remarkable that neither of the Courts at all proceed upon any such ground, and the decree of the Court of Sudder Dewanny Adawlut expressly proceeds upon the ground that he states that he was in possession for ten years; and I think we cannot ourselves, looking through the evidence in this case, feel ourselves warranted in drawing any other safe conclusion than that of the respondent having come into possession upon the death of his father. It has already been observed by His Honor the Vice-Chancellor, in looking through the testimony of the witnesses, that the periods of time to which they respectively depose are so different that it is quite impossible to place any reliance upon any definite number of years to which they are speaking, and therefore I think we must assume that the Court of Sudder Dewanny Adawlut came to the conclusion that the possession was a possession of ten years.

Then comes the question—What was the nature of the possession of the father and son; that is, Lall Oodwunt Sing and Lall Isruj Sing? The father came into possession, it is admitted, by a force which took possession of this property and pulled down the buildings; and on one side it is said that this was by a force of his own; and on the other it is said that it was by a force of the Government, who directed him so to do, and that he was acting therefore under public authority. The Court of Sudder Dewanny Adawlut in their judgment upon this subject, state the length of possession to have been, I think, a period of twenty years, and the son to have been in possession ten years. They say this: "It was clearly "proved that Lall Oodwunt Sing, the "grandfather of Lall Isruj Sing, the father "of the appellant, was confirmed, with the "approbation of the Nawab's Vizier, the "then ruler, in the possession of the zemin-"dary in dispute 1190 Fusli, a period of "twenty years before the present suit was "laid; and from the evidence of witnesses "and the interrogations put to both parties, "it is clear that Lall Oodwunt Sing in "1200 Fusli, a period of ten years before "the suit was instituted, having died, Lall "Isruj Sing, in right of inheritance, re-"mained possessed of the zemindary left by "his grandfather, from that time up to the "date of the plaint in this cause." So that they state him to have come in by inheritance, and they rely upon the nature of the inheritance by the father.

The other ground which is relied upon for shewing the possession of the father, was his perwanna, which is stated in this decree. In the argument it is not denied that the effect of this perwanna is a mere matter of revenue, and that the object of this is to have the revenue collected from the person, whoever it may be, who is in possession of the zemindary. That this person was in possession of the zemindary, and he had been so a considerable time, there is no doubt; but it is clear that the party himself did not rely upon that perwanna. Though it was undoubtedly a part of the evidence to shew that he was the person who was in possession at that time, yet that is not the evidence upon which he professes to rely, for the purpose of shewing that that possession commenced legally, that is, by the authority of the State, although he would be entitled to claim the benefit of it. For that purpose he puts forward the order of the State, which he calls the Royal Shooka, for the purpose of shewing how his possession commenced, and this is the document which is set forth in the papers bearing on the envelope the seal of Ahmud Shah Badhsa Ghazi, and is addressed to Lall Oodwunt Sing It is in these terms: "From the *arzee* of Kajeh Ahmud, who "was sent with orders from the Presence, "for the purpose of Expelling Bickremajeet "and razing his forts, as a punishment for "plundering a merchant's property, it is "ascertained by the Huzzoor that you ac-"companied the Khajeh aforesaid, and used "great exertions in expelling him and de-"stroying his forts: the zemindary of talook "Deya is therefore conferred by the Huz-"zoor on you; and it is expected that, after "having offered your thanks for the favor "conferred, and having settled the malgoo-

"zary, you make such arrangements that "no mark of him or his family remain in "that district, that it may be an example to "others also that you remain obedient to the "will and orders of the Huzzoor." This is the execution which this person is directed to put in force for the purpose of punishing a public offender.

Now, that document is confessedly tested: an investigation into its character has been instituted, and that document turns out to be a palpable forgery. Under these circumstances, what reliance can be placed upon other testimony? On this part of the subject there is a good deal of testimony with respect to the manner in which this property was originally taken possession of, and the period at which it was taken possession of. That it was taken possession of by force, the witnesses on both sides agree. The witnesses on one side say it was entirely by act of Oodwunt Rooder Sing himself; the others say that he was accompanied by soldiers, who were part of the Government force. Now, upon that testimony, supposing it to be equally balanced, we have a fact by which they attempt to turn the balance, and that is forced.

Under these circumstances, therefore, it appears to their Lordships that they can entertain no doubts that this was an act of wrong, and being an act of wrong, the party in possession who committed that wrong is not entitled to the benefit of the limitation, and that the party who came in upon his death not having been in possession under any supposable fair inheritance, he is not entitled to any favor. Their Lordships are of opinion, therefore, that the decree of the Sudder Dewanny Adawlut must be reversed.

Mr. Miller.—I would apply to your Lordships that the appeal may be reversed with costs. In the last part of the decree they have ordered us to pay all the costs.

The *Vice-Chancellor.*—We have simply affirmed the decree of the Provincial Court.

Mr. Wigram.—But then we shall have to pay the costs of appeal to the Sudder Adawlut, because the whole thing has been carried on by forgery.

Mr. Justice Bosanquet.—No, not the whole; there is forgery that is set out.

The *Vice-Chancellor.*—The decree of the Provincial Court seems to us to be right, and that decree must be affirmed, and the decree of the Sudder Dewanny Adawlut reversed.

The 4th February 1835.

Devise of zemindary to eldest son—Stipends to younger children (Reduction of)—Principle of Natural Equity (when applicable).

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Maharajah Grees Chund Roy

versus

Sumbhoo Chund Roy.

A zemindar bequeathed the whole of his zemindary to his eldest son, leaving certain fixed stipends to each of his other children. The settlement upon the younger children was originally a fair one, but, in consequence of events which had subsequently occurred, the Court considered that there ought to be a reduction in the stipends. It was alleged that the value of the zemindary had gradually been reduced by a sale of some portion of it; but as it was nowhere alleged that the sale had been occasioned by bad seasons or acts of God, and not by the neglect of the person through whom the appellant claims, the question of Natural Equity was held not to have arisen.

The Right Honourable Thomas Erskine.—There have been many points of law raised and discussed in this case, which certainly would be of great importance, not only as to the zemindar himself, but also to every branch of the zemindar's family; and if it had been necessary in this case for their Lordships to express any opinion upon those points of law, they would have taken time to consider this case, in order that the decision of those important questions might receive the careful attention which they demanded; but it appears to me that the facts in this case lay no sufficient foundation for the decision of those points.

It appears that this will, which was made by Rajah Kishun Chund, the great-grandfather of the present appellant and the grandfather of the respondent, bequeathed the whole of the zemindary to his eldest son, leaving a certain fixed stipend to each of his other children. Now, it is argued in this case that Kishun Chund had no authority by the Hindoo Law to give such stipends as he then allowed, because they were excessive; but all the facts of the case disprove that assertion: nor was it ever alleged in the Court below that that was an exces-

sive allowance, because it seems to be admitted that, at the time it was made, it was a fair stipend to be allowed, considering the extent of the zemindary. So far from being disputed, it appears to be acquiesced in for a considerable time. Iswar Chund himself admitted that the zemindary was of sufficient extent to warrant the payment of those different stipends, and he continued to pay them and promised to pay them.

Now, their Lordships do not say that the promise by Iswar Chund would of itself bind his heir, so as to make him pay a stipend which was avowedly unfit and excessive; but it amounts to an admission that the allowance made to the younger children was not excessive. And then, if the present appellant meant to set up that, in point of fact, that was an excessive allowance, he should have made that point in the Court below. But no such point appears to have been made, either in the Zillah Court or in either of the Courts of Appeal, that the original settlement upon the young children was excessive. On the contrary, it seems to have admitted that it was originally a fair settlement; but it was considered by the Court that, in consequence of events which had subsequently occurred, there ought to be a reduction in those stipends which originally were proper.

Then a number of cases have been cited to shew us that English equity applies to this case. Cases of contract have been cited which have been determined according to the civil law and the law of Scotland and other countries, where a party has made a contract for the letting of land at a certain rent, which, according to the intention of the parties, is to be proportionate to the profit of that land, and where, without any default of the tenant, the profits are reduced; and in those cases the proportion of those profits to be paid to the landlord has been held to be reducible also. It appears to me a perfectly distinct proposition from that which is now raised.

In order to raise a question in this case, the appellants should have made out clearly that the value of the zemindary had been reduced, and had been reduced, not by any default of his own or of those through whom he claims, but by an act of God, as in those cases, in order to raise the question of Natural Equity. But there is no such proof, there is no such allegation even: there is nothing but the vague, indefinite assertion, that by degrees the value of the zemindary has been reduced by a sale of some portion of it; but whether that sale had been occasioned by bad seasons, or by neglect of the person, or by any other cause, is nowhere alleged. It is not even alleged to have taken place in consequence of bad seasons. So that there really are no materials upon which their Lordships can enter into any discussion of the principle of the law upon which the Counsel for the appellant have sought to place this case.

But it has been said that the Court below have not decided this case; that, upon reference to a former decision, they were satisfied with that, without entering into any discussion of the points of law now raised. Why, for the very reasons I have given before, those facts were not sufficient to raise the point of law. There seemed to be nothing in the case but the amount of the arrears and the amount of payment; and then the consequence is that, as that question had been dismissed before in the case in which the father was originally a party, when the son of that father, the present appellant, afterwards came, as no new facts are brought in and no new point raised, the only question seems to be the amount of the arrears.

Then it is said the decree is erroneous, because they made the party personally responsible, instead of making him responsible only to the amount of assets. But, in the first place, it is not contended here that the value of the inheritance is not equal to the payment of all the arrears; but it is said that, if those are paid, the zemindar will get very little. But there was no such objection raised in the Court below. When the Zillah Court pronounced its judgment, and the present appellant appealed from it, he never made the objection that the original decree made him personally responsible, but he discussed it solely upon the general principle upon which he has discussed it here, for which he has laid no foundation in point of law; and it is too late now to call upon His Majesty in Council to reverse a decree pronounced twenty-nine years ago, upon the ground that it made the party personally responsible, when he himself, up to that time, had never made any such objection; and it now appears to be a point raised rather by the ingenuity of the learned Counsel than by any suggestion of his own. It appears, upon the whole case, that he was not likely to have any property that was not actually derived from his father. Their Lordships think there is no ground for disturbing the judgment, and therefore that the decree should be affirmed with costs.

The 6th February 1835.

Hindoo Law of Adoption—Adopted son succeeds lineally and collaterally.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Sumbhoochunder Chowdry, son of Shamchunder Chowdry, and Rooderchunder Chowdry,

versus

Naraini Debia and Ramkishore.

According to Hindoo Law, an adopted son succeeds, not only lineally, but also collaterally, to the inheritance of his adoptive father's relations.

Mr. Baron Parke.—This case comes before their Lordships upon an appeal by two persons of the names of Sumbhoochunder Chowdry and Rooderchunder Chowdry, against the decree of the Sudder Dewanny Adawlut, which was passed in favor of the respondent, Naraini Debia, and her adopted son, Ramkishore, in a suit in which the plaintiffs below sought to recover a fourth part of the revenues of the zemindary of the pergunnahs Mymensing and Zuffershye.

The decree of the Sudder Dewanny Adawlut, against which this appeal is preferred, affirmed the decree of the Provincial Court, which affirmed the decree of the Zillah Court of Mymensing, and the question is, whether this decree of the Sudder Dewanny Adawlut is wrong?

Their Lordships are, in this case, placed under the necessity of deciding a question of Hindoo Law, which, as far as we learn from the proceedings in the case, has not been expressly decided by the Court below, because the Zillah Court decided the case upon a ground which their Lordships think cannot be sustained.

The way in which the question arose appears to have been shortly this. Upon the death of Kishenkishore, which took place in the year 1773, his first wife, Ruttun Mala, adopted, or is said to have adopted (but whether she did or not is immaterial to the present question), a person of the name of Nundkishore, and he remained in possession of the property in question three or four years after the death of the widow. He died in the year 1786-7. Upon his death in that year, Joogulkishore, who was the father of Hirkishore, commenced a suit against Naraini Debia, who was then in possession, in right of her adopted or supposed adopted son.

This took place in the year 1788, and during the progress of that suit the present appellants were allowed to intervene as parties. That suit was brought to a termination, and the decree of the Court in 1795 was that one moiety of the property in question belonged to Ramkishore, one of the present respondents, and that the appellants were entitled to the other moiety. Against this decree there was an appeal to the Provincial Court by Naraini, the present respondent, and upon that appeal a decree was pronounced, by which the decree of the Zillah Court was reversed, upon the ground that the intervention of the appellants was illegal. The whole cause was put an end to, and liberty was then given to all parties to commence fresh suits.

In consequence of that, it appears that fresh suits were instituted. The first suit instituted was by Hirkishore, who was the son of the adopted son of the brother of the father of Ramkishore; and the other suit was instituted by these appellants, who were the sons of the brother of the half-blood. After the whole of these suits had proceeded a certain way, an order was made to stay the proceedings in the second suit till the termination of Hirkishore's suit, and that is one of the present causes of complaint. Accordingly, the suit of Hirkishore proceeded, and finally the Court decided that the claim of Hirkishore was well founded, and rejected the claim of the appellants. After that there was an appeal to the Provincial Court of Dacca, and that Court reversed the decision of the Zillah Court so far as it recognized the right of Hirkishore, and affirmed so much of it as related to the rejection of the appellants' suit.

From this decree there was an appeal to the Sudder Dewanny Adawlut, and the Sudder Dewanny Adawlut decided the case upon the ground that it appeared to be clear, upon the evidence, that Naraini Debia, the widow, had adopted Ramkishore, and that therefore the claimant had no title to the estate. It proceeded upon the ground that Naraini had adopted Ramkishore.

Now, the complaint made by the appellants is that they have never been heard upon some questions of fact, and have never been heard also upon some questions of law. So far as their objections rest upon their not having been heard upon any questions of law, it appears to their Lordships that there is no ground for the complaint, because the law is a matter upon which evidence is not to be received. But the Court is to determine all questions of law, and when questions are submitted to the Pundits, the ob-

ject is not to examine them as witnesses but to consult them upon matters of which they are supposed to be fully cognizant; therefore, there is no ground for the complaint of the appellants that they were precluded from giving evidence upon the points of law in the suit in which Hirkishore was a claimant.

But it is said that they may have been prejudiced by not having had an opportunity of litigating the questions of fact; and upon that point their Lordships are of opinion the proceedings of the Court were irregular. They had no right to decide upon a question of fact, in which the appellants were interested, behind their backs, and in a cause in which the appellants were not parties.

The Provincial Court and the Court of Sudder Dewanny Adawlut appear to have decided a very important question of fact, in which the appellants are interested, in their absence, for they have decided upon the evidence adduced, which was not in this suit, that Naraini had adopted by the directions of her deceased husband Ramkishore, and upon that ground they had decided that Ramkishore was entitled to the inheritance. That matter the appellants ought to have had an opportunity of contesting, and they have been precluded from doing it by the decision of both the Courts below; and if it had turned out that the appellants were entitled to the succession, it would have been a just ground for reversing that decision.

But, although they have alleged, in both their petitions of appeal, that Naraini was not authorized to make the adoption, and that the adoption did not take place according to the Hindoo Law, yet, nevertheless, if we see that the judgment is rightly founded upon the Hindoo Law, upon a question totally independent of that, and that these appellants have no right to succeed to the property, although the Court have put the judgment upon a wrong ground, we should say that the appellants are not entitled to succeed; and if they are not entitled to succeed according to the Hindoo Law, their Lordships must give judgment against them.

It is an admitted fact in the case, and is not disputed by the appellants themselves, that Joogulkishore was himself an adopted son. That is the first fact admitted in the first page of the Appendix. They say that Joogulkishore was the adopted son of Kishengopal Roy; and in the course of the suit it appears that the Court asked this question of the pleaders on the part of the plaintiff, "Is Joogulkishore Roy the adopted son of Kishengopal or not?" and the answer is, "He is the adopted son of Kishengopal Roy." That was in answer to a question put by the Court. That fact is, therefore, distinctly admitted by the appellant, and the question is, whether, that fact being admitted, the appellants can have any right to succeed to the property in dispute?

It may be admitted that, in the answers given by the Pundits, there is not an agreement upon the question of law, whether the son by adoption can succeed collaterally to the relations of his father? There is a difference of opinion, but the weight of the opinions is that he may so succeed.

Then there are opinions cited by the appellants themselves to the same effect, and the learned Counsel has cited the Daya Bhaga; and there is another authority to the same effect in Colebrooke's Principles of Hindoo Law, page 177, and again in Sutherland's Synopsis, page 219, where it is expressly laid down that an adopted son not only succeeds his adopted father, but also succeeds collaterally; and there are other authorities to the same effect. The Mitakshara is cited to the same effect.

Now, these are very strong authorities in favor of the proposition, that an adopted son is to succeed lineally and collaterally; and the reason pointed out, according to the Hindoo Law, is that he becomes for all purposes the son of the father.

Now, coupling those authorities with the opinions given by the Pundits in the course of the cause tending in the same direction, it appears to their Lordships, unless some authorities are cited to the contrary, and the learned Advocates for the appellants have neither of them cited a single authority from the Hindoo Law of a contrary tendency, the whole of their argument is founded upon this, that, by the course of the proceedings, they have been prevented raising the question of Hindoo Law. But no proposition is more clear than that this Court is bound to take notice of what the law is in that country. We are bound to take notice of it, and decide it as well as we can. We have not the advantage of the decree of the Court upon the Hindoo Law, and we are not so sure we are right, because this decree has gone upon a different point; but it is upon a point that, to some extent, affirms the notion that their Lordships are about to adopt; for the decree adopts the notion

that a brother may succeed to his brother collaterally. There may be a distinction between a succession in the direct line and a succession to collateral relations; but the decision is a decision in support of the proposition of Hindoo Law, which their Lordships now are about to recognize. Their Lordships think, therefore, looking at these authorities and the weight that is due to them, that an adopted son succeeds, not only lineally, but collaterally, to the inheritance of his relations; and, if so, these appellants are not in a condition to succeed, because they have distinctly admitted in their own pleadings, and by the answers of their own pleaders given to the Court, that an adopted son of the whole blood was in existence at the time of their suit being commenced. If an adopted son of the whole blood is in the same situation as the natural son of the whole blood, then the only remaining question is, whether the brother of the whole blood succeeds in preference to the half blood? Upon that point there is no dispute, for the authorities are uniform.

For these reasons it appears to their Lordships that the ground upon which the Courts have proceeded is not a correct ground, because they have proceeded upon a fact which the appellants had no means of litigating; yet they are right upon the point of law that the appellants are not entitled to the property. The decree of the Court of Sudder Dewanny Adawlut will therefore be affirmed, but without costs.

Decree of the Court below affirmed without costs.

The 13th February 1835.

Adoption by Parsees—Prior Will—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Homabaee, widow of Dosabhaee,

versus

Punjeabhaee Dosabhaee.

An adoption made by a Parsee immediately before his death would render extremely improbable the execution of a will by him a very short time previous thereto, and, therefore, call for very clear proof to establish its existence.

Although in cases of adoption by Dhurm-putr (a partial adoption) it is not indispensably necessary that a declaration should be made on the third day after the decease, yet it is usual to make such a declaration and to take a writing from the Dhurm-putr.

In the absence of any such writing, and upon the whole evidence, the adoption in this case was pronounced to be as a Paluk-putr, and not merely as a Dhurm-putr.

Mr. Justice Bosanquet.—Their Lordships are of opinion in this case that the decree of the Sudder Adawlut ought to be affirmed, and the circumstances of the case I will proceed to state.

The person to whom the property belonged, the subject of this suit, died on the 25th of June 1820. Upon the 21st of November in the same year, the respondent in this suit, Punjeabhaee, preferred his claim in the Zillah Court of Surat, in which he claimed to be entitled to the property of the deceased, as his adopted son and heir. Of course, in his plaint he states the relationship that he bore to the deceased, and he states that, in right of his relationship he performed all the usual ceremonies according to their faith and religion; and it may be justly observed that, if he was the adopted son and heir, he would, in respect of that character, be the person to perform the ceremonies, the adopted son being treated as the son of the person who adopts him to all intents and purposes, if he is Paluk-beta, as if he was the natural-born son, unless there is a restriction of the nature mentioned in this case, and he was only Dhurm-putr.

To this plaint the defendant (the now appellant) put in an answer upon the 20th of January 1821. In that answer she sets up a will. The proceedings go on to a rejoinder, and at that period of the cause the cause is referred to arbitration; and pending the arbitration, in the year 1822, an application is made on the part of two brothers, Ferozshah and Ardaseer, to the Zillah Court of Surat, requesting that this arbitration may be suspended. The Court, however, declined acceding to that proposition, and then an award was made. That award was appealed against to the Sudder Dewanny Adawlut, and those two persons, Ferozshah and Ardaseer, also took a part in that appeal. The award was ultimately set aside, upon the ground that the original submission to the award was not duly and formally made, and that, consequently, the award itself fell to the ground. The ground of the application to set it aside was, that there had been partiality on the part of the arbitrators, who appear to have thought that the present respondent was the adopted son,

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and that the will was invalid. However, the Court of Sudder Dewanny Adawlut, though they speak of the conduct of the arbitrators themselves, do not profess to proceed upon that ground, but set it aside upon the ground that the original submission was invalid.

Then the suit proceeded by the present respondent in the Zillah Court of Surat, and several witnesses were examined for the purpose of establishing the will, and also to establish the adoption; and Mr. Anderson, the Judge of the Zillah Court of Surat, was finally of opinion, in favor of Homabaee, the present appellant, that the adoption was not established, and that the will was.

This case is then appealed to the Sudder Dewanny Adawlut, and there was a division of opinion in that Court. The Second Judge is of opinion both that the adoption is established, and that the will is not established, but expresses a strong opinion that it is a forgery. The Chief Judge is of the opinion that was entertained by Mr. Anderson, and directly opposed to the Second Judge. He was of opinion that the adoption was not established, and that the will was. The Third Judge was of opinion that the adoption is proved, and the will is not satisfactorily established; and he throws out an opinion, in point of law, in the reasons he gives, that the will, if established, would not have the effect of setting aside the adoption; but, upon the point of fact, he gives an opinion that the adoption is made out, and that the will is not satisfactorily established.

The question for consideration here is, whether the opinion of those two Judges of the Sudder Dewanny, under those circumstances, is wrong and ought to be set aside?

Several points have been raised, both upon the law and the fact. The questions of law have been, whether a will made by a Parsee to dispose of his property can be valid for the purpose of defeating the right of his heirs? and another question is, supposing such a will can be made, whether would such a will, or not, be revoked by the adoption, if the adoption was clearly proved subsequent to the will?

It does not appear to their Lordships necessary to decide either of these questions of law, for, whatever opinion they may entertain upon either of these subjects upon these papers, it might be inconvenient to express a decided opinion upon points of law which are at all doubtful, where the question itself may be decided upon the matters of fact that appear upon these papers. It appears, I must say, that the general effect of a will in disposing of the property of a Parsee, as well as of other persons who die leaving a clear will disposing of property independent of adoption, seems to have been assumed in the case, and it can scarcely be said to be denied by either of the parties.

The substantial questions are of fact. *First*, whether the adoption has been proved? and, *secondly*, whether the will has been established?

If the adoption before the death of the testator is clearly made out and established at the time that the adoption in this case was alleged to have taken place, namely, almost immediately before the death of the testator, it would render the execution of a will by him a very short time previous to that extremely improbable. Without entering into the question of law, whether such an adoption made regularly and with ceremonies would have the effect of revoking a will, which it is not necessary to decide, this may be stated, that it would render the existence of such a will improbable, and therefore call for very clear proof to establish its existence. It is in that way, therefore, that the adoption will have its effect upon the evidence respecting the will.

With respect to the adoption, it will be observed that the case stood in a very different situation in the Sudder Court to what it did in the Zillah Court in Surat.

Several witnesses were called in the Zillah Court, and among others that important witness of the name of Dunsha Eduljee, a Parsee, a neighbour, who was called in when the adoption took place, the day before his death. His testimony is clear and distinct upon that subject. Several witnesses are also called in by the Sudder Dewanny Court, who state that the facts took place as that witness states; and that would be undoubtedly and clearly a valid and legal adoption, to all intents and purposes.

In examining the testimony given by the witnesses in the Court of Sudder Dewanny Adawlut, it appears that the persons spoken of as having been present at that alleged adoption were Punjeabhaee himself, the adopted son, Dosabhaee the adopter, the father of the adopted son, the mother of the adopted son's wife Moteebaee, and Eduljee Dunsha, who had been examined in the Zillah Court, and another person of the name of Peshtunjee Khaoosjee, who was also present, but, not being a resident at Surat,

may account for his not having been examined in the original suit. At all events, he was not examined in the original suit; and it is remarked by the Judge that neither party thought it necessary to call him, and he was not called by the Judge of the Zillah Court; but the sitting Judge of the Sudder Dewanny thought it necessary to call him, as a person spoken of originally as one of the persons present, and upon being examined he gives a most distinct account of what passed. He states that the adoption took place just in the manner proved by Eduljee Dunsha. Therefore the Court, who decided in favour of that view of the subject, had that additional important evidence before them that the other Court had not.

In addition to this testimony there is the testimony of Darashah, the father of the respondent, who may be supposed to have a bias in favor of his son, and Moteebaee, who had a bias in favor of her daughter, who married him. But there are, besides those two, other witnesses who are of importance, and speak to the admissions of the appellant herself upon this very subject; and one of these is the sister of the deceased, whose name is Koonwurbaee. She says, "When Dosabhaee was dead, Punjeabhaee "and Homabaee came to the room which is "occupied by the women when they are "impure, and the former said, 'That is the "'alleged adopted son; I will perform "'Dosabhaee's furneral ceremonies.' She "replied, 'You are his heir, his son-in-law, "'and the property belongs to you. I "'have now some of his money in my "'possession; I will pay the funeral ex-"'penses, and you must borrow some more "'and bring it to me, and I will give you "'an account of the money.'"

Now, this is the testimony with respect to the adoption before the death. There are, then, circumstances that took place, respecting which there is no doubt and no contradiction, namely, that three days after the death of the deceased there was a meeting of the caste, and at that meeting there were present, among other persons, the two brothers, Ferozshah and Ardaseer, the cousins of the alleged adopted son. They, as being the descendants of one of the three brothers, of whom the deceased was one, were present at this meeting; and the priest being there, the tunderooste was read, and it was read, as it is admitted by all, in the name of the person who claims to be the adopted son.

Now, there is some contradiction between the witnesses as to anything being said about its being Paluk or not. Some of the witnesses say he was expressly declared to be Paluk, or adopted son generally: others say, nothing was said; but all agree in this, that no remark was made, and no mention was made of its being Dhurm-putr. Homabaee herself was manifestly present, as appears by the testimony of one of the witnesses referred to, and she made no objection to the tunderooste being read in general terms. It is said by one of the witnesses, no distinction is made as to the mode of reading, whether it is Dhurm-putr or Paluk: but, inasmuch as adoption generally would imply that the adopted son is heir of all, and the adoption by Dhurm-putr is an exception, one should expect, if there was any exception made, it would be notified.

Now, it does appear that, although it may not be indisp nsably necessary, as a matter of law in Dhurm-putr, that a declaration should be made on the third day after the decease, yet it does appear it is usual so to do; and not only is it usual to make such a declaration, but that it is usual, in case of Dhurm-putr, to take a writing. Now, no writing is produced, or pretended to have been given, as an acknowledgment by Punjeabhaee that he was merely adopted as Dhurm-putr. We have had instances stated where a writing was taken in this family, and another instance where, it having been given, it was notified at the Parsee church; and therefore it is of importance to notice that what was usual was not observed.

Under all these circumstances, their Lordships are of opinion that this is very strong evidence to satisfy their minds that the Court of Sudder Dewanny has done right in coming to a conclusion that there was, in point of fact, a general adoption of Punjeabhaee, the respondent.

Then the next question is, was there, or was there not, a will? Now, we have to consider on this occasion the evidence given, and also the conduct of the parties who claim under it.

The answer was not put in until the 20th of January 1821, the plaint having been filed on the 21st November. It appears there had been some rumour of an intention to set up a will, and application was made by Punjeabhaee, the original plaintiff, calling upon Homabaee to produce this will and file it; and an order was made upon the very same day, by which she was directed to file it immediately, and further with an intimation that, unless it was filed immediately, it would not be received. This

was nine days before the answer was put in, and the will is not produced till then; and then the will is produced at the same time as the answer, and the reason given for the delay in putting in the will (which had never been made public, except as it may have been shewn to private individuals, it was never made public till the 20th of January 1821), and the reason given was that she was in a state that prevented her from complying with the order of the Court. If that excuse be true, it could not prevent her the whole time; and there is the evidence of persons acquainted with her females of the family, who state positively that she was not in that state at that time, and had not been for some time before. There is further the evidence of one of the woman, who says that, when the messenger came and called upon her to produce the will, she got up and went into a corner. This is the conduct of this person with respect to this will; and when the tunderooste is read declaring him to be the adopted son, she makes no mention of any disposition in her favor; she makes no objection to the ceremony; and when there is an order for the will being produced, she delays producing it for several days, and at last gives a reason for it not consistent with truth.

Then we come to examine the will itself. That will purports to have been made on the 2nd of June 1820, that is, twenty-three days before the death of the testator. It purports to be attested by two witnesses, and it is upon a stamp of fifty rupees, the proper stamp for such a will; and, in order to establish the probability of this will having been duly executed at the time, a witness has been called, the Stamp Darogah, to prove that a stamp corresponding with the stamp upon the will was purchased at that time. His evidence upon that subject is, that he finds by a book, or rather by some loose sheets, not by the book itself, that a stamp was purchased, as appears by an entry in the book, or rather upon certain loose sheets, where it is written down: "A stamp paper, No. 98, purchased on the "1st June 1820, by Rustomjee for Dosa-"bhaee Bermunkbaee." In the book it is written down as the third class of stamp paper. Now, upon this it is to be observed, we have neither the evidence of the person who bought it, nor of the person who sold it. There is reason to suppose that Rustomjee, the person who bought it, is dead (at least a person of his name appears to be dead), and I will assume for the argument he is dead; but there is no account from the person who sold it; and it is rather a remarkable thing that this document is inaccurate in this respect, that though it appears that the stamp upon the will is of the fourth class, that that which is written down in the book is, that it is the third class. However, the witness says: "A stamped "paper, No. 98 of the year 1816, has this "day been shewn to me." The stamp entered in the book was No. 98, and was of a corresponding amount; and, though there is this mistake, it does afford reason to believe that this was the stamp used on that occasion. But whether purchased by Dosabhaee's order is not established by this paper. However, this is a circumstance, when examining the probabilities, that we ought not to pass over a circumstance not of any great weight, that there was a stamp purchased at the time of the amount required for this will, by a person professing to come from Dosabhaee, and sold by this person, of whom we have had no account. And then it says it agrees with the Government account. What is the nature of that Government account, or whether it mentions that this No. 98 was sold to this person, we have no very clear and satisfactory evidence. But then, in order to establish this will, professing to be attested by the witnesses who have subscribed it, the witnesses themselves are examined. There is, first, the testimony of Abdool Kajee Mahommed Churagh, a Mussulman; and in his first deposition, in giving an account of his attestation of this instrument, he does not fix the time, but speaks very loosely of its being a certain length of time before in very general terms. He says: "About four "years, or four yours and a half ago, Dosa-"bhaee made me sign a will, and the will "which I have this day seen has both my seal "and signature to it. The circumstances of "the case are as follows: I have known "Dosabhaee for a long time, and we were "in the habit of going to each other's "houses. One day Dosabhaee said to me "that he felt unwell, and on that account he "intended to make his will. I told him "that it was proper that he should do so. "About 15 days after this, Dosabhaee came "with the will in his hand to my house, "and told me to sign it." According to this man's testimony, Dosabhaee came to his house with it, and this original deposition states that Dosabhaee was alive at that time. "How many days after you signed the will "did Dosabhaee die?" He says: "One or

"two months, or perhaps a little more." The will being dated the 2nd of June, and the testator having died on the 23rd of June he is very much out in his statement there. Then, after the testimony of certain witnesses examined on both sides, he is examined again, and he says twenty-three days, or a little more than a month before the death of the testator it was when he signed the will.

The next witness is a man of the name of Tekundass Doongursee, and he says: "About four years ago I went to Dosabhaee, "being a friend of his, for I was in the "habit of doing so every year. Dosabhaee "shewed me the will, and said that he was "in bad health, and on that account he "made his will, and had got one witness "to it, and requested me to sign it also. I "did so in Dosabhaee's office." Those two witnesses speak to their having signed the will. Those are the only two that have signed. Then Punjeabhaee Ruttumjee says: "About four years ago Dosabhaee made his "will in favour of Homabaee." That was in 1824, that is the date of his deposition. This man is a Parsee. He says: "The will "was brought to him, but he refused to sign "it. There were, however, then two wit-"nesses. The testator told me to read it "and sign it." After this he speaks to having seen it, and having seen the two witnesses' names to it, and that the testator told him that two other persons had refused to sign it.

Then there is Mooftee Gholam Ali, the person whom he appears to have consulted upon the subject of his will. He advised him to have it written in the Guzerattee language, and he would translate it into Persian, and the will was afterwards brought to him in the Guzerattee language, and he was asked to put his seal to it. This he declined to do, because it was in his own language, and he did not think fit to sign it in the Guzerattee language. He does not say whether there was any witness to it. So that there is only one witness who speaks to there being any witness to it, except the witnesses themselves who attest it Then we have no account of the man who was employed to write the will, and we have no other account except what I am about to state of the handwriting of the testator himself. You have no account of the person consulted, and who drew it up. It appears that the testator thought it necessary to come and consult Mooftee Gholam Ali about the will, and therefore he did not consider himself competent to make it himself, and there is no person who says it was an autograph in his own handwriting.

Then Ardaseer says that the signature appears to be in the handwriting of the testator. That is all that he says, and nothing further is asked upon that subject. With respect to the will itself, he says Homabaee told him, four or five days after Dosabhaee's death, that there was a will. He did not see it then: it was within two month after the death of the testator he saw the will, with two witnesses to it.

Now, whatever may be the value of this witness's character or credit, his testimony amounts, after all, to nothing more than this: that, a short time after the death of the testator, Homabaee told him there was such a will, which neither he nor she made any mention of at the time the tunderooste was read, and at the interval of a month or six weeks she shewed him the will with two witnesses to it. When it was made, or whether it was in existence at the time when the tunderooste was read, or whether she mentioned it to him, we have no evidence: all we have is that he says there were two witnesses to it. It is to be observed that here is a stamp; and those precautions might very possibly have been observed if the will was in contemplation in order to induce the testator to make a will. He was very near his death, and it was not at all impossible that this woman might have had the intention of applying it to the purpose of a will; but we have no evidence that the testator ever interfered about this stamped paper.

This is the evidence in favor of the will: now, what is the evidence against it? The evidence against it is, independently of the circumstance of it not being notified at the reading of the tunderooste, and there being no writing corresponding with it, acknowledging by Punjeabhaee that he was Dhumputr, independent of those circumstances, and its not being witnessed by any of the relations or of the caste, which possibly might arise from the circumstance of the testator being about to dispose of his property in a manner that his caste might disapprove of; still we find that that which is usual was not done upon this occasion. Then, independent of all that, we have the testimony of four, if not five, witnesses, who positively state that they saw this will after the death of the testator, and that at that time it had no witnesses to it; that they were applied to by the widow or by the

brother to sign it, and that they refused, and that at that time there were no witnesses to it.

Now, the persons who state that are Dunjeabhaee Saporjee and Dunsha Eduljee, who, be it observed, is a Parsee, and whatever credit is due to a person on that account is due to him. Hurgovindas Huggerwandas, who was applied to do it and refused, and Eduljee Rutumjee, a Parsee also, those four refuse to sign. They were asked after the testator's death, and they all say there was no witness to it at that time. Then we have this important fact besides, from the evidence of Eduljee, that Homabaee was the person who applied to him, and that she told him that Abdoola would witness it. Now, if that account is true, it is indeed not wholly unimportant, as contradicting the testimony of Abdoola, who stated he signed it before, and if so, the testimony of the second witness cannot be true. These witnesses are opposed to one another in the testimony they gave; but the evidence seems to warrant the conclusion that the majority of the Sudder Dewanny came to, namely, that this will was not satisfactorily established.

Then there is one other witness besides Peshtunjee Kalabhaee, who speaks not only of the declaration of Homabaee that Abdoola would witness it, but he positively says that Abdoola said he had signed it after the testator's death. "Abdoola said to Dadabhaee: "'You and Pestonjee are now endeavouring "'to settle the dispute between Punjeabhaee "'and Homabaee; the sooner you settle "'it the better, because after Dosabhaee's "'death, I attested Homabaee's will at "'her own request, and also at the desire "'of a respectable person.'" Who that respectable person was he does not mention. Here are three witnesses upon this part of the subject in contradiction of Abdoola, and, as I said before, if these witnesses are credited, it gets rid of the will.

Under all these circumstances, the majority of the Sudder Court were of opinion that the will was not proved. It is a question to be judged of in a great decree by a comparison of the evidence; but we may look at the circumstances of the case, and what are they? In whose favor is the adoption? The adoption is made in favor of one of his nephews who had married his own daughter; therefore it was not at all unnatural, if a selection was made, that that selection should be made in favor of the husband of his daughter. The other party who claims it upon this occasion is his second wife, and she is entitled to a provision out of the estate by the Parsee Law as well as the Hindoo Law. She will not be left destitute by this will not being established. She is entitled to a provision, and, therefore, the disposition is not an unnatural one, not an improbable one, not an unkind one, and not one that you can think at all unlikely to be made.

There is only one other observation with respect to Ardaseer, whose evidence has been so much relied upon. I have already observed that the evidence he gives himself does not amount to much; but the situation in which he stands, if compared with the testimony of other witnesses, does not appear to their Lordships to place him in a very favorable situation. He is a party to the cause, and may have had a very considerable interest in supporting the suit of Homabaee. Whether he had or not is not clear; but at the same time, the case is one of very considerable doubt and suspicion. It appears that the brother Ferozshah, at the time when the tunderooste was read, agreed to advance a sum of money to Punjeabhaee, to enable him to pay the funeral expenses, which it appears from the evidence that Homabaee had desired him to do, saying she had got some of the testator's money in her house, but that he must borrow money and send it to her, and she would take care to pay the expenses, and give him an account of it. Accordingly, Ferozshah does advance the money, and takes a note from him in the terms of which it appears, and he signs it, as is observed by the learned Counsel at the Bar, in the name of the person who was adopted, and with the name of Dosabhaee in addition to his own. Then it appears that, after this suit had commenced, the signatures were torn off of that note, and that note is returned to Punjeabhaee. For what purpose that note was returned, whether in order to prevent it having any effect against his claim, or whether it was for any other purpose, it is difficult for us to undertake to say. However, it was a fact the note was returned. It is very material to attend to what his conduct was, and the manner in which he states his claim at the time of the arbitration. When he puts in his petition, he says: "We, as heirs, have a right to share in the "inheritance. Darashah and Dosabhaee's "wife have combined together, and filed a "suit for 25,000 rupees in the name of Pun-"jeabhaee, the son of Darashah, for the

"purpose of getting possession of Dosa-"bhaee's estate, and they have set forth that "Punjeabhaee is the adopted son of Dosha-"bhaee, and the parties have, with their "own free will and consent, referred the "case to arbitration; and we thought that "Darashah would not get any more but his "share of the estate, but we have just heard "that plaintiff and the arbitrators for both "parties have combined together, and wish "to give the whole of Dosabhaee's estate "to Punjeabhaee, and intend to deprive us "of our share: on that account it is neces-"sary for us to file a suit for our share, "which we will do to-morrow." Now, it is certainly extraordinary, if this man at this time was conscious there was a will that was executed in favor of Homabaee, giving her the whole of the inheritance, and he had seen it, that he should hold this line of conduct. He opposed, however, there, and then he proceeds upon an appeal in the Sudder Dewanny; and it is rather material to turn to his testimony, upon which some judgment may be formed, whether or not he stands so clear entirely of all the circumstances relating to the commencement of the suit, as to place him entirely above all suspicion, and to entitle his testimony to countervail the testimony of all the other persons of his own caste who have given evidence upon this occasion. In page 42 there is this passage: This evidence was taken the 10th of July 1824, two years after the time when he had filed the petition, in which he complained that Homabaee and Punjeabhaee were combining together. The question is, "If Punjeabhee "Dosabhaee was not the heir of the de-"ceased, how came the note of hand for the "money advanced to Ferozshah to be taken in "his name?" "What do I know about it? "My brother gave the money, and can "answer that question." It is rather an extraordinary answer. "Did Homabaee "always come to you and Ferozshah to ask "your advice regarding this suit?" "No; "but once or twice she might have come to "talk about the decision of the suit." This is a man complaining of Homabaee and Punjeabhaee, and their colluding together "Did Ferozshah, Homabaee, and yourself, "appoint any respectable person to divide "Dosabhaee's estate?" "No one was ever "called by me; but, either by the wish of "plaintiff or some one else, some one was "sent for." That relates to something else. "What was written down for Homabaee's "maintenance in the rough copies which "were written regarding the decision of "the suit?" "After the investigation "agreeably to the custom of our family, "it was fixed that Dosabhaee's property "should be divided into three shares: "one share was to be given to Homabaee, "the second to Darashah, and the third to "my brother and myself. Punjeabhaee "was to get one house and garden situ-"ated on the banks of the river, which "fell to Dosabhaee's share, above what he "was entitled to. Moteebhaee was to be "given whatever was mentioned in the "decree of the Court. Four or five months' "allowances were due, which have been "deducted from the property, which ar-"rangement Darashah agreed to; but Ho-"mabaee, owing to the will, would not "agree to it." Now, it appears, I think, from these passages, that this person Ardaseer was so mixed up in the suit that we cannot say he was a person who can be supposed to have no feeling upon the subject, and at least he is not entitled to be placed in that high position that entitles him to give evidence to put down the testimony of all the other witnesses.

From all these circumstances, their Lordships are of opinion that the adoption in this case has been proved, and that the will has not been established; the consequence is that the decree of the Sudder Dewanny Adawlut must be confirmed without costs.

Judgment below affirmed without costs.

The 7th April 1835.

Hindoo Law of Adoption—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Sutroogun Sutputty

versus

Sabitra Dye.

According to Hindoo Law, neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity.

In no case should the rights of wives and daughters be transferred to strangers or to more remote relations unless the fact of adoption by which this transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.

Although the Hindoo Law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of life of a zemindar adopt sons, to acknowledge such adoption in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such an adoption.

Lord Wynford.—In this case it is not necessary that I should trouble your Lordships at any length; but these Indian names not being very familiar to me, and as it is very probable, from that circumstance, that I should confound different persons, I have thought it right to put the few observations, I feel it my duty to make, into writing.

My Lords: The Law of Adoption owes its origin to the timorous superstition of the inhabitants of India. These people, vainly imagining that, by leaving male children in this world, they secure themselves against the torments of the next, seem to have been so anxious to obtain natural or adopted sons, that they have established but imperfect securities against fabricated adoptions.

The Law of three children conferred advantages on Roman citizens, which induced them to adopt sons, and, when they had got the honors or offices which they desired, they often turned the adopted children loose on the world again. Tacitus (Annalium, lib. 15, c. 19) says: "Percrebuerat eâ tempestate pravissimus mos, quum propinquis comitiis aut sorte provinciarum, plerique orbi fictis adoptionibus adsciserent filios."

The Romans and other nations which incorporated the civil with their municipal laws have wisely provided against such frauds. By the Civil Law, the sanction of the Magistrates was essential to the validity of the adoption of an infant; these Magistrates regarding the circumstances of the person proposing to adopt, and those of the child that he was desirous of adopting, being authorized to decide whether the adoption would be to the advantage of the latter. (Digest, book 1st, title 7, C 2, c. 17.)

By the Code de Napoleon, adoptions must be registered in the Court of first instance, and in the Imperial Court; and in the latter an opportunity is afforded to the relations of the person proposing to adopt a child, of shewing that the adoption proposed ought not to be allowed, this Court having authority either to confirm or to annul any adoption.

In our own country, although wills are revokable, we do not allow the favored title of heir to be set aside but by a will in writing, attested in the presence of three witnesses; but according to the Hindoo Law, neither registration of the act of adoption, nor any written evidence of that act, having been completed, is essential to its validity. It is to be lamented that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would contribute much to the security of property and the happiness of Hindoo families, if, in a country where the religious obligation of an oath is unfortunately so little felt, and documents so readily fabricated, adoptions and all other important acts were required to be performed in the presence of some Magistrate, and to be recorded in some Court. But although neither written acknowledgments, nor the performance of any religious ceremonies, are essential to the validity of adoption, such acknowledgments are usually given, such ceremonies observed, and notices given of the time when adoptions are to take place, in all families of distinction, such as those of zemindars or opulent Brahmins. Wherever those have been admitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say that, in no case, the rights of wives and daughters should be transferred to strangers or to more remote relations, unless the fact of adoption, by which this transfer is effected, be proved, by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.

At the beginning of this case a striking improbability occurs, and which the appellant has endeavoured to account for by a circumstance that is attempted to be

proved by insufficient and contradictory evidence. Dhunjee Sutputty was, according to one account, twenty-two, and, according to another, thirty-six years old, when he adopted Sutroogun; his wife was eighteen. She had given promise of having children, for she had borne a daughter and another child that had died. Superstition was not likely to frighten a person so circumstanced into the doing an act by which his daughter would be disinherited, and the inheritance of any son or sons that he might have been divided with a stranger.

The Roman and French laws are wise in this respect: they do not permit persons under fifty years of age to adopt. (Hieneccius, L. 1, tit. 11, sec. 177.—Code Napoleon, lib. 1, tit. 8, sec. 1.)

To get over the improbability of so young a man adopting a son, we are told a story of his having his nativity cast by a Brahmin from the north, who assured him that no male child of his would live. One should have expected that that Brahmin should have been produced as a witness, or some reason given by evidence for not having him before the Court. Two persons have been called as witnesses, who stated that they attended Dhunjee Sutputty upon this occasion, when he went to this Brahmin. One of them knew the Brahmin's name and where he resided: he could have assisted in enquiring after him, and bringing him, or accounting for his absence. He lived but four days' journey from Dhunjee Sutputty. Those witnesses contradict each other. Deby Bhady, the family priest, says that the nativity was cast about the seventh or eighth hour of the day, in the presence of Lukhun Bhady, Subram Sarbtroom, Narain Sidhant, and himself. Juggernath Chuckerbutty saith, that the calculation was made about three hours after sunrise, in the presence of himself and Luckiputty. They differ as to the time of casting the nativity, and as to every one person supposed to be present at the time it was done.

The passage in the defendant's answer, in page 5, is not explained to my satisfaction. He says, "When first my father made over his property to me." He would not, in a pleading, have used those words with reference to an act of adoption. Again, "All "the papers relative to the talooks which "during my father's life were in the hands "of Luckichurn Sutputty." These words cannot mean papers relative to the adoption, for the main defect of *his* case is that there are no such papers.

The evidence as to the signing of the petition of the respondent is contradictory. Two witnesses swear that she did not sign it; three, that she did: but it does not appear that any of these witnesses saw more of her than her hands. But consider the improbability of her voluntarily signing a petition destructive of her own rights, and will not the balance of evidence incline against the genuineness of this paper? One of the learned Counsel admits that, if that be a false and fabricated instrument, little credit can be given to any part of the appellant's case. I think that, if any important paper produced by the appellant as a genuine paper be shewn to be false, the Court cannot have any safe ground for deciding in favor of one who knowingly has produced such a fabricated paper as a genuine instrument.

Sutroogun produced to the Court a letter purporting to have been written by a zemindar, as an answer to an invitation sent to that zemindar to attend the religious ceremonies thought proper to be observed for the sanctioning that adoption, and which letter appears to have been written before these supposed ceremonies were performed, although he had himself fabricated that letter, and obtained the zemindar's signature to it many years after the time when it purports to have been written. Is not this forgery equally as destructive of the appellant's case as that of the respondent's petition?

But it cannot be doubted that the respondent was kept in a state of *duresse* for the purpose of preventing her from asserting her rights. The darogah's answer to the Magistrate's order is evasive. He wishes to satisfy the Magistrate that he had not been confined. He first reports the answer given to him by Luckichurn, which answer is to a question, "How can peons be placed on "the inside of the house by the women's "apartment?" He makes Sabitra say she had not been watched by peons; but she adds, "The day after my brother brought a "man from the Magistrate's, there were two "peons near my door." The appellant, therefore, appears to me to have attempted to prevent the respondent from bringing her case before the Court by *duresse*, and to support his own by false witnesses and fabricated instruments.

I will not fatigue the Court by calling their attention to the numerous contradictions that are to be found in the evidence. I will only add that, although the Hindoo

Law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of life of Dhunjee Sutputty adopt sons, to acknowledge such adoptions in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such adoptions. It is admitted that there was in this case no acknowledgment in writing, and that no zemindars attended, or were invited to attend, the ceremony of adoption. The zemindars, it is said, were asked to attend the performance of the religious ceremonies; but the time when it is most important for the prevention of fraud that those persons should attend is that of the adoption, for what is then done cannot be undone by anything done or omitted afterwards. I think I have stated (but I am much obliged to one of the learned Judges for the suggestion if I have not) that there was no communication of the adoption to the ruling authorities, which is a more important circumstance than the noticing it to the zemindars or any other person.

Their Lordships are of opinion that this appeal should be dismissed with costs; and I hope that, if religion has not sufficient moral influence on the minds of Hindoos to prevent them from supporting their claims by perjury and forgery, self-interest will; and when they learn that the calling perjured witnesses, or producing forged instruments, will be visited with costs, I hope we shall have less reason to complain of parties attempting to avail themselves of those wicked means of supporting or defending causes.

Appeal dismissed with costs.

The 21st May 1835.

Sale (bona fide, though not strictly of a complete and final character).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Lalla Chooneelal Nagindas

versus

Sawaechund Namedas.

A deed of sale, though not strictly of a complete and final character, yet if genuine and duly attested, may be sufficient to bind the property and to give the purchaser the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete title to the property. Such a deed would necessarily prevail over any intermediate attachment of the property for debts due from the original proprietor.

Vaughan, J.—The Lords of the Council are unanimously of opinion in this case that the judgment of the Sudder Adawlut should be reversed, and the judgment of the Zillah Court affirmed.

It appears that the respondent, being a creditor of Selool Moleswar for 2,785 rupees, on the 29th March 1819 obtained an order from the Zillah Court of Kaira, in the nature of an attachment upon three houses situate in Oomrut, the subject of the present appeal; that, on the 4th of May 1820, he obtained a further order from the same Court, authorizing the sale of those houses for the purpose of satisfying that debt. The usual notice was given, requiring all persons who had any claims upon this property to appear and establish them. More than a year elapsed after the order for the attachment issued, before any step was taken or claim made by the appellant, who, on the 17th of May 1820, presented a petition to the Zillah Court, praying that the sale of the houses might be stayed, and thereupon filed his plaint in the same Court, insisting upon *his claim* to the property in question, as having been the *bonâ-fide* purchaser of it from Selool Moleswar, under a deed of sale executed by him to the appellant, on the 31st March 1819; that the consideration for the purchase was a debt of 5,801 rupees due from Selool Moleswar to the appellant and 200 rupees paid in cash, making together the amount of 6,001 rupees, the then fairly estimated value of the three houses; that, being a travelling Maharajah, and not an inhabitant of Oomrut, he was ignorant of the respondent's proceedings until long after the attachment had issued. Upon his plaint being instituted in the Zillah Court, the respondent denied the validity of this deed of sale, insisting that it was not a genuine but a false and fabricated document, and that no witnesses attested the execution of it. The case appears to have undergone a very full and careful investigation in the Zillah Court, where four witnesses were examined upon oath, who, in the judgment of that Court, satisfactorily established the due execution of the deed.

From this decree of the Zillah Court the respondent appealed, and on the 6th January 1823 the appeal was heard before the Third Judge of the Sudder Adawlut, when no

further evidence was adduced; but that Judge, not being satisfied, upon the inspection of the instrument, that it was written at the time therein set forth, and because the appellant claimed under a deed, whereas he produced only an agreement, thought there was sufficient reason for submitting the appeal to the Full Court. The case was accordingly submitted to a Full Court on the 30th January 1823, when, without examining any witnesses, the Sudder Adawlut reversed the decree of the Zillah Court with costs, being of opinion that the deed in question was not so complete a document as to warrant their interference with the attachment, not having all the requisites of a sale.

Upon a review of all the proceedings and of the evidence adduced in the different stages of the suit, from its commencement in the Zillah Court until the hearing of the present appeal, it appears that the respondent relied upon the invalidity of the instrument of sale, contending that it was not a genuine but a fabricated document; that it was not executed when it purported to bear date, and that it had no attesting witnesses at the time of its execution; that it was not an absolute and final deed of sale, being only a *satakut* or preparatory instrument in the nature of articles of agreement, intended to be followed by the execution of a more formal conveyance, and, therefore, was in itself of no validity to pass any interest in the property which was the subject-matter of the appeal.

The Lords of the Council are unanimously of opinion that there is no solid foundation for any of these objections. And first, with regard to the objection, that it was not a genuine instrument. In the Zillah Court four several witnesses were examined, all concurring in their attestation of the fact, that the instrument was executed by Selool Moleswar *at Baroda at the time* when it *purports to bear* date, and under the circumstances stated in their respective depositions; and when the respondent was invited and challenged to contradict or impeach their testimony, and indulged with time abundantly sufficient for the purpose, he never produced even a single witness of any description in the Zillah Court to repel the appellant's claim. The opportunity of doing so was a *second time* offered to him when the appeal was heard by the Third Judge of the Sudder Adawlut, and *again* when the decree of the Zillah Court was reversed by the Sudder Adawlut after a hearing before the Full Court.

The Lords of the Council are therefore of opinion that the facts and circumstances, as they regard the due execution of the deed, are conclusive in favor of the appellant.

As to the objection to the validity of the deed (assuming it to be genuine, and attested in the manner deposed to by the four several witnesses in the Zillah Court) founded upon the fact of its not being a complete and final deed of sale, inasmuch as the parties contemplated the execution of a more formal conveyance, the Lords of the Council are unanimously of opinion that it was sufficient to bind the property, and to give to the appellant the right to demand a specific performance of the contract, and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title to the houses which were the subject-matter of this appeal.

Under these circumstances, the Lords of the Council are of opinion that the sentence of the Sudder Adawlut ought to be reversed, and the original sentence of the Zillah Court affirmed without costs.

The judgment of the Sudder Adawlut reversed without costs.

The 22nd May 1835.

General Release.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Malick Bapoo Meyan

versus

Hari-Walub Nagurdas.

Case dismissed, because the Privy Council upon the evidence considered that the general release set up by the defendants could never have been contemplated by the parties to operate as a release of all demands.

The Vice-Chancellor.—Their Lordships in this case have the concurrent judgments of two Courts below, who were much better able to appreciate the testimony of the witnesses than we are. The evidence of Mooteebhaee, certainly, in the clearest manner shews an account to have been settled in the Sumvit year 1866. He had an interest in the result of the suit, and he takes upon himself to say that the transaction in regard to the jewels took place in respect of the settlement of this very account, and that they were given in part payment

of the balance; but these jewels are mentioned in the bond, and the bond was passed in 1863, and according to his statement the ornaments were given two years afterwards. The balance itself was not, however, settled till 1866, and so far from it being true that the ornaments were given two years after the bond, that it appears, upon looking at that document, which is dated 1863, that it states the fact that, "as security the following gold ornaments are "lodged with you;" after which follows a special description of them; so that the documentary evidence, which cannot be falsified, is quite at variance with that portion of Mooteebhaee's evidence. It is evident, according to the way in which he represents the case, that, even were it true that no direct authority was given to him in the first instance by Futteh Mahomed to settle the balance, yet that the balance, when settled, was recognized by him.

The defendants below in the original action wished to have it represented that there was a general release, and a document is produced which was executed in the Sumvit year 1874. Now, it is remarkable that they themselves, speaking of what appears upon the face of the bond as it is called in their answer to the original plaint, say: "The Rupees 50, entered as having been paid, may "have been due to him and paid: we owe "him nothing more. In proof of this, we "had a claim on Goverdhun Asharam, in "part of which he deducted Rupees 50, and "for the remainder he passed a bond; and "if Goverdhun's claim was on us, why did "he pass the bond?" Now, that can refer only to this instrument of 1874, which is set out in page 21 of the Appendix, and which appears to be anything but what is represented by the defendants in their own answer. With respect to the fifty rupees, it says, "fifty rupees for the Fusal of Sumvit "1874 are credited in part of my demand." The representation is, we had a claim upon him in payment of which he deducted 50 rupees, whereas, in the instrument, it appears that he had a large demand, in part-payment of which he had credited 50 rupees. I make that observation to shew that the defence must not only be false to a great extent, but false to the defendant's own knowledge.

This instrument, upon the face of it, appears to relate to some transactions as to the villages, and to represent the mode in which the rent should be paid. Then there being these 50 rupees "credited in part of my demand," it is said that the words, "besides this there is nothing else," which are written below the end of the instrument and not in any part of the body of the instrument where the transaction between the parties is contained, clearly shew a final settlement. It would appear most extraordinary that, where there was a foundation, at least, for a claim of nearly 4,000 rupees, in part payment of which 50 rupees had been given, the creditor should, without anything like a consideration or any equivalent, voluntarily execute a release of the whole. If it was a release, as they contend, it must discharge, not only the balance, but the sum due in respect of the transaction upon which the jewels were pledged; and, if so, how did it happen that the jewels were not in the possession of the defendants, but in the possession of Goverdhun Asharam? It appears to us that all these circumstances shew that that instrument never could have been taken as a release generally of all demands; and what one of the witnesses says is scarcely credible. Umrut Lal Kandas says: "In the month of Sravana (October) "of the year 1874 I went to Dholka, "to Shree Putraee, and Goverdhun Asha-"ram had taken the village Ranaysin "on lease, and Bapoo Meyan has an here-"ditary claim of custom (gras) upon the "village of Ranaysin. Goverdhun said: 'I "'demand 8,000 rupees; instead of that "'money shall I collect the Ranaysin (duty) "'custom.' Shree Putraee replied: 'The "'custom shall not be received by you in "'lieu of that demand.' Then Shree Putraee "settled that, on that demand, instead of "50 rupees, he should receive 118 maunds "of grain annually." Now, this statement may be true, so far as it goes to represent some conversation, in which there may have been a representation that 8,000 rupees were due; but it is utterly absurd upon the face of it, as representing the real state of the transaction, because, if there was a demand of 8,000 rupees, it is not in the least probable the parties should agree that, instead of there being 50 rupees paid, he should receive 180 maunds of grain. Other witnesses have also been examined, whose evidence goes to shew that the origin of this instrument of 1874 was in respect to the village of Ranaysin; but there is nothing to satisfy those who read the evidence that it could have been in the contemplation of the parties that it should operate as a release of all demands. It seems a very unfair defence to be set up by the parties, and, therefore, the appeal must be dismissed with costs.

The 4th December 1835.

Hindoo Law of Succession—Adopted son of daughter having brothers alive—Appointed daughter—Bought son.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Yachereddy Chinna Bassavapa and others

versus

Yachereddy Gowdapa.

According to Hindoo Law, a person cannot succeed as the adopted son of a daughter who has brothers alive, and who cannot be an appointed daughter if she had brothers when she married. Nor can he succeed as claiming under a bought son.

Mr. Baron Parke.—THIS case, which was argued before us on Friday and Saturday last with much care and ability, is involved in more than an ordinary degree of perplexity, from the want of clearness and precision in the pleadings, and distinctness in the evidence adduced by the parties. We have given the case all the consideration in our power, and upon the whole we do not see sufficient reason to reverse the decision of the Sudder Dewanny Adawlut, by which the decree of the Provincial Court was reversed.

The suit was instituted in the Provincial Court for the Centre Division on the 18th of August 1817 by Bassavalingapa, to recover one-third share in certain shops at Wallajapetty, alleged to have been formerly the property of Gowdapa, of which shops the defendant, Chinnapa Gowdapa, and Roodrapa, had possessed themselves, and the plaintiff rested his claim on the ground that Moodapa, the adopted son of the common ancestor, Bassavalingapa, his natural son, and Tircapa, his bought son, who married his two daughters in succession, and was made joint heir to the estate, were on his death entitled to all the property of the deceased in three equal shares; Chinnapa, the first defendant, having a right to one-third as representative of Moodapa; Gowdapa, the second defendant, to another, as adopted son of Solavapa, the adopted son of Bassavalingapa; and the third belonging to the plaintiff himself, as the adopted son of Tircapa. The other defendant, Roodrapa, was included, not as a party interested, but simply as being in possession of the subject-matter of the suit.

The plaint states that all the rest of the property had, some years after the death of the ancestor and about the year 1801-2, been actually divided, and one share given to the plaintiff's mother, Chinnamal, and that the property in dispute was agreed between her and Chinnapa and others to be divided, by an instrument of agreement (or farigh-kutti) of the 11th February 1805; that the mother preferred a complaint to Mr. Bruce, the Collector of Bellary, in 1806, and that, in consequence of his interference, Chinnapa, the first defendant, wrote a letter of the date of the 9th of August 1806, to the agent in possession of the shop in question, desiring him to divide the property in it. To this plaint Chinnapa, the first defendant, put in no answer. Gowdapa, the second defendant, claimed the whole property as the sole representative of the deceased Gowdapa, and denied the title of Chinnapa and also of Tircapa, under whom the plaintiff claimed. He also denied that he ever divided any part of the patrimonial estate, or agreed to divide that in dispute, and accounted for the interference of Chinnamal and Chinnapa with the property, by imputing to them a conspiracy to defraud him and the widow, Bassavalingamal, who adopted him.

Other subsequent pleadings took place, but in none is the lapse of time since the supposed cause of action accrued insisted upon as a bar. The plaintiff died a few days after the institution of the suit, and his right devolved on the present appellant, who continued the proceedings until their termination. After much evidence had been given on both sides, the Provincial Court pronounced its decree in favor of the plaintiff, whose title to one-third they state to be derived from Chinnamal, the second wife of Tircapa, "to whom the original proprietor gave that third;" and they add that the undivided property in all the estate was afterwards divided, except in the shop in question, in which the property was still united, and they decided that the plaintiff was entitled to one-third of it. From this decree there was an appeal to the Sudder Dewanny Adawlut, which reversed it, on the ground that the cause of action had arisen more than twelve years before the suit commenced, which was therefore barred by the Madras Regulation II., 1802, Clause

4; and the Court intimates that, if this were not so, the plaintiff had no title, because Chinnamal, under whom he claimed, could have no share of the inheritance, as, at the time of the common ancestor's decease, there was an adopted son and son of the body living. This appeal comes before His Majesty in Council from the decree of the latter Court, and the question to be now decided is, whether that decree was wrong.

It is contended, on the part of the appellant, that it was so; because, first, the objection as to the lapse of time was not taken on the pleadings, and was not available to the defendant below, unless so taken; and, secondly, because the action was really brought in time, and the right of the appellant was established by evidence.

An endeavour was made to support the first objection by analogy to the Statute of Limitations, which, it is now fully settled, must be pleaded by a defendant in our Courts, if he means to take advantage of it. But the language of this Regulation is much stronger than that of the Statute of 21st James I., and it prohibits the Courts of Adawlut from trying the merits of any suit, if the cause of action shall have arisen twelve years before, unless the complainant can shew, by clear and positive proof, that there had been an admission of the truth of the demand, or an application to a competent authority, within that period, and shall assign satisfactory reasons to the Court for not having sooner proceeded. And, adverting to this positive language affecting the jurisdiction itself, we think it would be incumbent on a plaintiff, in pleadings conducted with any degree of regularity, to shew, by proper allegations in his plaint, either that the cause of action did accrue within twelve years, or to bring himself within the other alternative stated in the Regulation; and it seems to us that it would be the duty of the Court to give judgment against him, when the cause came to a hearing, for defect of such allegations, unless that defect were supplied by the allegations in the pleadings of the opposite party.

But if the appellant had really established his claim in the manner contended for on the argument (that is, if he had shewn that there was an agreement made between competent parties, either in the lifetime of the common ancestor, or after his death, by which he obtained a right to a third of all the property belonging to that ancestor, both that which was actually divided, and that which was the subject of the suit, and which was to be actually divided when the complainant required it), it is by no means clear that this claim would have been barred by lapse of time; for the cause of action may not be considered as having accrued until it was clear that a refusal had taken place on the part of the person entitled, or of the person in actual possession, to deliver up that third share; and there seems to be little doubt that such refusal did not occur until after the 13th of September 1805, when Chinnapa wrote the letter to Chinnamal of that date, acquiescing in her right to the third part in question.

It is, however, unnecessary to decide this point, because we are of opinion, on an attentive consideration of the material allegations and evidence, that the appellant has not made out such a case of title.

It is very clear that the plaintiff below could not recover against the defendants, whom he admits to be in possession of the subject-matter of the suit, without proving his own title, however defective that of the defendants or some of them might be. It is equally clear that, by the Hindoo Law regulating the right of succession to the property of a deceased ancestor, the appellant, even supposing his father's adoption by Chinnamal to have been valid, had no right whatever to succeed to any part of the estate. He had not as claiming from Chinnamal, because Chinnamal being a daughter could have no share, as there were brothers living, one adopted and one born at the time of her father's death. She could not be an appointed daughter, for she had brothers when she was married (A). Again, the plaintiff could have no right as claiming from Tircapa, for Tircapa was a bought, not an adopted, son, and as a bought son (B) he could not succeed; and adopted he could not be (*a*), because Gowdapa had already another adopted son as well as a son born, and the fact of Tircapa's marrying a daughter excludes the possibility of his being a son, for such marriage would have been incestuous.

(A) Menu, cap. ix., v. 127; Daya Bhaga, cap. x., ss. 2 and 4.

(B) See the arguments and opinions on this subject, 2 Strange's Hindoo Law, pp. 132 to 193.

(*a*) See the opinion of Mr. Sutherland, 2 Strange's Hindoo Law, p. 86, and Strange's Hindoo Law, p. 78.

In no way, therefore, was it possible that the plaintiff could have any title by succession by the general Hindoo Law; and it does not appear by any averment in the pleadings, or any reference to Pundits, that there is any modification of the general law in this particular district. Accordingly, the plaintiff's right was put in the argument on the ground of some family arrangement, some contract between its members, either in the life or after the death of the ancestor, by which one or more of the other members of the family having the right to the property communicated to Tircapa, or some one under whom the plaintiff claims, a title which he did not before possess. Such an arrangement may have been made, and, if proved, would have been supported; and a case from India (*b*), in which a compromise was made by a deed, and an estate divided between persons having right and others having colour of right, has already been before their Lordships, in which the decree of the Court below was in favor of the deed, though it appeared probable that the party taking a benefit really had no title. But in the present case there is no sufficient proof of any such agreement.

In the plaint the foundation of the plaintiff's title is stated to be that Tircapa was made joint-heir when he was bought and given in marriage (Appendix, p. 4 and 14). But, assuming that it was competent for the ancestor to have so dealt with the property and given a share to the husband of his daughter, with or without the consent of the co-heirs, let us see on what the proof of such disposition rests. That Tircapa was treated as one of the family by strangers, appears from two letters addressed to him by the family name; but that he was made a co-heir, and had a share given to him, rests upon mere hearsay. Moodapa (p. 28) says that he understood so, but he never saw Tircapa; and Nagapa, another witness, brought to prove that fact, and who says that Tircapa was twice made heir to Gowdapa (p. 31), admits, on cross-examination, that he derived his information from Moodapa and others (under none of whom does the defendant claim, and therefore their statements are not evidence), that fifty years ago Gowdapa promised Tircapa to give him his daughter in marriage, and to consider him as a son, and to make him heir, and that he was brought to the house with the consent of Gowdapa's adopted son, but that the witness was not present. The evidence of another Nagapa is hearsay only. The fact, therefore, of a gift by the common ancestor to Tircapa is not proved by satisfactory evidence, even if such evidence be legally admissible in the Native Courts. There is no doubt, indeed, that, after the death of the ancestor (it would seem many years afterwards), a division of some part of the estate in the Nizam's country did take place between Chinnapa and Chinnamal, and by the account of one witness only, Bassavalingamal, the defendant Gowdapa's mother, had one share. This may have been because Chinnamal was entitled by a disposition made by Gowdapas and would be strong confirmation of that fact if it had been proved *aliunde* by some legal evidence, yet the only legitimate inference to be derived from that decision alone is that the parties who took shares were entitled in some way to those shares in those specific effects, but no more; and the documents, as far as they relate to the proof of title, are no evidence, except against Chinnapa himself. As admissions, they do not bind or affect the interests of the defendant Gowdapa, for whom he is not shewn to be agent; and Chinnapa himself could give no title, for, having been adopted when married, his adoption was void, therefore he had no title by succession, and there was no proof of any other.

The probability is that these acts were an encroachment on the rights of Bassavalingamal and the defendant, she being a widow and he an infant, whether adopted or not at the time.

Upon the whole, therefore, as the plaintiff was certainly not entitled to a share by the general Hindoo Law as of common right, and as no modification of that law in that particular district has been shewn to us in this case, he cannot recover the share in question, unless he can clearly prove that he had a title by gift or conveyance; and the evidence is too loose and unsatisfactory to convince any one that such a gift or conveyance was made. We therefore think that the judgment of the Sudder Dewanny Adawlut must be affirmed; except so far as it gives to the appellant below (the now respondent) the costs in both Courts. We think that, under the special circumstances of this case, such costs ought not to have been given, and each party ought to pay his own costs, both of the suit in the Court below and in the Sudder Adawlut, and we affirm the decree, so far as it is affirmed, without costs.

(*b*) Rajunderain Rai *v.* Govind Sing Beng.

b

The 9th December 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and Sir E. Hyde East.

Agreement (kararnamah)—Payment of Government Revenue—Conditional sale—Mortgage.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Sri Rajah Kakerlapoody Jagganadha Raz Bahadoor

versus

Sir Rajah Vutsavoy Jagganadha Jaggaputty Raz Bahadoor.

The appellant became security for the payment by the respondent of the Government dues in respect of a mootah then about to be sold for those dues; and by the first *kararnamah* entered into by the parties it was stipulated that, on default of the respondent to pay any part of the instalments, the appellant was to obtain a transfer of the property and to retain it after returning to the respondent the money which may have been paid by him. By a second *kararnamah* entered into on the same day, the plan of a conditional sale provided by the first *kararnamah* was reduced to a mortgage with a covenant between the parties that, whenever the appellant should take possession of the mootah for the purpose of enabling him to discharge the amount for which he became security, he should restore the mootah to the respondent as soon as he was re-imbursed all that he had advanced, out of the rents and profits of the mootah. HELD that there was no such inconsistency between the two instruments as to make the second an invalid instrument.

Bosanquet, J.—THEIR Lordships are of opinion in this case that the decree of the Court of Sudder Dewanny Adawlut ought to be affirmed. The facts of the case are very few. It appears that, the respondent being in possession of a mootah upon which certain dues were owing to the Government, the land was advertised for sale by the authority of the Collector. The appellant, either for the purpose of purchasing, as it is suggested, or for some other reason, was present, together with the respondent, at the time when this property was about to be sold, and, on the application of the respondent, he was induced to give a security for the payment of the duties due to the Government, amounting to about 29,000 rupees, and to take a security for the repayment of that as well as the repayment of the sum of 2,000 rupees, which the respondent owed to another person, and which he agreed to advance, and that he advanced 1,000, and I think the other 1,000 of that was not advanced; but that is completely immaterial in the present case. On this communication there were certain instruments executed, of which there is no doubt there was a pottah executed, and an *arzee*, which were necessary for the purpose of authorizing the Collector to make a transfer of this property to the appellant, who had entered into this security. These instruments are, upon the face of them, such as to authorize the Collecter at once to make a transfer of the property; but, as it was meant as a security to a certain extent, and no further, he entered into the first kararnamah, by which it is stipulated "that, "if the respondent should not pay the "instalments fully, and any part of them "should be in arrear, the zemindary is to be "continued under the appellant consistently "with the writing aforesaid, and that he "is only to return to the respondent the "rupees which may have been paid by "him." This is very positive, undoubtedly. The pottah and *arzee* were deposited with a third person, who was not to give them up to the appellant for the purpose of enabling him to obtain the transfer of the property until there should be a default made according to this agreement. A default was undoubtedly made, the respondent did not pay the whole he had engaged to pay, and a default having been made, and the appellant having been called upon to pay the money, they were given up and carried to the Collector, and the transfer was made.

Upon the face of this, the appellant was entitled to retain the property. The value of the property appears, upon the various statements made in the course of this case, to be of a very large amount in proportion to the sum agreed to be advanced; what the precise amount of it may be is not very material to this transaction, supposing the advance agreed to be made to be very greatly disproportionate to the real value of the property. I will come presently to what it appears to have been; but, admitting this to be a very hard and very oppressive bargain, if nothing else was done, the party in whose favor it was made would be entitled to take advantage of it; but one fact which is stated by the respondent, denied by the appellant, and insisted upon in that reply, is, that on the same day another instrument was entered into, by which this plan of a conditional sale, entitling the appellant to retain the property, provided no default was made,

was, in fact, reduced to a mortgage with a covenant between the appellant and the respondent, that, whenever he should take possession of this mootah for the purpose of enabling him to discharge the amount for which he became security, when he should have received out of the rents and profits of that mootah the sum he had paid, with all expenses, he should restore the mootah to the respondent.

Now, then, we must remember who the respondent and appellant were respectively. The appellant was the uncle of the respondeat by blood, and also related to him by marriage. The account which is given of the transaction by one of the witnesses who comes to prove the actual execution of the second instrument, the kararnamah, states, if he be worthy of credit, that which passed upon the occasion, for having stated that he himself was the writer of this instrument, and having stated who were the witnesses to that instrument, and those witnesses are called on the first occasion before the Provincial Court, he not only states that he wrote it, and those persons attested it, but he states this: "After the passing of the kararnamah, I asked "the defendant what advantage there was "for him by his taking the trouble of writing the zamin?" He answered me thus: "He is the real son of the elder sister of "my mother, and Jagganadha Raz, who is "my protector, has, for the accomplishment "of his, the plaintiff's business, incurred "expenses and trouble, and afforded him "assistance whereby he obtained a great reputation, and it would tend to my honour, "if I, although I may suffer great trouble, "pay five or six thousand rupees, and "preserve the mootah for him (the plaintiff); "and I have at present caused the pottah "and *arzee* to be written and taken, merely "in order to be sure; and, as soon as the "money due to me is paid, I will give "back his mootah to him." If that account is true, if this witness is to be believed, that explains the object for which this kararnamah was given; and, if this second kararnamah was given, there can be no question that it was an agreement between these parties, which the respondent was as much entitled to take advantage of as the appellant is entitled to take advantage of the first kararnamah, supposing a second executed.

The case was brought in the first instance before the Provincial Court, and both those documents were filed. The first kararnamah, together with the *arzee* and the pottah, were filed, and no objection was made to them; consequently, they are to be taken as correct. The question, then, is whether there has been anything to take off the effect of this first kararnamah, given on behalf of the appellant; witnesses were called for the purpose of proving this second kararnamah, the regular ordinary witnesses; that is to say, the person who actually wrote it gives the account of it, and the attesting witness. The Judge of the Provincial Court did not think it necessary to call for further witnesses, for he was of opinion—and he so states in his judgment—that, if the first instrument was a good and valid instrument, it follows, as a necessary consequence, that whatever transactions may have subsequently occurred, it *bonâ fide* became the property and the right of the defendant. He did not enter into any question whether there was evidence of that second instrument, and it appears that subsequently he admitted to the appellant that it was unnecessary for him to call witnesses to rebut the evidence given on the part of the respondent.

In that state of things the respondent appeals to the Sudder Dewanny Adawlut; and, that Court having heard the case argued upon the evidence, the decree was, as appears to their Lordships, very properly reversed, because they were of opinion, and their Lordships are also of opinion, that, if that second kararnamah was executed, of which the evidence was plain before the Provincial Court, and was not opposed, that was sufficient to entitle the respondent to possession, in consequence of the whole advances having been discharged out of the profits of the mootah. It is material to observe here that, in giving their judgment upon that occasion, they stated the value of this mootah, with all the particulars, and how much had been received from it during the time, so as completely to apprize the respondent of the circumstance of the beneficial property being much greater than the amount of the security which had been given on the part of the appellant; and then it being represented to them that the witnesses had been stopped on the part of the appellant, the reply of the Court was, that it was perfectly open to the appellant to controvert any view taken of the value of this property, supposing the value to be an important feature of the case; but the view taken by the Provincial Court was that the first instrument being executed

whatever might have taken place afterwards, that instrument entitled the appellant to treat this as a sale, and to hold it; it is also to be observed that, in a very early stage of these proceedings, certainly in the reply of the respondent, it was stated that this mootah, which was given as a security for the advance of a sum of about 31,000 rupees, was worth a lac of rupees, so that the attention of the party had been completely called to that; but he called no witnesses to disprove it; he not only called no witnesses, but he does not appear, from the beginning to the end, to have called that fact at all in question. In the final decree of the Court of Sudder Dewanny Adawlut, they state that in detail. In his petition of appeal he never calls that in question, and the objection is now started for the first time that that representation is not to be relied upon. Their Lordships cannot but think that this fact appearing upon these proceedings, taking into consideration the conduct of all the parties in this suit, that a mootah of the value stated in these proceedings was professed to be sold by the first kararnamah for about one year and ten months' purchase, which certainly is a very inadequate price; that is an important feature in the case.

Then, upon the reply, evidence being adduced for the purpose of impeaching the testimony of those who set up the second kararnamah, which is undoubtedly *primâ facie* legal evidence of the execution of that instrument, evidence is called on the other side to support it upon the testimony of those respective witnesses. If the case turned entirely upon this, there might be some difficulty in saying whereabout possibly the balance of credit was due; but there is a circumstance then introduced into the case in the first instance, namely, another instrument, which is adduced for the purpose of rebutting the evidence offered on the part of the respondent, of the execution of that kararnamah; and that transaction, if it really took place, would certainly go very far, if not conclusively, to show that there was a fabrication. I speak here of the receipt by which it is asserted that 14,000 rupees, which had been paid by the respondent, and the payment of which 14,000 rupees by him appears to be corroborated by other witnesses on the respondent's side, was actually repaid by the appellant to the respondent, and an instrument upon that occasion taken, in which it is stated, after setting out the whole of the transaction: "I therefore demanded from you the payment of that sum, which you have this day paid to me in ready cash; the price of the cottam-mootah has therefore been discharged in full; I will never make any kind of demand. This receipt has been written and given with my consent." This receipt is said to have been given on the 18th of February 1823. It is evident from the proceedings that the date of 1823 is a mistake; the original transaction took place on the 28th of July 1812, and it appears by a document, which has been given in evidence, that, in February 1813—the very day in February, I think, does not appear—but by a document filed, and which was read on the part of the respondent, it appears that, in that very month of February 1813, an application was made to the Collector by the respondent, requesting him to stay his hand, and not to allow the transfer of this property, as being contrary to good faith, and making an objection to the transfer. It is supposed that, notwithstanding he was then protesting against the transfer of this property, he did, in this very month of February 1813, execute this receipt, in which he states the whole transaction, stating himself completely out of Court, and that he had received payment of the whole sum he himself had advanced, and that he never could make any kind of demand.

In order to prove this instrument, witnesses were called, and, among others, a witness was called who was the attesting witness, and which witness, when called upon, could not even tell the particulars of the letters of his own signature, or of the signature of the person who signed it. In respect of not being able to read the letters of the signature of another, that might very possibly be; he might write a very bad hand; but that he could not tell the letters of his own signature appears very improbable. There are witnesses called on the part of the respondent to contradict the circumstance of that 14,000 rupees ever having been repaid from acknowledgments on the part of the appellant. On the other hand, evidence is called by the appellant for the purpose of proving that they were paid. The Court of Sudder Dewanny Adawlut were clearly of opinion that that instrument was a fabrication, and their Lordships certainly concur in that opinion. That being the case, it is a very important circumstance that the main feature of the appellant's case, which was brought forward for the first time, after the case had been sent for review, for the pur-

pose of rebutting the evidence of this second kararnamah, not only falls to the ground, but falls to the ground because it is a fabricated instrument, set up on the part of the appellant, and that has certainly the effect of cutting down to a great extent the attempt on the part of the appellant to rebut the evidence which, it must be always recollected, is *primâ facie* legal evidence of that instrument.

Putting that instrument out of view—recollecting that the instrument never had been adverted to in the early part of the proceedings—that it might naturally be expected when the second document was set up on the part of the respondent—that the appellant should come and assert another document, the conclusive answer to that is, that nothing of that kind is brought forward till the case is sent for review. It is in contradiction also, as I noticed, to the judgment of the Court of Sudder Adawlut. The appellant insisted that he had paid the whole money to the Collector, whereas now he admits that it was paid by the respondent, but then he asserts that he repaid it to him.

Putting that out of the case, then we have now to consider whether there is a probability of this second kararnamah having been executed, or whether it is so improbable that it should have been executed, there being *primâ facie* legal proof of it, that their Lordships ought to hold, contrary to the opinion of the Court of Sudder Dewanny Adawlut, that the instrument is not available. There are two circumstances with respect to probability and improbability. The improbability on the one side is said to be this: that this was not an absolute but a conditional sale in the first instance; if it was a conditional sale, which condition is recited in the first kararnamah, why was not the additional condition by which it was to be held as a mortgage also inserted in the same instrument? Undoubtedly, that is a circumstance which at first strikes one as very improbable, and has great weight with their Lordships in the consideration of this question. But, though it is improbable, and appears to be so to their Lordships, it is by no means an impossibility, as I think one can conceive circumstances in the case which were not unlikely to produce that, and that I find noticed in the judgment of the Court of Sudder Dewanny Adawlut. It must never be forgotten that this is a transaction between near relations, that the object of the respondent was to prevent this, which appears to have been his paternal inheritance, from being disposed of to strangers by a public sale, and he persuades his uncle to become a security for him; his uncle requires security that he shall not be called upon to pay money without the power of reimbursement, and he takes a security which enables him to take possession of the property, provided the instalments shall not be duly paid and punctually paid to the amount of the smallest sum, by his nephew, on behalf of whom he makes this advance. Then an instrument is executed to that effect, but it is stated by the witness Coondoor, to whose evidence I have already referred, that the uncle promised to his nephew that, though he took possession of his property, if he should be repaid out of the rents and profits, he would give him back his estate. There is nothing very improbable in the uncle having made that promise to his nephew, and if he did make that promise, binding upon him as a private agreement, it is not improbable that he should put it into writing. It is an agreement that would not affect any other person to whom the uncle should transfer the property which he had acquired, but it is an agreement by which, as long as he held the property, he would be bound; and the Court of Sudder Dewanny Adawlut took notice in their judgment that an instrument might have been executed in the common form, which I think they say probably the first kararnamah was, notwithstanding the subsequent instrument. There is some expression of that kind which leads one to infer, and indeed that is a necessary inference from the proceedings, that the Sudder Dewanny Adawlut, constituting the Judges on the spot, saw nothing in the nature of this transaction so improbable as to induce them to believe it could not have taken place.

It is further to be observed, with respect to the witnesses by whom the facts are proved, that we have not the benefit in the same way that the Court before whom the question was brought in the first instance had of seeing the witnesses, and the opinion of the Court was given, not merely upon the fact of the execution of that kararnamah, but taking it to be executed, and connecting that fact with the testimony which had been given.

Such being the circumstances of improbability which had their full weight with the Court, though I do not think them unanswerable, then comes the circumstance of

probability on the other side, namely, the value of the property. Is it at all probable that this property should have been sold, and sold out and out, for less, as it appears to their Lordships upon these proceedings, than two years' value? But, supposing it was even three years' value, or even four years' value, would it not have been extremely improbable that an instrument should have been executed by the nephew to his uncle, transferring it to him out and out, provided he was in arrear in the payment of his instalment to the amount of a single rupee? It is so improbable a transaction, one should be very much inclined to suppose that, though this instrument was executed for the purpose of enabling the appellant, the uncle, to have that kind of possession of the property, yet there should be some private understanding or some promise that, when he should be reimbursed, or if he should pay to a larger amount, or something of that kind, he would restore to him his paternal property. That is probable, and, that being probable, it returns to what I observed before; it being highly probable such a promise should be made, is it not highly probable that that promise should be put into writing?

Under these circumstances, their Lordships are of opinion that the conclusion to which the Court of Sudder Dewanny Adawlut came is correct; that the receipt set up for the purpose of rebutting the second kararnamah is a fabrication; that the second kararnamah has been executed; and that, consequently, effect is to be given to that kararnamah. The receipt being clearly a fabrication, that impeaches the testimony brought forward, to a certain extent, by the person who sets it up, who is the appellant, when he brings forward testimony for the purpose of impeaching the credit of the witnesses to the second kararnamah, who state circumstances which are *primâ facie* legal evidence of the actual making of the instrument by the person who wrote it. The Court of Sudder Dewanny Adawlut must be the best Judges of instruments of this description; and their Lordships are of opinion that there is no such inconsistency between those two instruments as to make the second an invalid instrument; but treating it, therefore, as an agreement between the parties, notwithstanding the first instrument may have been deposited, the effect of the transaction is that, if the appellant should be reimbursed, all which he has advanced out of the rents and profits, he will restore the estate to his nephew. Then, if he is to restore the estate to his nephew, he must not only restore the estate, but what he has been overpaid; and it does not appear to their Lordships there is any such apparent objection to the amount they have awarded (I think 9,000 rupees is the sum he has been overpaid) as to furnish an objection, and that objection does not appear to have been taken in any of the proceedings on the petition of appeal. Their Lordships, under these circumstances, are of opinion that the decree of the Court of Sudder Dewanny Adawlut must be affirmed, and affirmed with costs.

Decree affirmed with costs.

The 11th December 1837.

Present:

Hereditary Offices—Enam Grants—Limitation.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Beema Shunkur, Bal-Crishna, and Venaik, sons of Gungadhara Sastri,

versus

Jamas-Jee Shapor-Jee and others.

The grant of a village in Enam by the Government cannot deprive the Meymoodars of their hereditary rights. To entitle the person in possession to the enjoyment of the office and receipt of the dues from the village, it is not essential that the duties of the Office should have been actually performed, if the party was prepared to discharge them when required. Claims to recover arrears of such dues are limited by Section 4, Regulation V., 1827, of the Bombay Code to 12 years.

Erskine, J.—In this case Jamas-jee Shapor-jee and Ramvalub Jenan Ram, two of the present respondents, together with Toolee Ram Muja Ram, and Rustom-jee Rutton-jee, whose interests are represented by the other two respondents, on the 17th of September 1827, commenced a suit in the Court of the Assistant Judge, in the Zillah of Surat, against the present appellants for the recovery of the sum of Rs. 1,344, being the amount of the arrears of certain hereditary rights of office alleged to be due to the plaintiffs from the appellants. The plaintiffs' suit was founded upon the allegation that they were the hereditary Meymoodars, Parek, and Mehtahs of the Chowrassee pergunnah, and that the owner of the village Dindolee, which was situate within the pergunnah, were bound to pay to the hereditary Meymoodars the annual sum of Rs. 56; that the village of Dindolee had, in the year 1803, been granted by the Governor in

Council to Gungadhara Sastri, the deceased father of the present appellants, who succeeded to the village as his heirs; and that neither the father nor the appellants had paid any part of the hereditary dues, the value of which the plaintiffs claimed in that suit. The defence set up by the appellants was in substance, *first*, a denial of the plaintiffs' title to the hereditary offices claimed by them; *secondly*, a claim of exemption from the payment of the accustomed dues, by virtue of the grant of the village by the Company to the father of the appellants in Enam; *thirdly*, a denial of the right of the plaintiffs to recover any of the alleged arrears, on the ground of their never having performed the duties of their several offices in respect of the village of Dindolee since the date of the grant, and that the appellants and their father had in consequence employed and paid others to transact those duties; *fourthly*, a denial of the plaintiffs' right to recover under the Regulations of 1827, Regulation V., cap. 1. The plaintiffs supported their claim by several documents filed as evidence in the suit, and by the testimony of several witnesses examined in their behalf. The defendants produced no evidence. The Assistant Judge, on the 11th September 1828, pronounced his judgment. and thereby decreed that defendants should pay plaintiffs Rs. 1,344, as the dues of the Meymoodars and others for twenty-four years, at Rs. 56-1 per annum and costs. From this decree the appellants appealed to the Zillah Courts of Surat, upon the grounds already enumerated, as their defence before the Assistant Judge.

In this stage of the cause, the grant of Dindolee in Enam to the appellants' father, which had not been given in evidence before the Assistant Judge, was produced by the Collector of Surat, which, however, is wholly silent on the subject of the dues in question; and the following answers to questions put by the Court to the Collector were returned and read. The first question put by the Court was, "When Government give a town in jaghire, do the jaghiredars pay the Meymoodars and other officers their rights of office, or do they cease from the time the town is given in jaghire?" The answers were, "Either the Honourable Company or the Guicowar give villages in jaghire; the jaghiredars must pay the hereditary Meymoodars, Pareks, and Mehtahs their yearly dues; no hereditary office ceases on a village being given in jaghire, but continues as heretofore." The second question was: "If the Meymoodars, Pareks, and Mehtahs do not go to jaghiredars' villages to perform the duties of their offices, do they then receive their fees of office, or not?" And the answer returned was: "The Meymoodars, Pareks, and Mehtahs do perform their duties, but transact all business that comes before them in the office at the head station, and there receive the fees of office." In addition to this, the depositions of two hereditary zulatee or accountants were cited, who proved that it was customary for the owners of land given in jaghire to pay the customary dues to the hereditary Meymoodars, Pareks, and Mehtahs, even where no duties were performed.

On the 19th of November 1829, the Zillah Court pronounced its decree, which concludes thus: "It is now here proved that the Meymoodars' rights are hereditary, but it is well known that the children receive these rights from their father, and that the person doing the duties receives the fees; and if Government give a village in jaghire, the Meymoodars' rights over it do not lapse; and it is proved beyond all doubt that plaintiffs are the Meymoodars and Mehtahs of these villages, and if they had performed the duties of their office, their claims would have been proved against defendants; but it is clearly proved that plaintiffs have not performed the duties of this office for twenty-four years, nor received their dues, which therefore do not accrue to them for that period. Therefore, after mature deliberation, the Senior Assistant Judge's decree is reversed, and the plaintiffs' claim thrown out; but the plaintiffs' rights as Meymoodars and Mehtahs are decreed to them, and that defendants should in future employ plaintiffs in those duties, and pay them their dues, and if they should not call upon them to perform the duties, nor shew good reason why they should not employ them, they shall nevertheless pay them their fees, plaintiffs paying costs in both Courts."

Against this decree the present respondents appealed to the Sudder Dewanny Adawlut at Bombay, and the cause came on to be heard on the evidence produced in the Courts below on the 15th December 1831. The sitting Puisne Judge gave his opinion to the following effect: "The trying authority is for confirming the decision of the Senior Assistant Judge, and awarding to the appellants the amount sued for: but. as the correctness of this opinion may be questioned in reference to the law of limitation, the case is referred to a Full

Court, for the adoption of such mode of disposal as the Judges may consider most expedient." And on the 16th May 1832 the four Judges pronounced the decree of the Court, *viz.*—"The parties being this day present in Court by their vakeels, and all the papers and proceedings filed in the suit having been read, and mature deliberation had thereon, the Court is of opinion that the appellants are entitled to recover fees for the last twelve years, and, therefore, determines to amend the Judge's decree of 19th November 1829 to that extent; costs to be borne in proportion to the sum awarded."

From this decree the present appeal was presented to His late Majesty in Council, and has been referred by Her present Majesty to the Lords of the Judicial Committee, and was argued before them on Saturday last. When these points were insisted upon by the learned Counsel for the appellants: *first*, that the plaintiffs' witnesses had not made out any title to the fees claimed; *secondly*, that the respondents were not entitled to recover anything, on the ground that they had not performed any of the duties in respect of which the fees were payable; and, *thirdly*, that their claim was barred by the 5th Bombay Regulation of 1827, chapter 1, or that at all events it should be reduced to the amount of six years' arrears under the 3rd Section of that chapter. On the other hand, the respondents insisted that they had clearly made out their claim, and that the Sudder Adawlut, so far from having awarded them more than they were entitled to recover, ought to have confirmed the sentence of the Assistant Judge of the Zillah Court, and decreed them the arrears of the whole twenty-four years, for that neither the 3rd nor the 4th Sections of the Regulation relied on applied to their case.

Their Lordships disposed of the first point during the argument, being satisfied that, although the evidence of the enjoyment of the office was slight, there was nevertheless sufficient to shew the respondents' title to it, and receipt of the dues from the village of Dindolee before and down to the grant of that village to the appellants' father in 1803; and there being no evidence on the other side, which the appellants might easily have produced if those fees had been paid to any other party, their Lordships also intimated their opinion that the grant of the village in Enâm by the Company could not deprive the Meymoodars of their hereditary rights, and, agreeing with the Courts below, that it was not essential to the respondents' case that the duties should have been actually performed if the respondents were prepared to discharge them when required, and seeing no reason to doubt the conclusion formed by the Zillah Court, that respondents attended at their office according to the ordinary course of practice in such cases. Their Lordships confined the argument of the learned Counsel for the respondents to the questions arising out of the Bombay Regulations, and, after hearing the Counsel on both sides, took time to consider their true bearing and effect upon the case before them.

Their Lordships have now fully considered these Regulations, and are of opinion that the decree of the Sudder Adawlut is right and ought to be affirmed. They cannot, however, adopt the view taken by the learned Counsel for the respondents, that the claim of their client ought to have been extended beyond the twelve years by virtue of the provisions of the 1st Section. For their Lordships think that that Section is in no way applicable to the present proceeding. The object of that Section appears to have been to prevent the title of the actual possessor of any lands, houses, hereditary offices, or other immoveable property, from being questioned after an uninterrupted possession as proprietor for more than thirty years; and if the appellant had been able to shew that some persons other than the plaintiffs had been for more than thirty years in the possession of the office of moojomoodan for this pergunnah, the title of the possessor might have been set up by the appellants in answer to the respondent's claim, otherwise they would have been liable to a double payment. The question then is, whether this case falls within the 3rd or 4th Section, for the 2nd Section refers to suits for damages, for injuries to the person, and for the recovery of privileges of caste, and, therefore, is obviously wholly inapplicable. The 4th Section declares that in all suits not falling under any of the limitations in the preceding Sections of that Chapter, it shall be a sufficient defence that the cause of action arose more than twelve years before the suit was filed.

Unless, therefore, the appellants can bring the case within the provision of the 3rd Section, the Sudder Adawlut has rightly decreed to the respondents the amount of the arrears for the last twelve years.

This Section provides that in all civil suits for debts not founded upon, or supported by, an acknowledgment in writing, and in all

suits for damages other than those specified in the preceding Section, it shall be a sufficient defence that the cause of action arose more than six years before the suit was filed.

The question is, whether this is a suit for debt or damages within the meaning of this Section, for if it be either the one or the other, as it clearly does not fall within any of the exceptions, the amount to be recovered must be reduced to the arrears for the last six years. In order to decide the question, it is necessary to bear in mind the foundation of the respondent's claim; it does not rest upon any contract, expressed or implied, made by the sovereign proprietor of the territory, of which a part has since been given to the appellants, by which the possessors of land within that territory are bound to contribute in certain proportions to the maintenance of certain hereditary officers created by the grant, imposing an obligation on the officers to perform certain duties when required, and an obligation on each landowner to pay an annual stipend for the maintenance of the officer.

The question is not whether such an obligation might be enforced by a suit in the nature of an action of debt, but whether a claim so constituted is a debt within the purview of this Regulation, and their Lordships are of opinion that it is not. They consider the debt pointed to by this Section as confined to demands founded upon the contract of the parties, for the terms of which the Government in India justly thought it unsafe to rely upon the fading memory of witnesses beyond the period of six years; neither can this be looked upon as a suit for damages within the meaning of the Regulations. For the respondents are not suing for damages sustained by them, in consequence of any tortious interference with their hereditary rights, or for any breach of contract by the appellants, but seek in this suit to recover the payment of the specific sums granted to them, in respect of the lands occupied by the appellants; and their Lordships are of opinion that the Judges of the Sudder Adawlut were right in applying the fourth Section of the Regulations to this case, and will advise Her Majesty to affirm their decree, and to dismiss this appeal with costs.

The 30th November 1838.

Present:

Lord Brougham, Mr. Baron Parke, Sir T. Erskine, Sir H. Jenner, Sir S. Lushington, and Sir E. Hyde East.

Mortgage—Equitable Mortgagee.

Pandoorung Bullal Pundit

versus

Balkrishen Hurbajee Mahajun.

To entitle a person to claim as equitable mortgagee, it is not sufficient to show that he paid off the original mortgage, but also that it was his own money that was paid, and that he was to stand in the position of the original mortgagee.

Mr. Miller and *Mr. Wigram* having been heard for the appellant,

Mr. Serjeant Spankie rose to address their Lordships.

Mr. Baron Parke.—You need not trouble yourself; none of their Lordships have any doubt about the propriety of the decree of the Sudder Dewanny.

In this case the appellant shapes his case as equitable mortgagee from Khateykur.

He says he has paid off the mortgage at their request, and he was to stand in the position of the mortgagee, as if a real mortgage had been made to him. He has given proof, sufficient perhaps, that he was the hand that paid off the money under the original mortgage; but that it was his own money, or that he was to stand in the situation of the original mortgagee, he has not made out. It depends upon the letter No. 8; he says it is a genuine letter; that fact is not proved; there is no proof brought forward in favor of it, and his own conduct affords a strong argument against him. He made originally a very different case, and never said a word about this mortgage for above a year; there is no proof of that document upon which he now relies.

Lord Brougham.—The proof of that letter was a most material point in the case. It was, as Dr. Lushington said, very early made the subject of dispute by the party against whom the claim was made; and whatever may be said as to the informality of these proceedings, you are not to make the want of form on the one side supply the defects on the other side, or make the mere statement, that he was ready to move, be taken as proof that he did make the motion.

The appeal will be dismissed without costs.

The 30th November 1838.

Mesne Profits.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Sooriah Row

versus

Rajah Enoogunty Sooriah.

Decree of Sudder Court estimating the amount of mesne-profits from the average of two preceding years as ascertained in a former suit (the evidence in the present suit being unsatisfactory on both sides), upheld.

Erskine, J.—It is not necessary in this case to enter into a consideration of those circumstances which led to the present action, because the whole issue between the parties was, by the conduct of the Court itself, and by the assent of the parties, reduced to this simple question: "The only point to be proved in "this case is the precise amount of the net "profits of the village of Gorasa in the "years Swabhanoo and Tarana." By this their Lordships understand the Court to state that the only question for the parties to direct their proof to was, what was the real value of the property during those two years? or, in other words, what was the amount which the plaintiff had lost in consequence of his not having been in possession of that property to the possession of which he was entitled?

The Court before whom this plaint was first brought was so dissatisfied with the evidence on both sides, that it took the extraordinary course of dismissing the suit altogether, making the plaintiff pay the costs.

Now, it was obvious, from the evidence before the Court, that the plaintiff was entitled to something, and the Court ought to have ascertained, in the best manner it could, what that something was; it ought not to have made the plaintiff pay the costs when he was entitled to something; but, upon the appeal, the Court of Sudder Adawlut seems to have been dissatisfied with the great mass of evidence given on both sides, and they, therefore, agreeing with the Provincial Court that the evidence was altogether unsatisfactory, and not to be depended upon as to the actual produce, proceed to say: "What the value of those "profits may be, the documents and witnesses "in this case will not prove, but it need "only be observed that the defendant him-"self rated the produce of this very village "in his suit No. 2 of 1820 in the Provincial "Court for the Northern Division, at Rs. "8,132-2 for two years; and the Northern "Provincial Court, in their decree in that "suit, awarded in his favor Rs. 4,111-11-2 "as the value of the profits of the year "Pramadi; and, according to the plaint, "Rs. 8,342-13-7 had been paid to the "plaintiff on account of the profits of the "two years, Vishoo 1,821-2 and Chitrabha-"noo 1,822-3, up to the date of the decree of "the Sudder Adawlut in the appeal suit "before alluded to. It may, therefore, very "fairly be inferred that the sum claimed by "the appellant as the value of the mesne-"profits of one year, *viz.*, Rs. 4,121-6-9, "is not considerably over-rated, if it be "over-rated at all." And then they proceed to adjudge to the plaintiff something less than would be due upon that calculation, after deducting from that amount 1,000 rupees, received by the plaintiff himself. It is impossible for the Court to say that the fact of the defendant himself, or of those under whom the present appellant claims—that the defendant himself in that suit having claimed the sum of 8,000 rupees for two years before, and received half of it for one year's profit, and there having been double that sum paid into Court for two years' profit—that those facts did not amount to evidence to guide the Court, and to satisfy them that it was a fair average value, because those years in respect of which that account was taken were the years immediately preceding 1823 and 1824, the profits of which were under discussion. Without saying what the value of the evidence would have been if there had been any contradictory evidence, or if there had been any circumstances to shew that the value of those years was less than that of the preceding years, or any other circumstances, still it is enough to say that it was evidence upon which the Court might, in the absence of any other proof, found its judgment; and that it was a fair calculation of the profits of the years 1823 and 1824. The Court has discarded altogether the evidence of the defendant as well as the other evidence of the plaintiff. And if their Lordships, upon looking at the evidence for the defendant, could see that it placed within the reach any means of saying how much less than that sum the produce of the years 1823 and 1824 was worth, they would have availed themselves of the opportunity thus given, of correcting any error into which the Court of Sudder Adawlut might have fallen, in taking the amount of the preceding years; but when the evidence of the defendant is looked at, it really seems to be perfectly valueless, because it depends upon the testimony of two witnesses,

Volaty Ramanapa and Volaty Honoomanloo, who state, according to their judgment, what the assessment of those two years actually was; but they are not the persons making the assessment, they had no accounts to produce to corroborate it, and they are speaking at a distance of ten years. The first witness states he is a Mirasidar, or Curnum of Gorasa, from which it would seem he had been the person making out the account; but, upon an examination of the evidence, we find he was not the person making out the account, but his younger brother. And all the ground upon which he builds his testimony, that the assessment in 1823 was Rs. 950, and in 1824 Rs. 860, seems to rest upon what he states afterwards as a fact, that he used to see these accounts, when the parties had an opportunity of producing the accounts themselves, and the parties who made the account. The Court cannot receive that as evidence of the fact of the assessment having been to that amount: he did not make it; he borrowed his knowledge from seeing the accounts only, and it, therefore, is not receivable as evidence of the actual amount of the assessment. The evidence of the next witness is more loose, though he states some knowledge corresponding with the other witness; he had not personal knowledge of it, and very slight means of knowledge; indeed, he says: "As myself and the Gorasa Curnum, named "Volaty Cama Raz, are cousins, and as I "used to go to Gorasa occasionally, having "a *maniam* there, I understood the above "circumstances," which, being translated, means "*he* and I used to talk them over, and that was our understanding." But where is the cousin—why was not he called? If it was to depend upon the evidence and the account of the Curnum, why was not he called? Having made the assessment to prove the value, the accounts were not to be the measure of the value, but the knowledge of the person making the assessment would be evidence, and it might be very strong evidence, of what the value was.

Those being the only two witnesses who interfered with the conclusion drawn by the Court—that, as the value of the village was 4,000 and odd rupees in 1819, 1820, 1821, and 1822, therefore, they might presume it was about the same in 1823 and 1824—it seems to their Lordships that they cannot interfere with the decision the Court have come to, in adjudging to the respondent that account, *minus* the sum he is proved or admitted to have received, 1,000 rupees; and, therefore, the judgme Court below is affirmed, but withou

Lord Brougham.—The judgmen Court in the first instance gave co most unaccountable way I ever sa judgment was reversed, and costs him of the first Court.

Mr. Sergeant Spankie.—Yes, my

Lord Brougham.—He has got of all the three proceedings below, costs here.

Erskine, J.—No costs of this a have already observed that the appell ample means of proving the actual the village, because, upon the death of Row, the property reverted to the appellant, he goes through the whole accounts, and an account would be ed by the Government to him o was received during the time it was sequestration.

The 3rd December 1838.

Present:

Lord Brougham, Lord Denman, Sir T Erskine, and Sir H. Jenner.

Sale of Legacy by Sheriff—Proof of extin of Legatee's interest.

On Appeal from the Sudder Dewanny A lut of Madras.

Stephen Lazar and his wife Thamar La

versus

Colla Ragava Chitty.

A seizure and sale by the Sheriff of the amount o legacy, under a writ against the executor, declared valid in the absence of proof of payment extinguis the legatee's interest.

Lord Denman.—In this case their Lo ships have had to consider the proprie the judgment of the Sudder Dewa Adawlut, in setting up a bill of sale to respondent in this case, which the She executed, having taken possession unde certain writ which came into his hands the year 1826. There are two very imp ant questions with regard to the jurisd tion both of the Sheriff and the Court; the second, because there certainly is a gr peculiarity in the language of the w requiring him to seize goods and chatt within the jurisdiction under which he l

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lands which are not *primâ facie* within his jurisdiction; and there is also a great question whether the Court had a right to proceed with regard to those lands, which their Lordships understand to be not within the jurisdiction limited by the charter of the King, but within the jaghire of the Company. However, their Lordships do not find it necessary to enter into the consideration of those very important questions; and the point not necessarily coming before them, their Lordships think they ought not to volunteer any opinion at all upon a question of such magnitude; and of course it follows that, upon the other part of the case, their Lordships are of opinion that the appellants are entitled to their judgment.

Now, that depends upon one very short view of the case, according to the opinion which their Lordships have formed of the nature of it, and we do not enter into the question of whether the proceedings have been fraudulent or not, or in what sense and for what purposes they may have been fraudulent; but the opinion which I have now to pronounce proceeds upon its being generally admitted on all hands that the appellants had an interest in this property under the will of Sultan Shamier, and that possessing that interest as they did, there is nothing like a sufficient proof that they were in any way divested of it. We do not see how they could be divested of it except by the clearest proof of their being paid off, and that could only be for the life of the female appellant, for the family had an interest in it after her death, and we find that there is nothing to satisfy us that any such payment has taken place as to extinguish the interest of the parties.

It appears that the possession must be considered as having been changed in the year 1826, because that is the period to which the bill of sale relates, and it refers to that period. Now, at that period, the parties were actually in possession under that bill of sale, having resumed the possession of the lands of the executor and family of the female appellant, and afterwards putting them into the hands of Narcis for the benefit of these appellants. However, we do not consider that in this appeal the proceeding of the parties is to be taken as a history of a series of frauds; but with this observation, that there is a considerable appearance that this property was in Narcis for the benefit of the appellants, we pass by the charge of fraud, finding the circumstances very difficult to understand, simply saying that we are by no means satisfied that the interest which was originally created under the will of the grandfather has been extinguished by payment to these appellants; and with that view of the case, feeling that they had an interest which the creditors of Nazir (the executor of Sultan Shamier) had no right to possess themselves of, their Lordships feel bound to say that the seizure and the sale have for that reason been improper. And we think, therefore, that the judgment of the Court of Sudder Dewanny must be reversed, and the original judgment of the Provincial Court, of course, will be revived; and we consider that the appellants ought to have the costs of all the proceedings.

Lord Brougham.—We not only relieve the appellants from paying costs, but give their costs in the second instance, and their costs of appeal here.

The 17th December 1838.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir T. Erskine, Sir S. Lushington, Sir E. H. East, and Sir A. Johnston.

Evidence—Mesne Profits (limited to amount claimed).

On Appeal from the Sudder Dawanny Adawlut of Madras.

Sooriah Row

versus

Cotaghery Boochiah.

The observation that the evidence of a witness proves too much is not rebutted by the suggestion that it cannot be supposed that the witness was suborned, for, if he was possessed of common shrewdness, he would not have overdone the thing, and thus have given rise to such an objection.

The Court cannot give more mesne-profits than is claimed, although a greater amount may be proved.

Lord Brougham.—It appears to us that there is no sufficient ground for setting aside

the judgment of the Court below. It is for the appellant to satisfy us that injustice has been done to him by the decree of the Court, and it has been correctly observed, that the case of the plaintiff was scanty in point of evidence—to which observation an answer has been made by the learned Serjeant and Mr. Moore, that from their situation the evidence of that which was in contest between the parties, namely, the amount of mesne-profits, was not so fully within their reach as it was within the reach of the appellant, but that there was on their part evidence enough—*primâ facie* evidence, as we should say here—to go to a Jury. The other party had to consider how they should meet that evidence. They might have rested upon the defect of evidence; but it being incumbent upon the appellant to shew the judgment below to be wrong at the time, we must see what was the nature of the evidence before the Court. The defendant might have left the plaintiff to prevail by the force of his own case, contending that he was not called upon to answer it, unless it was such as if, unanswered, disposed of the case; but here, instead of relying upon the weakness of their case, he has undertaken to rebut it by evidence. Let us look, then, to the sort of evidence he has produced, and that which might have been expected; and, first, I would refer to the fact of a certain witness not being called upon the part of the appellant, who from his situation must have been well acquainted with the subject-matter—better acquainted than the other witnesses, and with the means of information within his reach. The next point is, with respect to the books; and whatever we may say as to the change of possession of the books in the subsequent stage of the cause under the decree at that early period, when this proof was adduced on the other side these books were within reach—were in possession of the party; and the Court, I have no doubt, proceeded upon this principle, that everything is to be presumed against the party who keeps his adversary out of possession of the property, and out of possession of the evidence, and takes means to keep that evidence in his own possession; the Court, I have no doubt, looking to the circumstances of this case, thought that everything was to be presumed against the defendant; and the proof, on the part of the plaintiff, to be pressed most strongly against him, where he kept the other party out of possession, and received the rents and profits of the estate, and kept the books in which the accounts were recorded, notwit the plaintiff had given the most sca of the rents and profits—a position I do not quite accede. And there point to which the Court below n attended, namely, that the credibil witness is shaken by the gross dis beyond all probability of its being in truth, the discrepancy between accounts, between four hundred r the one side and upwards of twelve on the other.

The observation one cannot hel upon this evidence is, that it pr much on behalf of the defendant w that suspicious evidence; in a which it is ingeniously suggested, often under the pressure of the ca it cannot be supposed that the wit suborned, for that if he was poss common shrewdness, he would not *ha* done the thing, and thus have giv to such an objection. That is a ver argument before a Court, and too to justify the Court in placing any c able reliance upon it, for we do find, for the ends of justice, that men into these inconsistencies, and by thereof the fraudulent character evidence becomes apparent. In the of their Lordships, no reliance can b upon that remark to rebut the obs to which it is applied.

On the other point it is necessar only one word; the property in was treated as separate property by on the part of the appellant to wl have been referred; that was the on tion for our consideration, and u evidence we are of opinion that the ground to alter this decree. With to the damages, the Court have g amount in the declaration; but it that, adding the interest, a greater was proved, and the Court was re from giving that greater amount only they could not give more than the in the declaration. Considering t cumstances of this case, we cann giving the costs. It has been very ly and very ably argued, and I am b say, on behalf of the Court, very su argued.

Judgment affirmed with costs.

The 11th December 1839.

Present:

Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Sir H. Jenner, and Sir E. H. East.

Security—Sureties.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Raja Gopal Inder Narain Roy

versus

Raja Jagarnath Gurg.

A security voluntarily signed, existing upon the record, and never taken off the file, is a valid and subsisting security. The intentions and motives of the obligor in giving the security must be judged by what is mentioned in the instrument. The acceptance of the separate security of one surety is not invalidated by the acceptance of separate securities of five other sureties.

Lord Brougham.—The question in this case, which was argued fully before their Lordships, was, whether a security given by Gopal Inder Narain, in the case of Raja Motee Lal *versus* Jagarnath Gurg, must be held still to be a subsisting security, as it has been decided to be in the Courts below, or not, and the ground upon which it is denied to be a subsisting security is this: That in the case of Motee Lal *versus* Motee Hura, Gopal Inder Narain had tendered a security, and that that security—which, be it observed in passing, and it is not immaterial to the case, was tendered by him originally alone, and upon the supposition that he was to stand as the single security without any co-obligor at all—that that security had never been accepted, and that the whole proceedings taken together in the Zillah Court and the Provincial Court by way of appeal, and subsequently in the Zillah Court, and subsequently again in the Provincial Court, do not amount to an acceptance of the security.

Now, we are all of opinion that, if those proceedings be considered, they are manifestly and undeniably an acceptance of the security, or at least that the security does subsist as fully as if that difficulty, which alone is said to encumber the case with respect to the existence of the suretyship, never had been interposed by the order made in the Calcutta Provincial Court of Appeal on the 19th of March 1806. It becomes only necessary, in order to support this proposition, upon which the judgment below must have rested, and upon which our affirmance of that judgment proceeds, to state what those proceedings were, which I shall do as succinctly as possible, making but a very few observations as I proceed.

The Zillah Court, upon a reference to its Nazir, the proper officer (as we should refer it to the Master), and upon his report, accepted the security of Gopal Inder Narain as sufficient. When the Provincial Court came afterwards to deal with the case, on the 19th of March 1806, they made an order, proceeding upon reasons which, whether they are better or worse, it is unnecessary to enquire, but coming to the conclusion that the security of the said surety is not valid in this case, whereupon they order: "That a copy of these proceedings, containing a Precept, be sent to the Zillah Judge of Midnapore;" and having displaced, as it is contended, Gopal Inder Narain's security, the Court added: "Should the appellant, Motee Hura, presently give good security, the said Judge should cause her to enter on the contested zemindary, and if she cannot, in conformity with the order of the 27th of last month, the zemindary should be delivered in charge to Government, and the return should be forwarded on or before the 15th April."

Now, admitting, for the present, that without which the whole argument of the appellant in this case fails—admitting that this is tantamount to an order, rejecting the acceptance of the security, which had been accepted by the Zillah Court below—admitting that without which, I say, this appeal cannot stand for a moment—then observe what follows. It was referred back according to that order to the Zillah Court, when the Zillah Court respectfully, but distinctly, suggests to the Provincial Court a circumstance which appeared to the Zillah Court to have escaped the attention of the Provincial Court, namely, that the acceptance of the security of Gopal Inder has been already recorded, and, therefore, it appears unnecessary (this is the delicate form of expression they use, out of respect for the Provincial Court) that that security having been already accepted, and its acceptance recorded, "It appears unnecessary to inform the Provincial Court of the presentation of these papers, because they were placed in the Record Office. Now, an order has been issued by the said Court for rejecting the security of the said Gopal Inder; it, therefore, seems proper to send the statements above-mentioned, since Gopal Inder Narain, Zemindar, had been accepted as sufficient for this security."

Upon this it returns to the Provincial Court once more; and see what is done by the Provincial Court. I do not say that what I am about to read as having taken place on the 13th of May 1806, amounts to a distant reversal of the order of the 19th of March, of the same year, which is the substratum of the appellant's whole argument. I do not say that what is done on this 13th of May 1816 amounts to an order rescinding the former order which stated the invalidity, by which must be supposed to be meant, according to the scope of the appellant's argument, the insufficiency of Gopal Inder Narain's suretyship. I do not say that, therefore, it was an order retracing the former steps altogether, and accepting the security which at first they had refused. But I say, at least, it so far retraces the steps taken by the order of the 19th of March, as to shew that they were not dissatisfied with the order made by the Zillah Court, either in the second instance, when they remitted it to the Zillah Court, or in the first instance, when the Zillah Court accepted the security of Gopal Inder Narain, nor recollect what it was that they had done on the 19th of March. They had said that Gopal Inder Narain's security was insufficient, and that, therefore, it should be referred to the Zillah Court, with that order, and that Motee Hura should be caused to enter on the contested zemindary, if she should give good security. But observe what they now do. They say: "At this time it is not right that any order should be given for ousting the respondent who is in possession, or for changing his security, which the Zillah Judge has pronounced sufficient, because the security of the appellant is also thought sufficient." That is to say, Gopal Inder Narain's security *plus* the security of the five kyals. Therefore, what they now say is: "Do not change the possession. Let Motee Lal give whatever security she pleases, or can give; do not change the possession because her security is pronounced to be sufficient, contrary to what we had originally thought on the 19th of March. What is that security? Gopal Inder Narain and the five kyals."

Then comes the mode in which the Sudder Dewanny Adawlut deals with it, in which they say that, conformably to the custom, and according to the security-bond, it may be demanded from Gopal Inder Narain and the other five securities; treating the whole six, therefore, as being a sufficient security. Now, this clearly shews that all these Courts—not only the Zillah Court, not d the Court of Sudder Adawlut, but intermediate Court, the Provincial Co upon whose supposed rejection and fi rejection it must be contended that security of Gopal Inder Narain never accepted; it appears that that Court, well as the other two, considered and de with Gopal Inder's obligation as an existi and valid security. That appears cle and then it was most accurately stated the Zillah Court, and not denied by the P vincial Court, and sanctioned by the fi finding of the Sudder Adawlut Court—it stated most accurately and correctly to be security standing upon the record, and ne taken off the file, but subsisting upon record.

Now, one observation plainly arises up this. Has not Gopal Inder Narain, su posing he has any case at all for being off, mistaken his way altogether? Ou he not to have proceeded to have that off the record, in order to have the argume of the Provincial Court admitted and sa tioned by the Sudder Adawlut? Ou he not to have taken that course, instead allowing it to remain on the file; allow it to stand on the record as subsisting. then endeavoring to escape its obligati by the argument to which I am next refer, namely, that true it is it subsi that true it is that he voluntarily, and w his eyes open, signed the obligation; th true it is, therefore, that there is a subsisti and valid security given by him, and wh may stand alone, and which is not joint several, which is not conditioned upon ot persons, either five or one, or any of kyals joining in the security. But the pellant says that, inasmuch as he acted upo the supposition that he was to be joine with the other five, and that the Cou acted upon a supposition that the other were joined with him, they did not acc him alone, but accepted him in conjunct with those other five. Now, that is whole of the residue of the argument wh I have not hitherto dealt with in the narra I have given of the facts of this case.

First, then, it is said that he him considered that he was only bound, in event of the other five being bound, of w avail is it what a person considers who gi an obligation? You are to look to what does, not to what he thinks; you are gather what he means from what he has in his instrument, not from what he s gests; now, in order to escape the obliga

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that instrument, you are to look to his ligation which he has contracted in point fact and in point of law—an obligation ich is binding upon him—not to the intenn and motives, and expectation and speation, which he may have had in his own nd at the time he so bound himself If really had intended only, and meant only, bind himself in this cause upon the supition of his being bound together with five kyals, he ought to have framed the curity in a perfectly different manner, he ght to have made it a joint security with ose five kyals, which would have given his remedy against them, and he ought have made it conditional upon those five als becoming a subsisting security toge- er with himself. He has done no such ing; and it must further be remarked, as stated in the outset of my narrative, that originally (which I think cuts even that e ground from under his feet as to what views and intentions were) tendered his curity absolutely, singly, and alone, and ckoned upon his being the only security in e cause, and it was received as such; but en the others were added for greater secuty. For whose benefit were the others ded? Not for the benefit of Gopal Inder arain, who had originally tendered himself one, and, as so tendered, had been accepted; o such thing, but for the better security the appellant in the cause.

Then next, and lastly, it is said that the ourt only accepted him conditionally, cause they accepted him together with the her five. Now, really, I think, if the rmer view of the case was of little avail the appellant, this can be still less, because e Court have accepted him alone in point fact; but I go further, and say that, if ey had accepted him with the other five, at would be immaterial for the purpose of is argument, for, if they accepted him th the other five, and he bound himself conditionally without the other five, the ourt accepts him according to his obligan. They accept him as a separate secuy. They accept the other five as parate securities, and that acceptance is lid and effectual, and finished and executd as to him, without the least regard to e other five; because it must be an ceptance in conformity to and according the tenor of the whole obligation, with hich, in the first part of the argument specting the joint suretyship, I have dealt. would be just as good an argument—and is is really a *reductio ad absurdum* of this part of the appellant's case—it would be just as solid a ground of escape for Gopal Inder Narain to say (and this applies to both parts of the case), it would be as good an argument to set up this: "I gave my security, I tendered myself as a surety, upon the supposition that the other five sureties would be sufficient, and the Court accepted me upon the supposition of the other five kyals being sufficient; if the five kyals prove insufficient, therefore *cadet quæstio* as to me, for I never meant to bind myself upon that supposition, and *cadet quæestio* as to the Court, for they never meant to accept me upon that supposition." But can anything be a greater absurdity than this? because this is the very case provided for. The reason why Gopal Inder Narain's security is taken as well as the other five is, in case they should prove insufficient. So that, according to the scope of that argument, the very purpose for which Gopal Inder Narain is added to the five kyals, namely, the possible insufficiency of the kyals, would be set up as a reason for letting off Gopal Inder Narain; the very ground of taking Gopal Inder Narain being the possible insufficiency of the other five.

Upon the whole, therefore, we are clearly of opinion that this is a valid and subsisting security. In the course of the argument some illustration was thrown out with respect to the case of recognizances entered into by the Court, with respect to which the acceptance is supposed necessary to perfect it. It is unnecessary, for the further illustration of this question, to enter into that, but, upon the grounds already stated, their Lordships are of opinion, without any doubt whatever, that this appeal must be dismissed, and dismissed with costs.

The 10th July 1840.

Present:

Lord Brougham, Mr. Justice Bosanquet, Sir H. Jenner, Dr. Lushington, and Sir E. H. East.

Hindoo Law of Inheritance—Widow Ranee (Right of—to alienate)—Wusseeyutnamah—Gift.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Keerut Sing

versus

Koolahul Sing and others.

A childless widow Ranee has no power to alienate her deceased husband's property as against his collateral heirs, by a wusseeyutnamah or deed of gift.

Dr. Lushington.—THIS appeal is preferred against three decrees of the Court of Sudder Adawlut, bearing date the 19th of January 1825, confirming three decrees, made by the Provincial Court of Patna on the 19th of February 1823. The property involved in these suits appears to be very considerable, and on the death of the last possessor, the Ranee, the widow of Juswunt Sing, became the subject of litigation, and gave rise to the three suits already mentioned.

It is not necessary to enter into the particulars of these suits further than to say that the respondents claimed in various proportions the whole property as heirs of the Rajah last in possession. The present appellant, Keerut Sing, claims this zemindary upon several grounds: *First*, by virtue of a wusseeyutnamah or deed from the Ranee, the widow of the Rajah Juswunt Sing, the last proprietor, who died in possession of the property. This deed bears date the 5th of July 1813, the Ranee having died herself on the 26th of October 1818. *Secondly*, the appellant alleges himself to be a relation of the late Rajah, though not, as was admitted at the bar, the nearest relative. *Thirdly*, he claims as in possession, denying that the respondents, the plaintiffs in the Court below, have made out their title. Both Courts have pronounced against his claim, and in favor of the respondents.

It may be expedient in the first instance to examine his title under the alleged deed; because, if the deed were validly executed by a person having legal authority so to dispose of the property, all other questions would be unnecessary; and in considering the title preferred under the deed, the power of the Ranee so to dispose of the property is obviously the first consideration; for if that question be determined in the negative, none can arise as to the execution.

Then, as to the power of the Ranee to dispose of the property, assuming Keerut Sing to be a near relation of her deceased husband; this question was put by the Court to the Pundits, and answered decidedly in the negative; that will appear by reference to the Appendix, folio 212.

There does not appear to be the least reason to doubt that this answer is a true exposition of the law which must govern the claims of all parties to the property. It is in conformity with the law, as laid down and acted upon in former cases.

This doctrine, too, is recognized by Judge of the Provincial Court, Append page 225, and also in his judgment of 19th of February 1823; and this decree affirmed by the Judge of the Sudder D wanny Adawlut, on the 19th of Janu 1825, but without stating the law partic larly.

As we are all of opinion that the law h been correctly laid down, and that the Ran had no power to execute a deed of this nor, all title on behalf of the appellant, founded on this deed, necessarily falls to ground; and in this view all questions to the execution of the deed require no co sideration. But as a title, on the footing possession, has been set up, we have n deemed it right wholly to pass by the que tion of execution.

Keerut Sing had been the Mookhtar o general Attorney of the deceased Ranee and employed confidentially by her. Man witnesses have been examined to prove th due execution of the deed, executed, beyon all question, if executed at all, under mo suspicious circumstances. We do not thin we are called upon to pronounce the whol to be a forgery; neither, on the other hand are we satisfied, on looking to the evidenc and the discrepancies therein, that the whol proceeding was *bonâ fide*, so that the whol defect was the want of title in the grantor We think that there is no sufficient groun for holding that the appellant was a *bon fide* possessor by reason of this deed.

The appellant further alleges that hi possession should not be disturbed by reaso that the respondents are not the right hein Now, first, as to his possession, the fact appear to be as follow: The appellant be ing Mookhtar, as already stated, of the la Ranee, and resident with her on her dea on the 26th of October 1818, took posse sion of the property. The property wa attached by decree of the Judge of the Ci of Patna, on the 26th of December 181 with permission to any of the parties to i stitute a suit in three months. In the mon of September 1821, that decree was reverse by the Provincial Court, and the appella restored to the possession of the propert Several suits were then instituted, and o the 14th of June 1822 the Provincial Co took charge of the property by the appoin ment of a Surbarakar. There was also claim preferred on behalf of the Governme for the property as an escheat, but it do not appear that the claim was prosecute We are of opinion that this is not such

session as can be regarded with any orable eye. It is not necessary to say it should be dealt with, if there was no at all in the respondents. It is suffi-t to observe that, though doubts may exist to the proportions in which the claimants uld share, we think the decrees appealed m are right to the extent that the re-ndents, in some proportion or other, are itled to the whole property. As against m collectively, the appellant has no right ll.

Under these circumstances, we intend to rm the decrees of the Court below. ere are, in point of fact, it may be said, ee decrees of the inferior Court and three rees of the superior Court; for all the suits seem to have been considered as one combined suit. Their Lordships think it right, not only to affirm these decrees appealed from, but also with costs. They do not think it necessary to enter more particularly into the evidence, inasmuch as they affirm these decrees; but they are of opinion, looking at all the circumstances attending the taking possession of this property, and the manner in which the deed is alleged to have been obtained, that it is their duty to affirm the decrees with costs, and to discourage such attempts to take property from the right heirs by doubtful deeds of gift, and erroneous assertions of heirship.

Decrees affirmed with costs.

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